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Emerging Legal Issues in the Collection and Dissemination of Internet-Sourced Research Data: Part II, Tort Law Issues Involving Defamation[1]

INTRODUCTION

This article is the second installment in a series of four articles examining the possible basis for legal liability of researchers who use the Internet in the collection of research data. In specific, it examines the potential legal issues associated with the protocols of ethnographers who use listserv, discussion board, blog, chat room and other sorts of web or Internet-based postings as the source of their data. The author assumes that the forum for participation is legitimate, in that the list, board, blog, chat, site, etc. is not created or otherwise concocted by the researcher, but involves situations akin to off-line practices where a researcher would be listening to the conversation or watching the behavior of subjects in a public place. The forum is "legitimate" in this sense but the researcher is either reviewing the log, transcript or other record of participation made by others or is observing ("listening in on") the online conservation as it occurs among forum participants. In the latter case the researcher might be a hidden observer or merely an obvious but silent member, i.e., "logged-in" as a user but choosing instead not to participate. In this case it could be said that the researcher is somewhat of an interloper. The legal implications (potential and likely consequences) of either asynchronous review or synchronous observation (data collection) and use (dissemination) of the information collected are discussed.

The author also assumes that the host location of the listserv, discussion board, blog, chat room or other sort of web or Internet-based forum is within the jurisdictional boundaries of the United States, i.e., U.S. law applies. While the basic legal concepts may apply across international borders researchers unsure of which law applies should consult additional resources or make similar analysis within their specific context. Even within the United States, some legal concepts may vary across state lines (or federal jurisdictional boundaries such as judicial districts and circuits) and again reference to the context of the particular researcher may be necessary. As a result this article offers readers an awareness of the variety of legal issues that might arise in the general context (data collection via observation) as well concrete examples in the selected specific context (online observations subject within U.S. jurisdictions). It offers the informed and experienced opinion of the author but should not be taken as legal advice. If legal advice is needed by the journal readership, the appropriate source for that advice should be sought. The opinions offered are based on interpretation and application of the relevant

[1] Portions of this article represent an updated and expanded version of a discussion that first appeared in the Journal of Information Ethics (Lipinski, 2006).

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precedent, but little if any case or statutory law exists in the precise ("on point" to use the appropriate legal phrase) context of data collection from online forums by researchers in this manner. To be sure that is a good thing, but with the ever-increasing recourse of litigation to settle perceived harms or alleged disputes the law is sure to develop in this regard. It is the goal of the author that the analysis presented in this series offers the initial legal context in which such issues would be adjudicated and more importantly resolved

The first article in the series discussed legal aspects of harm based in claims of negligence that arise from the online practices of researchers. This second article in the series discusses the claims against researchers based in defamation, either for comments made by the researcher or by a forum participant that the researcher then disseminates in other publications such as proceedings, articles, chapters, etc. The next installment in the series reviews the potential for harm based on several theories of privacy invasion. A fourth and final article discusses copyright and online licensing. The latter concept includes assessment of the enforceability of terms and conditions governing access to and use of listserv, discussion board, blog, chat room and other web forums to which the researcher assents by use of a click-on or similar mechanism. This article does not discuss the use of the Internet as a collection device, e.g., online surveys. Since these practices do not involve direct interview or interaction with or treatment of human subjects much of the precedent involving negligence, informed consent and related issues is not relevant, however, it is reviewed initially for guidance in suggesting the applicable legal standards of conduct. While it is concluded that the likelihood for success of such claims is small, analysis will include steps that researchers can take to ensure that such risk remains small.

UNDERSTANDING THE LAW OF DEFAMATION

The Restatement (Second) of Torts (1977, § 559) "Defamatory Communication Defined" states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Examples include "reflecting unfavorably upon his personal morality or integrity" and "imputation of certain physical and mental attributes such as disease or insanity" (Restatement (Second) of Torts, 1977, § 559, comments b and c), "Slanderous Imputations of Criminal Conduct" (Restatement (Second) of Torts, 1977, § 571), "Slanderous Imputations of Loathsome Disease" (Restatement (Second) of Torts, 1977, § 572), "Slanderous Imputations Affecting Business, Trade, Profession or Office" (Restatement (Second) of Torts, 1977, § 573), and "Slanderous Imputations of Sexual Misconduct" (Restatement (Second) of Torts, 1977, § 574).

