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The Emoji that Cost $20,000: Triggering Liability for Defamation on Social Media

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I. INTRODUCTION

Social media[1] has taken the world by storm.[2] As of 2016, over three billion people in the world are active Internet users,[3] and over two billion are active on social media.[4] Facebook reports 1.79 billion monthly active users worldwide,[5] while another statistic reporting the number of active Facebook users says it is "still counting."[6] With lower but still influential numbers, Twitter reports 313 million monthly active users for 2016.[7] In 2013, social media surpassed email

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1. The phrase "social media" serves to describe interactive websites where users can post comments, photos, and other content to communicate virtually with other users. *See Social Media Definition*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/ definition/ social_media (last visited Oct. 20, 2016) (defining social media as, "[w]ebsites and applications that enable users to create and share content or to participate in social networking."). The most common social media websites for users in the United States include Facebook, Twitter, Google Plus, and Instagram, but there are numerous others throughout the world. *See* Simon Kemp, *Digital, Social & Mobile Worldwide in 2015*, WE ARE SOCIAL (Jan. 21, 2015), http://wearesocial.net/blog/201015/01/digital-social-mobile-worldwide-2015/ (citing global statistics on use and popularity of social media for Internet users).

2. *See generally* Andréa Ford, *The Global Network: Facebook Has Conquered America. Can It Take Over the World?*, TIME, at 59 (Dec. 2010), www.time.com/time/pdf/global_network.pdf (mapping the number of active Facebook users in 2010 throughout the world).

3. *Statistics and Facts of Internet Usage Worldwide*, STATISTA, https://www.statista.com/topics/1145/internet-usage-worldwide/ (last visited Oct. 2, 2016) ("Currently, more than 3.17 billion people worldwide access the internet.").

4. *Statistics and Facts About Social Networks*, STATISTA (Oct. 2, 2016, 11:46 AM), https://www.statista.com/topics/1164/social-networks/ (reporting 2.34 billion social media users in 2016).

5. *Company Info*, FACEBOOK NEWSROOM, http://newsroom.fb.com/company-info/ (last visited Nov. 12, 2016).

6. *See* Shea Bennett, *Facebook, Twitter, Instagram, Pinterest, Vine, Snapchat—Social Media Stats 2014*, SOC. TIMES (June 9, 2014, 3:00 PM), http://www.adweek.com/socialtimes/social-media-statistics-2014/499230.

7. *See*, TWITTER, https://about.twitter.com/company (last visited Nov. 12, 2016).

to become the number one Internet activity in the United States.[8] Most sources agree that social media use will continue to grow[9] and that social media communication will continue reaching new heights globally.[10]

The staggering number of social media users[11] provides new ways for individuals to communicate. Twitter,[12] for example, enables users to post statements called "tweets."[13] Tweets contain up to 140 characters, and may be accompanied by photos, videos, and links.[14] Within the 140 characters, users may include Emoticons. An Emoticon, more commonly referred to as an emoji, is "[a] small digital image or icon used to express an idea, emotion, etc.[,]" in

8. Felix Richter, *Social Networking is the No. 1 Online Activity in the U.S.*, STATISTA (Aug. 14, 2013), http://www.statista.com/topics/1164/social-networks/chart/1238/digital-media-use-in-the-us/ (noting that the average U.S. resident spent thirty-seven minutes per day on social media in 2013).

9. *See, e.g.*, Kemp, *supra* note 1 (noting the expansive growth of social media use and stating that such growth "shows no signs of slowing anytime soon"); Carlos Monteiro, *Infographic: Who's Really Using Facebook, Twitter, Pinterest, Tumbler, and Instagram in 2015*, ADWEEK (Jan. 12, 2015, 12:02 AM), http://www.adweek.com/news/advertising-branding/new-social-stratosphere-who-using-facebook-twitter-pinterest-tumblr-and-instagram-2015-and-beyond-1622 (predicting that the number of users of popular social media websites, including Twitter, will continue to increase and that the most drastic increase in users will come from the sixty-five and older demographic); Proctor, *supra* note 7.

10. This Note focuses on social media within the U.S. legal framework. The use and effect of social media, however, spans continents. *See The World Factbook*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2153rank.html (last visited Sept. 17, 2016) (listing the top three regions with the most populous Internet users as China, the European Union, and the United States, in that order); *Company Info*, *supra* note 5 (detailing Facebook headquarters' report that "[a]pproximately 84.2% of our daily active users are outside the US and Canada."). Even in countries where the government has banned certain social media websites, citizens remain active users. *See* Geelan Fahimy, Comment, *Liable for Your Lies: Misrepresentation Law as a Mechanism for Regulating Behavior on Social Networking Sites*, 39 PEPP. L. REV. 367, 386 n.111 (2012) (citing Ford, *supra* note 2) (observing that even though the Chinese government constantly blocks Facebook, nearly 100,000 people in the country actively use the site).

