CYBERBULLYING IN THE CONTEXT OF BALANCING OF RIGHTS*

*Sandra Marie Olaso-Coronel***

The theory of a "free marketplace of ideas" was established in U.S. jurisprudence by Justice Oliver Wendell Holmes in his dissent in *Abrams v. US*.[1] Founded on the importance of protecting freedom of speech to foster the "marketplace of ideas," the theory envisions that views and opinions must be available for people to either accept or reject based on their merits; this is based on the reasoning that faulty or ill-conceived ideas are challenged and exposed to reveal truth and wisdom.

The "marketplace of ideas" used to be limited to the hearing distance of individuals engaged in face-to-face or group discussions. With the invention of the printing press it expanded to wherever the printed material is able to land. The development of radio and television broadened the marketplace even farther, such that ideas freely penetrated the very homes of listeners and viewers without them needing to go out to find information.

But the Internet has expanded the marketplace like no other—the exchange of views and opinions are now no longer restricted by time, space, distance, or even large bodies of water. The Internet has become the great equalizer in terms of access to information, such that every student who is online from a developing country now has equal opportunity to read the very same books and other learning references of students from developed nations, without the expense of physical travel.

In addition to the foregoing, with the unprecedented growth of online commerce, customers have never before had a wider selection of goods. The worldwide competition has resulted in a cutthroat battle in pricing, which is unquestionably beneficial to the market.

---

* *Cite as* Sandra Marie Olaso-Coronel, *Cyberbullying in the Context of Balancing of Rights*, 93 PHIL. L.J. 328, [page cited] (2020). This article was submitted by the author in furtherance of her LL.M. in Computer Communications Law in Queen Mary University of London.

** Lecturer, University of the Philippines College of Law; Partner, Yorac Sarmiento Arroyo Chua Coronel and Reyes Law Firm; LL.M. in Computer Communications Law, Queen Mary University of London (2019); J.D., University of the Philippines College of Law (1994); B.A. Journalism, *cum laude*, University of the Philippines Diliman (1990).

[1] Abrams v. US, 250 U.S. 616 (1919).

As in many good things, however, the Internet also brings a lot of dangers, including those adversely affecting its users. As the new social platform, the Internet has now become a venue for abuse and bullying. Cyberbullying includes cruel text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.[2] Online harassment can include repeated attempts to impose unwanted communications or contact upon an individual in a manner that could be expected to cause distress or fear in any reasonable person.

Cyberbullying has become so severe in the United States (U.S.) that several incidents have resulted in tragic teenage suicides. In 2003, a 14-year old hanged himself in the family bathroom after a girl he met through AOL Instant Messenger ("IM") copied and pasted embarrassing information that he disclosed to her in confidence into AOL IM exchanges with her friends. In 2006, a 13-year old hanged herself in her bedroom closet after being bullied online by an adult neighbor. In 2008, an 18-year old hanged herself after her ex-boyfriend sent her nude photo to hundreds of other teenagers. In 2009, a 13-year old hanged herself after a picture of her breasts that she "sexted" to her boyfriend was shared to numerous other students. In 2010, a teenager jumped off the George Washington Bridge after his roommate used a webcam to stream a footage of him kissing another man. In 2012, another one hanged herself in her home after a stranger who convinced her to bare her breasts on camera used the picture to blackmail her.

This loss of young lives to cyberbullying is not unique to the U.S. In 2012, a 15-year old committed suicide in the woods near her home in Ireland after she was incessantly bullied online and called a "slut" and "ugly." A month later, a 13-year old took her life after being bullied online about her weight and looks. In 2013, a 14-year old from Lutterworth hanged herself after people on an *ask.fm* page told her to die. That same year, a 15-year old hanged himself after being harassed about his dating habits. A 14-year old from Bixham, Devon hanged herself after suffering months of cruel taunts online. A 17-year old took his own life after an extortion gang threatened that a sexually explicit video of him would be released online. In 2014, a 19-year old from Wallan, Victoria took her life after receiving a deluge of Facebook hate messages. In 2015, a 17-year old from County Tyrone took his own life after being tricked into posting inappropriate images of himself on the Internet.