In the case of researchers the defamation of a research subject would come in the form of written communication, a publication, i.e., in the form of a proceeding paper, journal article, book chapter, etc. The Restatement (Second) of Torts (1977, § 577) "What Constitutes Publication" states that "[p]ublication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." While a researcher may not desire to defame anyone in the course of a conference presentation or

through the dissemination of a composition such as a proceeding, article, chapter, etc. circumstances may exist where such claim is conceivable. Consider the sociologist who studies gang communities and comments that the conduct recounted by forum participants constitutes a crime or a public health scientist may conclude that the symptoms a forum participant described indicate a case of venereal disease.

The Restatement (Second) of Torts (1977, § 577) adds that "[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication." In the case of posting to a list, board, blog or chat posting, etc. the forum host or moderator might have liability for failure to remove defamatory content once made aware that such posting is objectionable (but see discussion below of possible immunity under 47 U.S.C. § 230). Again the focus of this article and the others in the series is upon the legal consequences of researcher conduct, not host conduct. However, it is this defamatory content posted by others that the researcher may capture for later review, analysis, and incorporation into a subsequent proceeding paper, journal article, book chapter, etc.

Those who act as a publisher or re-publisher of defamatory material are also liable with the speaker or writer of the defamation. The Restatement (Second) of Torts, § 578 (1977) "Liability Of Republisher" states the "rule" on republication: "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." This may be the more likely way a researcher could be subject to a claim of defamation, not as an original speaker or composer of a defamatory communication, but through republication of the defamatory comment of another.

Researcher liability might then arise in one of two ways. First the researcher may disseminate his or her own statements based on the observed online forum activity that are construed as defamatory. Second, the researcher might quote, thus repeat and re-publish the defamatory statements made by an online forum participant about another. Furthermore, the concept of communication is broad enough "to denote the fact that one person has brought an idea to the perception of another." (The Restatement (Second) of Torts, 1977, § 577, comment a) As a result, a researcher who communicates, through a powerpoint presentation at a conference, defamatory comments of their own composition or includes defamatory snippets of others obtained from the list, board, blog or chat posting would be communicating a defamatory statement.

Associations, serial and book publishers who distribute the defamatory writings of researchers in conference proceedings, journals, books, etc. are liable under the republication rule, but not the campus bookstore that offers such items for sale or the university library that adds such items to its holdings or collections unless there is actual knowledge that the content is defamatory or constructive knowledge of the same, i.e., circumstances from which a reasonable person would make conclude that the content is defamatory. This rule is found in the Restatement (Second) of Torts (1977, § 581) "Transmission Of Defamation Published By Third Person": "one who only delivers or transmits defamatory matter published by a third person is subject to

liability if, but only if, he knows or has reason to know of its defamatory character. The Restatement (Second) of Torts (1977, § 581, comment e) explains: "Bookshops and circulating or lending libraries come within the rule stated in this Section. The vendor or lender is not liable, if there are no facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains matter which upon inspection, he would recognize as defamatory. Thus, when the books of a reputable author or the publications of a reputable publishing house are offered for sale, rent or free circulation, he is not required to examine them to discover whether they contain anything of a defamatory character. If, however, a particular author or a particular publisher has frequently published notoriously sensational or scandalous books, a shop or library that offers to the public such literature may take the risk of becoming liable to any one who may be defamed by them." The same standard of 'no liability without knowledge' applies to newsstand vendors, but not newspapers (Restatement (Second) of Torts (1977, § 581, comment d), newspapers are responsible for it original publications or for acts of republication.