---

[2] *Cyberbullying Tactics*, STOP BULLYING WEBSITE, *at* https://www.stopbullying.gov/cyberbullying/cyberbullying-tactics

Victims of cyberbullying are not limited to children. In 2012, Australia's Next Top Model presenter Charlotte Dawson attempted suicide due to online harassment on Twitter. Other stars like Adele, Cheryl Cole, Tome Daley, Caroline Flack, Richard Bacon, LeAnn Rimes, Cher Lloyd, Amy Childs and Kylie Minogue have come out publicly complaining that they have been victims of cyberbullying ranging from comments about their weight, their physique, or their sexual orientation, to wishes for their death and actual threats of physical and mortal violence on them and their families.[3]

It is said that the relative anonymity afforded by the Internet—because it does not require authorship to be disclosed, as it in fact allows authors to hide behind false identities—with the sender undertaking conduct in secrecy, and the perpetrator singly dictating the time, manner, and extent of the attack, results in "disinhibition," or engaging in conduct or behavior that one might not do face-to-face.[4] It is believed that it is precisely this disinhibition that feeds the bullying.

That the offending materials spread at viral speed, that these materials intrude relentlessly upon victims through their hand-held gadgets and phones, and that they are impossible to be removed from the Internet, make for its devastating consequences. Additionally, that the hurtful message or content is "liked" by many, or shared or forwarded multiple times, validates the bullying behavior as being acceptable, making it easier for that person to be more aggressive and vicious as he is backed-up by his pack of "likers," "sharers," or "forwarders."

This unparalleled increase in such "dangerous" online activity appears to have triggered fear that the Internet is evolving into something uncontrollable or overwhelming, to the end that governments have been forced or pressured by competing forces to regulate it.

In the United Kingdom (U.K.), as there is no specific law that addresses cyberbullying, the following laws have been made to apply for purposes of exacting liability:

---

[3] Tim Nixon, *Cyber-bullied Stars: The Celebrity Victims of Vile Online Abuse*, THE SUN, July 30, 2013, *available at* https://www.thesun.co.uk/archives/news/911035/cyber-bullied-stars-the-celebrity-victims-of-vile-online-abuse

[4] *What is Cyber Bullying, in* CYBER BULLYING: A PREVENTION CURRICULUM FOR GRADES 3-5 AND CYBER BULLYING: A PREVENTION CURRICULUM FOR GRADES 6-12 (Hazelden Publishing), *available at* http://www.violencepreventionworks.org/public/cyber_bullying.page

1. Protection from Harassment Act 1997, which prohibits the pursuit of a course of conduct "which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other,"[5] and prescribes imprisonment for a term not exceeding six months;[6]

2. Criminal Justice and Public Order Act 1994, which punishes intentional harassment, alarm or distress in that the offender: "(a) uses threatening, abusive or insulting words or behavior, or disorderly behavior, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress";[7]

3. Criminal Justice and Public Order Act 1994, which applies if the cyberbully takes, keeps, or distributes indecent photographs or pseudo-photographs of children;[8]

4. Malicious Communications Act 1988, which specifically punishes "any person who sends to another person—(a) a letter, electronic communication or article of any description which conveys—(i) a message which is indecent or grossly offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender; or (b) any article or electronic communication which is, in whole or in part, of an indecent or grossly offensive nature [. . .]";[9]

5. Communications Act 2003, which governs the misuse of an electronic communications network or electronic communications service: "(a) if the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or (b) he uses the network or service to engage in conduct the effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety," [10] and persistence in such misuse; and

---

[5] Protection from Harassment Act 1997, § 1 (1997).
[6] § 11.
[7] Criminal Justice and Public Order Act 1994, § 154 (1994).
[8] § 84.
[9] Malicious Communications Act 1988, § 1 (1988).
[10] Communications Act 2003, § 128(5) (2003).

6. Defamation Act 2013, which punishes the publication of statements "caused or is likely to cause serious harm to the reputation of the claimant,"[11] for which the Court may order that: "(a) the operator of a website on which the defamatory statement is posted to remove the statement; or (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement."[12]

In the Philippines, since there is at present no law which specifically defines the offense of cyberbullying, this is currently prosecuted as criminal threats under the Penal Code, with an aggravated penalty under the Cybercrime Prevention Act.[13]

As it has become increasingly apparent that traditional regulatory legislation falls short in addressing the anxiety caused by abusive online conduct, more detailed regulations are being issued and considered for enactment, all of which are specifically intended to manage and ensure the "safety" of the Internet medium.