According to the (Restatement (Second) of Torts (1977, § 558) "Elements Of A Cause Of Action For Defamation. Elements Stated" there are four elements that must be proved before a claim of defamation is successful: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Generally, one cannot defame a deceased person (Restatement (Second) of Torts, 1977, § 560) but one can defame a corporation (Restatement (Second) of Torts, 1977, § 561). For living persons the standards vary depending on the nature of the defamed person. Is the person a public figure or a private person? "One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters." (Restatement (Second) of Torts, 1977, § 580A, "Defamation Of Public Official Or Public Figure") Elected public servants and appointed heads of governmental agencies are examples of public officials and a famous sports or movie star is an example of a public figure.

The law imposes a higher burden for plaintiffs in these cases—the public official or public figure—as their status of prominence or fame should accommodate a higher level of criticism. In plain words people so positioned in society should have thicker skins. Thus a claim for defamation is actionable only if the communication is made with knowledge of its falsity or reckless disregard for the truth. When a private person or ordinary citizen is the target of the defamation a lower negligence (ordinary care) standard is also used: "One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them."

(Restatement (Second) of Torts, 1977, § 580B, "Defamation Of Private Person")

DEFENSES AND APPLICATION TO THE RESEARCH SETTING

There are several "defenses" to a claim of defamation. If the statements are true, there is no defamation. According to the Restatement (Second) of Torts (1977, § 581A, "True Statements"): "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." Likewise "Expressions of Opinion" are not actionable either: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." (Restatement (Second) of Torts, 1977, § 566) Finally, "the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation." (Restatement (Second) of Torts, 1977, § 583, "Consent, General Principle") This last option may prove helpful to researchers, who follow an "informed consent" protocol before observing, collecting and disseminating data from forum participants. However the Restatement (Second) of Torts (1977, § 583, comment d, emphasis added) suggests that the subject would need to be aware of the specific content of the defamation made by another forum subject: "It is not necessary that the other know that the matter to the publication of which he consents is defamatory in character. It is enough that he knows the exact language of the publication or that he has reason to know that it may be defamatory." In other words the general consent a subject may offer to the forum host or the informed but nonetheless non-specific consent a subject may offer to a researcher would be consent to publish the subject's own comments, not necessarily a consent to defame, i.e., allow a defamatory posting made by another about the subject to be disseminated. The researcher would have to obtain permission ("consent") from the subject after informing the subject of the "exact language" that will be published for the defense of consent to apply.

A final set of defenses are known as privileges. Privileges come in two forms. The first, known as absolute privileges "are based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests." (Restatement (Second) of Torts (1977, "Introductory Note" to "Absolute Privilege Irrespective Of Consent") Public officials have absolute privilege for comments made in their official capacity. This form of privilege is more akin to immunity.

The second form or privilege is known as conditional privilege and may apply to online researchers, depending upon the source of the comments gathered and republished. Conditional privileges "arise out of the particular occasion upon which the defamation is published. They are based upon a public policy that recognizes that it is desirable that true information be given whenever it is reasonably necessary for the protection of the actor's own interests, the interests of a third person or certain interests of the public. In order that this information may be freely given it is necessary to protect from liability those who, for the purpose of furthering the interest in

question, give information…" (Restatement (Second) of Torts (1977, "Introductory Note" to "Absolute Privilege Irrespective Of Consent") Conditional privilege exists where the source of the content is a report of an official proceeding or public meeting (Restatement (Second) of Torts, 1977, § 611, "Report Of Official Proceeding Or Public Meeting"). This would include "the report of any official proceeding, or any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions… [including] the report of proceedings before any court… the proceedings of an agency of the court, such as a grand jury returning an indictment… the report of any official proceeding or action of either house of the Congress of the United States or the legislative body of a State or the municipal council of a city, town or village. It is also applicable to public proceedings and actions of other bodies or organizations that are by law authorized to perform public duties, such as a medical or bar association charged with authority to examine or license or discipline practitioners." (Restatement (Second) of Torts, 1977, § 611, comment d) Researchers may use the record of such proceedings as a data source. An online researcher would be privileged to republish such data in a proceeding, article, chapter, etc.

This principle of conditional privilege is illustrated in Crucey v. Jackall, where Williams College sociology professor Robert Jackall, and co-defendant publisher Harvard University Press were sued for statements in his book entitled Wild Cowboys: Urban Marauders & the Forces of Order. The appellate court dismissed the case but with little discussion, failing to assess whether the source of the comments were from an "official proceeding" which would make the republication privileged under law. "It is uncontroverted that the statements at issue had their genesis in an investigation conducted by various elected officials, the results of which were ultimately included in the Congressional Record." (Crucey v. Jackall, 2000, 20) Instead the court relied on a "gross irresponsibility" standard under New York law. If the subject matter is "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition" the plaintiff must prove that the defendant acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." (Chapadeau v. Utica Observer-Dispatch, 1975, 64) This is yet another form of privilege sometimes known as the privilege of fair comment.

It is interesting to note that Professor Jackall did not claim that the false statements were in fact the truth. Rather as concurring Judge Saxe observed: "The documentary evidence submitted by defendants establishes, as a matter of law, that the assertions made about plaintiff in the book were accurate reports of the substance of the evidence obtained by the Molinari investigation. While the mere existence of these affidavits does not make their assertions true, defendants' book does not say that the accusations contained in the affidavits were true or proven. Rather, the book merely reports, accurately, on the impetus for, the process of, and the evidence obtained by the Molinari investigation." (Crucey v. Jackall, 2000, 24, Saxe, J. concurring) As with a claim based on negligence, where the researcher confines conduct to that falling within the methodological protocol or here within or "the standards of information gathering and dissemination ordinarily" used by similarly situated

researchers a claim based on defamation would fail as it could not be said the researcher acted with gross irresponsibility. However, not all research will fall within the "legitimate public concern" and "warranting public exposition" standard. But as this case demonstrates if the source of the comment is from an official proceeding or public meeting the use of the comment may also be privileged.

ADDITIONAL FACTORS AFFECTING LIABILITY: NATURE OF THE ONLINE FORUM

Assuming privilege or other defense is not available could a researcher be liable for including a defamatory comment made by a data subject in a conference proceeding, article, book chapter, etc.? Considering the intellectual processing of various data subjects' postings into a final research product through "data" collection, selection and presentation, the researcher functions more as an editor or publisher. If the forum is considered the source of initial publication, the researcher would fall under the republication rule. Which label is used matters little, what is important is that the researcher would not be considered a distributor, like the bookstore or library. However, if the underlying comment is not defamatory the researcher can have no liability for repeating it.

Whether a simple negligence or a higher knowledge or recklessness standard applies depends on the target of the list, board, blog or chat posting. Recall the higher standard respecting public officials or public figures and the underlying rationale for the rule: such individuals have the means to counter such statements, thus there is ability to self-mitigate defamatory harms. Persons so positioned have ready access to the media or the means to otherwise counter the harm. Private persons are not so fortunate. Considering the accessibility of all participants to the forum, the ability to make counter-statements (to self mitigate), it could be argued that all list, blog, board, chat, etc. participants should be held to this higher standard. "Since anyone can start a blog—or respond to a blog posting with his or her own document when the blog gives readers that opportunity—the private/public figure distinction may no longer be as meaningful for defamatory blogs. Indeed, both private and public figures have the same means and access, at least on the Internet, to counter false statements." (Peterson, 2006, p. 10) If courts would adopt this view then a researcher would face liability only if the forum comments were published or republished with knowledge or reckless disregard for the possibility that the statements might be false and thus defamatory.

Courts are beginning to recognize that claims of defamation regarding comment made online requires assessment of the context in which the alleged defamatory comment is both made and perceived. The Delaware supreme court in Doe v. Cahill (2005, 467) commented on the nature of typical blog banter and held that the appropriate standard of review for issuance of a protective order preventing release of the blogger's identity was summary judgment, not the lower good faith standard the lower court applied: "We agree that the context in which the statements were made is probative, but reach the opposite conclusion. Given the context, no

reasonable person could have interpreted these statements as being anything other than opinion. The guidelines at the top of the blog specifically state that the forum is dedicated to opinions about issues in Smyrna." Consider a blog where disgruntled investors post comments such as "all Enron accountants are crooks". Suppose a researcher includes such comment in a proceeding, article, chapter, etc. In the scholarly context, the researcher is not attempting to offer his or her version of events using the interview comments in support but is reporting purposely how others view the matter, e.g. investors lack confidence in large energy holding companies and not that crimes were or were not committed in a particular instance.