In the U.S., even as the Megan Meier Cyberbullying Prevention Act failed to pass into law at the federal level, 23 of the 50 states already have cyberbullying laws in place,[14] of which seven states impose criminal penalties, with three others proposing the same.[15] In New Zealand, the Harmful Digital Communications Act was passed in 2015. It imposes imprisonment for intentionally causing harm by posting digital communication. In the Australian state of Victoria, the Brodies Law was passed in 2011 as a reaction to the tragic death of Brodie Panlock by suicide after enduring intimidating bullying by co-workers. It punishes all kinds of bullying, including cyberbullying, by up to 10 years in jail. The Canada Criminal Code prescribes

---

[11] Defamation Act 2013, § 1 (2013).

[12] § 1.

[13] Rep. Act No. 10175 (2012), § 6. Cybercrime Prevention Act of 2012. "All crimes defined and penalized by the Revised Penal Code, as amended, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by the relevant provisions of this Act: Provided, That the penalty to be imposed shall be one (1) degree higher than that provided for by the Revised Penal Code, as amended, and special laws, as the case may be."

[14] These states are Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, Tennessee, Utah, Virginia, and Washington.

[15] These states are Arkansas, Louisiana, Missouri, Nevada, North Carolina, Tennessee, and Washington. Those with proposed legislation are Hawaii, Michigan and New York.

imprisonment,[16] forfeiture of equipment or device, and actual damages for sharing intimate images of a person without the consent of the person in the image.

However, even with all these various laws in place (which provides for either directly addressing the offensive act of cyberbullying or indirectly making laws on non-online activity nevertheless applicable), there still remains a discourse on the basic issue of whether or not cyberbullying could be legally prohibited without running afoul of the internationally established tenets of freedom of expression.[17]

In 1997, the U.S. Supreme Court declared in *Reno v. ACLU*,[18] that speech over the Internet is entitled to full protection under the First Amendment.[19] It is established that online communications of sentiments, opinions, information, and ideas through words, tweets, posts, pictures, videos, memes, etc. are generally recognized as protected speech under the various charters of democratic nations, consistent with the generally accepted principles of international law specifically established under the Universal Declaration of Human Rights. In the U.K., this precept is embodied in the Human Rights Act 1988. In Canada, it is in the Canadian Charter of Rights and Freedoms. In the Philippines, the same is reflected in Article III, Section IV of the 1987 Constitution.

Thus, the determination of whether or not cyberbullying could validly be prohibited requires a careful consideration of the author's right to free expression. Consequently, the development of legislation and policy to police the Internet must consider free speech ramifications for it to be successful—that it is responsive yet not restrictive of the open nature of the Internet as the new "marketplace of ideas." Uniformly for most jurisdictions, restrictions on the free flow of speech may be justified by a higher public interest in, for example, national security, child welfare, flow of commerce, etc.

---

[16] CAN. CRIM. CODE, ¶ 162.1(1a). This imposes an imprisonment term of not more than five years for publication of an intimate image without consent.

[17] UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 19. "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[18] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[19] U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The "right to be left alone," conceptualized in 1890 by Atty. Samuel Warren and future U.S. Supreme Court Justice Louis Brandeis, is believed to be among the "higher public interest" rights against which a "balancing" must be considered respecting free speech and expression. Verily, when speech constitutes an attack upon the honor and reputation of an individual, the subject of the communication has a corollary right to be protected against it. Thus, even as the "marketplace of ideas" desires to facilitate and maximize participation in public and private dialogue, the exercise of free online speech may be curbed once it is shown to be violative of the privacy rights of third parties.

In considering this concept of privacy rights, its balancing with free speech and expression requires a consideration of how much privacy is to be regarded to a specific class of individuals. For example, when videos of private affairs of entertainment celebrities are uploaded on the Internet, a debate will arise as regards the potential conflict between the free expression rights of the person who posted the material as against the celebrity's right against intrusion into his personal space and the subsequent public disclosure of embarrassing private facts. It is argued:

> [G]iven the unique position of celebrities, where their personal affairs contribute as much as their professional abilities to their fame and success, the scope of protection must be determined by looking, not into the private fact disclosed, but rather, into the means by which such information was accessed, as well as the context or surrounding circumstances of the incident giving rise to a privacy issue.[20]

In cases, however, where it is the celebrity who posted material containing private facts and such online post solicits a deluge of negative comments and reactions, it would certainly be arguable if the celebrity could still invoke a right to privacy.