As the Delaware court observed (Doe v. Cahill, 2005, 467): "[a]part from the editorial page, a reasonable person reading a newspaper in print or online, for example, can assume that the statements are factually based and researched. This is not the case when the statements are made on blogs or in chat rooms." (Doe v. Cahill, 2005, 466) Again, recognition of the unique context of such forums may lead other courts to conclude that the researcher shares no liability for any harm associated with the further dissemination of the comments because the initial posting is not defamatory as a matter of law: "Given the context of the statement and the normally (and inherently) unreliable nature of assertions posted in chat rooms and on blogs, this is the only supportable conclusion. Read in the context of an internet blog, these statements did not imply any assertions of underlying objective facts. Accordingly, we hold that as a matter of law a reasonable person would not interpret Doe's statements as stating facts about Cahill. The statements are, therefore, incapable of a defamatory meaning." Of course this does not mean that such comments can never be defamatory (see, Doe v. Cahill, 2005, 467, at n. 78), but context is paramount. Researchers can ensure that the protection derived from the forum context is carried over into their use of such comments by making clear to readers the source and the context as well, ensuring that the posters', boarders', bloggers', chatters' comments are not confused with their own comments.

DEFAMATION ARISING FROM THE ALTERATION OR PARAPHRASE OF FORUM COMMENTS

U.S. Supreme Court precedent suggests that failure to confine reporting of data subjects' comment to precise quotes is not grounds for negligence even where the secondary author has added words. Recall that in defamation of a private person the plaintiff need only prove "fault amounting at least to negligence on the part of the publisher" whereas a public official or public figure must prove knowledge or reckless disregard for the truth. "We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. An interviewer who writes from notes often will engage in the task of attempting a reconstruction of the speaker's statement. That author would, we may assume, act with knowledge that at times she has attributed to her subject words other than those actually used. Under petitioner's proposed standard, an author in this situation would lack First Amendment protection if she reported as quotations the substance of a subject's derogatory statements about himself." (Masson v. New Yorker Magazine, Inc., 1991, 514-515) While the case arose in the context of media reporting, i.e., taped

interviews that were then published (and edited) in print, it is nonetheless indicative of the intellectual breathing space courts give to those in the news media, in the propagation of newsworthy content.

A court might undertake a similar public policy analysis in a case involving scholarly communication as well. "Even if a journalist has tape-recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word." (Masson v. New Yorker Magazine, Inc., 1991, 515) The connection to researchers who transcribe forum content, a personal statement video posted on myspace.com for example, to print or summarize original print comment should be obvious. Likewise, a similar "error" in transcription or summarization can occur in the reporting of research consisting of the list, board, blog or chat script or audio. Dialog may be taken out of context, punctuation or definition of jargon may be added for purposes of clarity but without an intentional change in meaning.

The question is not whether the exact language is retained or not, but whether in spite of retention or error, the meaning conveyed is defamatory. "In all events, technical distinctions between correcting grammar and syntax and some greater level of alteration do not appear workable, for we can think of no method by which courts or juries would draw the line between cleaning up and other changes, except by reference to the meaning a statement conveys to a reasonable reader. To attempt narrow distinctions of this type would be an unnecessary departure from First Amendment principles of general applicability, and, just as important, a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century. From then until now, the tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false." (Masson v. New Yorker Magazine, Inc., 1991, 515) In other words there is no separate compensable harm due to alteration or misquoting alone: "If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation. These essential principles of defamation law accommodate the special case of inaccurate quotations without the necessity for a discrete body of jurisprudence directed to this subject alone." (Masson v. New Yorker Magazine, Inc., 1991, 516)

However, if there is alteration and a change in meaning, to a message that is now defamatory, the deliberateness may supply the requisite knowledge of falsity necessary, even if the plaintiff is a public official or public figure. Because the standard of defamation for public figures or public officials requires a showing of

malice (knowledge of falsity or reckless disregard of the truth of the matter) the Court concluded "that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity … unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case." (Masson v. New Yorker Magazine, Inc., 1991, 517, citations omitted) Thus alterations, short of constituting a material and defamatory change are not actionable. However, this case involved the application of liability standards where public figures or public officials are involved. Misquoting the typical list, board, blog or chat participant (a private citizen) is subject to a negligence standard alone. Hopefully a court would reach a similar result as long as the researcher's alteration for clarity, i.e., no change in meaning, is consistent with the research protocols of the discipline.

STATEMENTS BASED ON OPINION OF THE RESEARCHER

Context may remain the legal Teflon in cases of alleged defamation, especially in matters of opinion. Recall that opinion is a defense to a claim of defamation. Could a researcher be liable for offering expert opinion, i.e., opinion based on their field of study? The most analogous cases are those involving a book and similar product review. Though "[a] writer may not commit libel at will merely by labelling [sic] his work a 'review'" the general rule offers a defense where "a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation." (Moldea v. New York Times Co., 1994, 31) In a case involving a negative review by New York Times sportswriter Gerald Eskenazi of investigative journalist Dan E. Moldea's book Interference: How Organized Crime Influences Professional Football, the reviewer expressed the general opinion that the book was marred by "too much sloppy journalism" and offered a number of examples of its journalistic shortcomings. The review was published in the New York Times Book Review on September 3, 1989.

The court engaged in an extended discussion of the context of the book review and the valuable purpose book reviews serve: "the instant case involves a context, a book review, in which the allegedly libelous statements were evaluations quintessentially of a type readers expect to find in that genre… There is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works. The statements at issue in the instant case are assessments of a book, rather than direct assaults on Moldea's character, reputation, or competence as a journalist. While a bad review necessarily has the effect of injuring an author's reputation to some extent-sometimes to a devastating extent, as Moldea alleges is true here-criticism's long and impressive pedigree persuades us that, while a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre." (Moldea v. New York Times Co., 1994, 315).

Likewise a court might allow online researchers latitude in the context of scholarly writings critical of the work of others where the purpose may be to critique previous work in the discipline. The advance of scholarly pursuit is not without its share of dispute over alternative interpretations, theories, paradigms, etc. Such criticism may indeed work to discredit the standing or reputation of another scholar. In spite of the fallout such review might generate the court in Moldea v. New York Times Co. (1994, 320) again stressed the value of critical speech: "Any intelligent reviewer knows at some level that a bad review may injure the author of the book which is its subject. Indeed, some bad reviews may be written with an aim to damage a writer's reputation. There is nothing that we can do about this, at least not without unacceptably interfering with free speech. There simply is no viable way to distinguish between reviews written by those who honestly believe a book is bad, and those prompted solely by mischievous intent. To allow a plaintiff to base a lawsuit on claims of mischief, without some indication that the review's interpretations are unsupportable, would wreak havoc on the law of defamation." A court might be convinced to allow researchers a similar "breathing room" for scholarly review of another's work that is supportable interpretation.

A similar breathing space of context was recognized in the context of online reviews as well. In a case involving a review posted on amazon.com the court concluded that "the statements contained in the defendant's book reviews are expressions of pure opinion and are therefore protected. The defendant's statements appear in the context of a book review under the heading 'Reviews.' As such, the average person understands that such reviews are the reviewer's interpretation and not 'objectively verifiable' false statements of facts." (Hammer v. Trendl, 2003, *3; Hammer v. Amazon.com, 2005) The reviews were of self published books by the plaintiff Jeffery Hammer including Mind Reading in Written Form!: The Magic, Power, and Secrets of Handwriting Revealed! and An Advanced Guide to "Basic Hypnosis". It is logical to conclude that if a researcher made a similar online dissemination of opinion whether in the context of a book review or comment on another's scholarship in the context of academic rigor and debate as long as the opinion no matter how critical or damaging was a supportable interpretation of the source material a claim for defamation could not be made.