Would this argument similarly apply to information about private individuals, referring to private facts about them or posted by them on their Facebook page? Would negative comments and reactions solicited by such posts be now an intrusion into their privacy? On the one hand, since the original post is on this private person's Facebook page, would the fact that it is he who controls the existence of the post, and necessarily the comments thereon, remove his privacy protection? If the post is copied and pasted

---

[20] Jenny Jean Domino & Arvin Kristopher Razon, *Open Book: An Analysis of the Celebrity's Right to Privacy*, 87 PHIL. L.J. 900, 901 (2013).

elsewhere, beyond the control of the original author, can he then complain that his privacy is infringed?

On the other hand, if the private information refers to an exposé on the lavish lifestyle of a government official connected with an agency generally perceived as—or with a high potential of—being corrupt, would the official's privacy be more important than the free speech of the investigator? Would comments supportive of the exposé, and therefore detrimental to the image of the government official, also be protected? What about negative reactions to the article, alleging bias or bad faith on the part of the author—are these covered?

On this matter of subject classification, there are a number of general rules to be remembered. False statements on matters of public concern, though defamatory of public officials, are only unprotected if the speaker has knowledge that his statements are false yet persists in expressing them. As long as there is no proof of actual malice on the part of the author,[21] the privacy rights of the public official cannot prevent the exposé. In case of defamation of public figures, the actual malice test also applies.[22] The law, however, affords no protection against false statements or defamation of private individuals, as they do not "advance society's interest in 'uninhibited, robust, and wide-open debate.'"[23]

Specific to acts of cyberbullying, the following jurisprudence on non-online speech may nevertheless be relied upon in determining if the communication is actionable in the context of balancing of rights:

1. In *Roth v. US*, the U.S. Supreme Court ruled that obscenity "was outside the protection intended for free speech and press" and may be banned simply because banning it protects "the social interest in order and morality." [24] Child pornography is unprotected even when it is not obscene because of the legislative interest in destroying the market for the exploitative use of children.[25]

2. Speech is unprotected if it "tend[s] to incite an immediate breach of the peace" directed at the hearer by provoking a

---

[21] New York Times v. Sullivan, 376 U.S. 254 (1964).
[22] Snyder v. Phelps, 562 U.S. 443 (2011).
[23] Gertz v. Welch, 418 U.S. 323 (1974).
[24] Roth v. US, 354 U.S. 476 (1957).
[25] Osborne v. Ohio, 495 U.S. 103 (1990).

fight or for the average person to retaliate.[26] Speech is also unprotected if it advocates the use of force and is directed at inciting or producing imminent lawless action.[27]

3. Threats of violence intended to place the target at risk of bodily harm or death are also not protected.[28] In this case, the concern is not so much the "speech" but the "conduct" it incites. Corollary to this, speech is unprotected if it is likely to be seen as a "direct personal insult" or if the same intentionally, knowingly, or recklessly inflicts severe emotional distress on private persons.

4. As regards hate speech, it is unprotected if it constitutes "fighting words."[29] The US Supreme Court declared that fear of violence, which results from the disruption that such fear engenders and from the possibility that the violence will occur, carries a special force of magnitude when the threat is directed against individuals or groups who have been historically subjected to discrimination within society.

Cyberbullying, as a form of expression, is generally considered to be protected speech. However, when abusive text, email messages, IMs, or chats prove to be defamatory, or constitute "fighting words" or "threats," they step out of the protection of free expression. Similarly, when sexting or revenge pornography demonstrates obscenity or child pornography, they are then actionable. When the distribution of these pictures or videos will cause distress or fear upon any reasonable person, they may also lose their protection.

Cyberbullying delivered through the use and creation of fake profiles for the purpose of preserving anonymity or shifting authorship and blame on others would likely be defamatory and therefore beyond protection. When the bullying is committed through the unauthorized disclosure of private data that may place the target at risk of bodily harm or death, the communication may be deemed unprotected.

---

[26] Chaplinsky v. New Hampshire, US 315 (1942).
[27] Brandenburg v. Ohio, 315 U.S. 568 (1969).
[28] Virginia v. Black, 538 U.S. 343 (2003).
[29] R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 505 (1992).