STATUTORY IMMUNITY FOR "PUBLISHERS" IN INTERNET SCENARIOS FROM ALL TORT-BASED HARMS

In spite of hyperbolic nature of posts made on various online forums the content of some messages may in fact be defamatory or at least so in the eyes of the aggrieved party. Case law demonstrates the aggrieved parties are not bashful about taking such matters to court. In Stratton Oakmont, Inc. v. Prodigy Services Co. (1995), the plaintiff thought the following postings among others were defamatory: "soon to be proven criminal" and "cult of brokers who either lie for a living or get fired" among others). In Cubby v. CompuServ (1991) similar comments were at the heart of the dispute: that plaintiffs "gained access to information first published by Rumorville 'through some back door' and a statement that Blanchard was 'bounced' from his previous employer, WABC, and a description of Skuttlebut as a 'new start-up scam.'" Would the researcher have any liability for reposting or

reprinting the statement in a report or other form of published research? Depending on the circumstances, federal law may offer immunity for the republishing of defamatory material or for any tortious material for that matter.

In response to the success of the plaintiff in Stratton Oakmont, Inc. v. Prodigy Services Co. Congress acted swiftly to overturn the result. In 1996 Congress amended the federal communications law to offer immunity to online intermediaries. Under 47 U.S.C. § 230(c)(1) (2004, emphasis added) "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." While the researcher is not the service "provider" he or she is a user of an "interactive computer service." As long as the "information" (the forum content) is "provided by another information content provider" the researcher cannot be "treated as the publisher [or republisher] or speaker.

The statute also protects the list, board, blog or chat room operator as the "provider" of the service. As explained by the Conference Report: "This section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material." (H.R. Rep. 104-458, 1996, 154).

An information content provider is defined in section 230(f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided though the Internet or any other interactive computer service." In the scenarios under discussion our list-er, board-er, blogger or chat participant is a "person… responsible … for the creation [here as speaker] … of information provided through the Internet or any other interactive computer service." The forum participant who made the initial posting of the defamatory comment could not be considered an "interactive computer service." An "interactive computer service" is defined in 47 U.S.C. § 230(f)(2): "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." However, the forum participant provides their defamatory information "through the Internet" thus the protection offered by the statute should apply in situations where the source of the participant comment is from an online source and the use made of it is also online, i.e., the dissemination by the researcher is also online, in an e-journal for example. In other words a "provider or user" could not obtain the material from "another information content provider" (so far so good) but then publish it off-line and expect the protection to still apply.

Early cases indicate that section 230 applies where the "interactive service provider has an active, even aggressive role in making available content prepared by others" (Blumenthal v. Drudge, 1998, 52), and recent cases continue this trend. Any activity in the form of editing, selecting, or otherwise arranging content falls under

the immunity of the statute: “Appellants claim that Moldow controlled the content of the discussion forum, thus shaping it, as a result of which he was transformed into an information content provider… by selectively choosing which messages to delete and which to leave posted. These activities, however, are nothing more than the exercise of a publisher’s traditional editorial functions, namely, whether to publish, withdraw, postpone or alter content provided by others. This is the very conduct Congress chose to immunize … the immunity continues to apply even if the self-policing effort is unsuccessful or not even attempted.” (Donato v. Moldow, 2005, 726-727, citations omitted) Under the immunity of section 230 only the original speaker, the person who posted the content to the online forum remains liable, those who repost the comment of others are immune. (Barrett v. Clark, 2001). Moreover, the developing case law suggests the immunity will apply in a variety of torts not just defamation: nuisance (Kathleen R. v. City of Livermore, 2001), defamation and negligence (Ben Ezra, Einstein & Co. v. American Online, Inc., 2000), and negligence (Doe v. American Online, Inc., 2001). As a result, if the source of the allegedly defaming content was first published “online” then statutory immunity is offered under federal law for researcher classification as either a publisher or a distributor as long as the source of the content is from another “information content provider.”

While it may appear that section 230 immunity for material created by another is limitless, the Court of Appeals for the Ninth Circuit concluded that the operative section 230(c)(1), the “provided by another information content provider” proviso coupled with the statutory definition of “information content provider” found in subsection (f)(3) requires that the third party content be actually “provided through the Internet or any other interactive computer services.” (Batzel v. Smith, 2003) In other words, “[t]he structure and purpose of 230(c)(1) indicate that the immunity applies only with regard to third-party information provided for use on the Internet or another interactive computer service. As we have seen, the section is concerned with providing special immunity for individuals who would otherwise be publishers or speakers, because of Congress’s concern with assuring a free market in ideas and information on the Internet… So, if, for example, an individual who happens to operate a website receives a defamatory ‘snail mail’ letter from an old friend, the website operator cannot be said to have been ‘provided’ the information in his capacity as a website service… and therefore does not apply when it is not “provided” to such persons in their roles as providers or users.” (Batzel v. Smith, 2003, 1033, emphasis added)

Under the facts of the case the “provided by” proviso prevents someone who sends a ‘private’ message that the provider posts from claiming immunity or from taking a defamatory or otherwise harmful message first released in print form and posting it. In the first instance, the email message was not “provided through the Internet or any other interactive computer service” and in the second instance, though provided was not done so “through the Internet or any other interactive computer service.” In the court’s view of the issue, the message while received via email, might not have met the statutory requirement of being “provided” for that purpose, i.e., posting on the World Wide Web. The court thus remanded the case for further proceedings and established the following rule: “We therefore hold that a service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user

under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other 'interactive computer service.'" (Batzel v. Smith, 2003, 1034).

Applying this interpretation to the scenario of data collection from online forums it is logical to conclude that a posting made on a list, board, blog or chat website, or other online forum (but not a private email that is forwarded to such list, board, blog or chat) would be one made for use on the Internet and so would fall within the statutory immunity of section 230. "When a user sends a message to a bulletin board, it is obvious that by doing so, he or she will be publicly posting the message." (Batzel v. Smith, 2003, 1034) Unless the chat room or forum could be considered in some way a private, party-to-party or "conference call" it would appear to fall under the "provided by another information content provider" and "information provided though the Internet or any other interactive computer service" (defining an information content provider) provisos. Again this immunity applies only when the source is online and the dissemination is also online, i.e., the researcher is a "user of an interactive computer service." In other cases, collecting data from offline surveys or dissemination through traditional print journal for example, the immunity would not apply and the general principles of defamation and its defenses would apply.

CONCLUSION

The protection offered by section 230 is a significant grant of immunity for researchers who collect subject commentary from online sources (i.e., "provided by another information content provider") and "publish" that information in online venues (therefore is a "user of an interactive computer service"). Protection extends to all form of tort harms, the various invasions of privacy claims, i.e. defamation, negligence, etc. If the results are published in traditional print sources such that the immunity offered by section 230 does not apply, the existing concepts of tort law suggest that the likelihood of liability is small.

The following guidelines can be used to assist the researcher in avoiding the possibility of claims made on the basis of negligent or defamatory content.

- Defamation: to avoid claims of defamation for comments made about research subjects or others use statements of facts.
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- Defamation: to avoid claims of defamation for comments made about research subjects or others use statements of opinion with supportable interpretation.
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- Defamation: to avoid claims of defamation for comments made about research subjects or others obtain the consent of the target subject or third party, i.e., the person about whom the defamatory statement is made.
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- Defamation: to avoid claims of defamation for comments made about research subjects or others use

privileged sources of content such as official proceedings or public meetings.

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- Defamation: to avoid claims of defamation for disseminating defamatory comments made by others articulate or maintain the context of the forum, i.e., hyperbole, book review or other critique.
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- Defamation and other tort-based harms such as negligence: to preserve the statutory immunity of section 230 and avoid claims of defamation for disseminating defamatory or tortious comments made by others when disseminating that content online ("user of an interactive computer service") use content from online public sources ("provided by another information content provider" and "information provided though the Internet or any other interactive computer service").

- Defamation and negligence: Alterations are acceptable if no change in meaning to the message is made.

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