Based on the abovementioned parameters, it is clear that there are forms of cyberbullying that are legally actionable. From extant laws, the remedies available to victims of cyberbullying include:

1. Injunctions or restraining orders,[30] which refer to legally imposed prohibitions to approach or contact the plaintiff, on his/her representation that he/she is being cyberbullied;

2. Imposition of filtering or blocking,[31] where the former refers to an Internet program that is designed to disallow particular harmful content from being accessed, and the latter refers to a similar program, but one that serves to restrict access to particular websites for some stated purpose;

3. Notice and take-down,[32] which are procedures for the immediate removal from the Internet of allegedly offensive material, upon a request made by a complainant to the web host, portal or site; and

4. Imprisonment and award of damages,[33] which are post-litigation remedies that can serve as penalties for the offensive material.

Looking at these remedies from a free expression angle would reveal, however, that they are in the nature of either prior restraint or subsequent punishment—the very antithesis of the free marketplace of ideas theory. Justice Brennan of the U.S. Supreme Court has declared that "[a]ny system of

---

[30] NZ Harmful Digital Communications Act 2015, ¶ 19(1). This authorizes Courts, on an application, to make one or more of the following orders against the author of offending material: (a) to take down or disable material; (b) that the defendant cease or refrain from the conduct concerned; (c) that the defendant not encourage any other persons to engage in similar communications towards the affected individual; (d) that a correction be published; (e) that a right of reply be given to the affected individual; (f) that an apology be published.

[31] ¶ 19(2a). This authorizes Courts, on an application, to order the take down or to disable public access to material that has been posted or sent.

[32] ¶ 24. This authorizes the host, who is unable to contact the author (for example, because the identity of the author is unknown) after taking reasonable steps to do so, to take down or disable the specific content complained as soon as practicable, after providing the author of the specific content with a copy of the notice of complaint, altered to conceal personal information that identifies the complainant if the host has received confirmation that the complainant does not consent to the host providing that information to the author, no later than 48 hours after receiving a notice of complaint.

[33] ¶ 22. This prescribes the penalty of—in case of a natural person—imprisonment for a term not exceeding 2 years or a fine not exceeding USD 50,000; or in the case of a body corporate, a fine not exceeding USD 200,000.

prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity."[34] Thus, the determination of whether speech infringes on the privacy rights of others such that it is no longer protected is precisely the unique task involved in balancing of rights. The prohibition on prior restraint is essentially a limitation on restraints, until a final judicial determination that the First Amendment does not protect the restricted speech.[35]

The conflicting *Yahoo!* cases present the legal issues surrounding filtering content. On the one hand, in *LICRA v. Yahoo!*,[36] the French Court held that Yahoo! has the obligation to filter Internet content on its website to prevent access by French users to offensive and prohibited content such as the sale of Nazi memorabilia. The Court found that filtering may be imposed upon websites because it is technologically possible to identify a substantial number of users operating from computer sites in France through the combination of geographical identification technologies of Internet Protocol ("IP") addresses and a declaration of nationality. In contrast, in a subsequent U.S. case involving the same parties, the U.S. Court deemed as unlawful the imposition of filtering Internet content upon websites. In *Yahoo! v. LICRA*,[37] Yahoo! sought relief from a California Court when it questioned the enforceability of the French Court decision that required geo-filtering. The California Court ruled that foreign judgments that conflict with the company's First Amendment rights are not enforceable in the U.S.

Note that jurisprudence from the European Union (EU) is categorical in asserting that filtering is not offensive to free expression if performed only at the first layer of the packets comprising the communication, i.e. the header indicating the IP address of the communication for purposes of blocking the material.[38] It is argued, however, that once filtering goes into the content of the data, it becomes a scheme to modify user behavior and is violative of free expression.[39]

---

[34] Freedman v. Maryland, 380 U.S. 51(1965).

[35] Near v. Minnesota, 283 U.S. 697 (1931).

[36] Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France v. Yahoo! Inc., (2000).

[37] Yahoo! Inc. v. Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France, N.D.Cal. 145 F.Supp.2d (2001).

[38] Twentieth Century Fox Film Corp., et al. v. British Telecoms PLC, EWHC 1981 (2011).

[39] Sophie Stalla-Bourdillon, Online Monitoring, Filtering, Blocking…What is the Difference? Where to Draw the Line? (2013), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354113 (Southampton Law School research paper).

As regards the take-down mechanism, very recent developments in EU jurisprudence appear to establish a new standard in the management of abusive exercise of free speech considering the unique attributes of the Internet.

In the case of *Delfi v. Estonia*,[40] Delfi, a news portal in Estonia, questioned before the Grand Chamber an award of damages to an individual who became the subject of nasty comments and threats in response to what was otherwise a well-balanced story on ice bridges published on its site. Delfi argued that the Estonian Court was wrong in awarding damages because it deleted the offending comments as soon as there was demand for it, invoking intermediary non-liability under the E-Commerce Directive.[41] The Grand Chamber found that the award was justified because the comments constituted unprotected "hate speech," and decreed that a news portal is under an obligation to be aware of its content, such that a simple notice-and-take-down regime may not be a sufficient defense where their response was not prompt enough. In balancing Articles 10 and 8 of the European Convention on Human Rights (ECHR),[42] the Grand Chamber declared that news portals are not mere technical intermediaries protected by Article 15 of the Directive.

---

[40] Delfi v. Estonia, ECtHR 64669/09 (First Section, 2015).

[41] Directive 2000/31/EC, art. 15. "No general obligation to monitor. 1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. 2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

[42] EUROPEAN CONVENTION ON HUMAN RIGHTS, art. 10. "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."; *at* art. 8. "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In the case of *MTE v. Hungary*,[43] the European Court of Human Rights held that the right of MTE and the Internet news portal index to free expression was violated when the Hungarian Court decreed them to be liable for readers' comments on an article criticizing two real estate management websites' business practices, when these comments were "notably devoid of pivotal elements of hate speech and incitement of violence." The Court found there was an invalid interference with Article 10 rights, stating that applicants "provided forum for the exercise of expression rights, enabling the public to impart information and ideas" and imposing liability on them for this "may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression of the Internet."

By distinguishing between the kind of speech used by the commenters in *Delfi* and in *MTE*—"hate speech" versus speech that "is notably devoid of pivotal elements of hate speech and incitement of violence"—and using this distinction as basis for determining the validity or invalidity of interference, the European Court seems to now impose on portals the obligation to generally monitor the content of their systems, determine if speech therein is offensive, and take-down those that are offending without needing a complaint or request for take-down.

Of course, the *Delfi* and *MTE* rulings apply to portals that are not "intermediaries" within the context of the E-Commerce Directive. As far as Internet Service Providers ("ISPs") are concerned, the EU Court has ruled in *Sabam*,[44] that Article 15(1) of the Directive prohibits national measures that would require an intermediary provider, such as an ISP, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual property rights.

Arguably, it is this new prescription under *Delfi* and *MTE* that may constitute prior restraint that is offensive to free speech. What must be avoided is leaving to Internet portals, rather than to the courts or other arbitral bodies, the determination of whether or not the contents appearing on their sites—which should generally be protected speech—are not, in fact, protected and should be summarily removed from the Internet.

---

[43] MTE v. Hungary, ECtHR 22947/13 (Fourth Section, 2016).

[44] Sabam v. Netlog, 2 C.M.L.R. (2012).

While there is yet no U.S. Supreme Court ruling on the matter, the District Court for the Western District of Texas held in *Doe v. MySpace, Inc.*[45] that the interactive website is covered by the immunity granted under Section 230 of the Communications Decency Act ("CDA"), hence, it is not liable for failing to prevent an adult MySpace member from contacting a minor user that resulted to the child's sexual assault. Section 230(c)(I) of the CDA states that "[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." In ruling thus, the Texas Court relied on *Zeran v. America Online, Inc.*,[46] which held that the failure of AOL to remove crude and offensive advertisements on its site after being notified of their fraudulent nature is not actionable as it would be an "impossible burden, forcing website operators to thoroughly investigate every (potentially bogus) claim of defamation." In that case, the Court likened MySpace to traditional communication carriers such as the postal service or telephone companies who are neither liable for the communications exchanged through their service nor obligated to refuse their services to potentially unscrupulous users.

Indeed, the marketplace theory frowns upon restrictions on speech in an exceptionally profound manner, upon the fundamental premise that any restraint that results in less speech must be looked upon with disfavor. It is in fact argued that the marketplace theory would even tolerate "speech anarchy" on the submission that "a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems."[47] Indeed, one of the functions of free speech, which is often provocative and challenging, is the invitation to dispute.[48]

With all the foregoing, it is important to note that as a consequence of the seemingly endless wealth of information and communication in this developing marketplace of ideas called the Internet (and not to mention the ease and speed with which it can be accessed by users), complaints of abuse—whether valid or invalid—are expected to be generated more and more frequently from all sectors.

---

[45] Doe v. MySpace, Fifth Circuit Court of Appeals 528, 413 F.3d (2008).

[46] Zeran v. America Online, Inc., 524 F.3d (1997).

[47] Todd G. Hartman, *The Marketplace vs. The Ideas: The First Amendment Challenges to Internet Commerce,* 22(2) HARV. J.L. & TECH. (1999), *available at* http://jolt.law.harvard.edu/articles/pdf/v12/12HarvJLTech419.pdf

[48] Beauharnais v. Illinois, 343 U.S. 250 (1952).

Consequently, caution is all the more needed in the balancing of rights. In *ETK v. NGN*,[49] the U.K. Court held that protection of privacy under Article 8 of the ECHR is always balanced with the protection of free expression under Article 10. In this case, the Court dismissed the privacy rights violation complaint filed by Max Mosely against News of the World upon the ruling that the ECHR does not require a pre-notification of an impending publication about his actions since the same would be tantamount to prior restraint, violative of Article 10 on free expression.

In *MTE*,[50] the European Court of Human Rights (ECtHR) ruled that courts must make a proper balancing between competing rights involved, namely, between the Internet news portal's right to free expression and the real estate company's right to respect for its commercial reputation. The Court found that the news portal's right was breached by the imposition of liability on them for any injurious or unlawful comment made by the readers as the "notice and take-down procedures allowing rapid response are an appropriate tool for balancing the rights and interests of all those involved."

This later ruling presents yet another view of the right to privacy vis-à-vis the balancing of rights in online speech: what about the privacy rights of the sender of the offending message? Should ISPs and Internet portals be required to disclose the identities of their subscribers? Who determines when this is necessary and to what extent? Given that most cyberbullying laws give the police the right to demand disclosure of information and access to the metadata that ISPs and phone companies keep on every call and e-mail from their customers, would this not constitute a search and seizure that requires a warrant in order to be valid?

What is clear is that the increasing number and frequency of complaints of abuse of the online media spawned an urgent need to craft laws intended to prevent further exploitation. This paved the way for the creeping-in of positive governmental interference on the Internet, specifically, legislation that establishes controls on the exchange of information.

It is submitted that governments must resist this pressure for further restrictive legislation and instead leave to the courts or other dispute resolution mechanisms the task of carefully balancing rights on a case-to-case basis. While it can be argued that controlling Internet content and/or exchange of information may seem advantageous and relatively harmless in the short term, any such limits will inevitably jeopardize the very growth that

---

[49] ETK v. News Group Newspapers, Ltd., 439 EWCA Civ (2011).

[50] Hartman, *supra* note 47.

makes the Internet the ultimate marketplace of ideas. As one Harvard lawyer succinctly noted, "any attempts to limit or control the exchange of information would be antithetical to the attributes that have made the Internet the ever-expanding vehicle for global information exchange that it is today."[51]

Consider this: save in the case of minor victims, is the need to protect against online abuse so compelling that we are now offering the police new investigative tools that would allow them to sweep up vast amounts of personal information without needing to resort to court action? Is this not more dangerous than the struggle against cyberbullying?

Furthermore, are we really willing to allow ISPs and Internet portals or hosts to have legal access to communication content on the premise that it is necessary for them to do so in order to implement filtering, blocking, or take-down measures? By granting access to these types of private content, are we not already granting these ISPs and portals possession of our data and information? If their action need not require court intervention, what would the allowable limits be?

Verily, the level of government intrusion that we must have to tolerate should only be proportionate to the wrong sought to be thwarted. A compelling case must be presented in order to justify the government being granted more power. To ensure this, it is submitted that the balancing of interests requires court intervention rather than legislation.

In the fight against cyberbullying, the unique characteristics of online technologies must be considered: anonymity, lack of supervision, power imbalance, viral speed, pervasiveness, and permanence. Overwhelming as the abuse of technology may seem, the necessity of finding adequate means to protect online users from harassment should never be at the expense of protecting the right to unhampered public discourse in the interest of advancing the marketplace of ideas. Similarly, the solution to cyberbullying should not necessitate the giving up of privacy rights to government interference or even control by means of the technology itself. Even hurtful speech should enjoy the presumption of protection, and courts should be allowed the chance to determine upon which specific facts the balance of rights should tilt.

- o0o -

---

[51] *Id.*