11. *See generally* Kemp, *supra* note 1 and accompanying text (noting the use and popularity of social media throughout the world).

12. *See The Twitter Glossary*, TWITTER, https://support.twitter.com/articles/166337-the-twitter-glossary (last visited Feb. 8, 2015) ("Twitter [is] [a]n information network made up of 140-character messages (including photos, videos and links) from all over the world.").

13. *The Twitter Glossary*, *supra* note 12. The term "tweet" is also used in the Twitter community as a verb, meaning to upload a statement onto Twitter. *The Twitter Glossary*, *supra* note 12 ("Tweet (v.), The act of sending a Tweet.").

14. *The Twitter Glossary*, *supra* note 12.

electronic communication.[15] Emojis are often included alongside text to portray an emotion or otherwise add to readers' understanding of the text.[16] The most basic emoji is a yellow smiley face, but emojis span from face emotions, like happy, sad, and angry, to animals and ordinary objects, like a cat or a briefcase.[17] With such options, tweets are largely only limited by individual users' creativity.

After a user posts a tweet, the tweet displays on the user's personal timeline. More popular tweets may also end up on blogs and other websites.[18] Twitter, like other social media websites, gives users the ability to post statements virtually, affording opportunities for disconnected communication[19] and anonymity,[20] along with the power to reach millions from a desktop at home.[21]

The popularity of social media has given rise to new legal issues.[22] Social media provides users with a new medium for communication,

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15. *See Definition of Emoji in English*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/us/emoji (last visited Oct. 10, 2016).

16. *See* Lisette Mejia, *17 People Who Emoji Better Than You*, POPSUGAR (June 28, 2016), http://www.popsugar.com/tech/Funny-Emoji-Texts-35465201#photo-35465201 (showing instances where people used emojis to tell a story). Today, people use emjois not only on Twitter, but also in text messages, emails, other social media websites, and other electronic communication. *Id.*

17. *See Emoji Keyboard Online*, https://emojikeyboard.org/ (last visited Oct. 10, 2016) (illustrating available emojis).

18. *The Twitter Glossary*, *supra* note 12.

19. *See, e.g.*, Brandon Copeland, *Social Media: The Decline of Face-to-Face Communication*, BRAND & MORTAR (Sept. 10, 2014), http://www.brandandmortar.com/social-media/social-media-killer-face-face-communication/ (arguing that social media has led to the decline of face-to-face communication and thus inhibited real relationships formed by expressing emotions); Brian Jung, *The Negative Effect of Social Media on Society and Individuals*, HOUS. CHRON., http://smallbusiness.chron.com/negative-effect-social-media-society-individuals-27617.html (last visited Feb. 8, 2015) (claiming that one of the negative effects of social media is "a [f]alse [s]ense of [c]onnection"). *But see, e.g.*, Claire Cain Miller, *Technology Has Made Life Different, but Not Necessarily More Stressful*, N.Y. TIMES (Jan. 15, 2015), http://www.nytimes.com/2015/01/16/upshot/technology-has-made-life-different-but-not-necessarily-more-stressful.html?_r=0&abt=0002&abg=0 (noting studies that show social media reduces stress, and arguing that communication through technology leads to closer relationships).

20. *See* Jung, *supra* note 19 ("The anonymity afforded online can bring out dark impulses that might otherwise be suppressed.").

21. Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 430, 433 (2013) (commenting that Twitter allows any individual to become a publisher and entertain a global audience).

22. *See, e.g.*, *id.*; United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009); Draker v. Schreiber, 271 S.W.3d 318, 320 (Tex. App. 2008). The rise of social media and other

and often an innovative platform on which to impose harm.[23] This reality has created new factors to consider in otherwise traditional cases.[24] With few statutes to mitigate these harms,[25] courts are forced to adapt existing law.[26] Even with recent developments in the judiciary, courts are often left playing catch-up.[27]

This context also exposes over two billion individuals to liability based on social media use.[28] The few statutes in place largely serve to immunize social media websites, leaving individual users unprotected.[29] The two billion social media users must be made aware of potential liability arising out of social media use, and further, they must be informed on how to avoid it.

This Note provides background and proposes a solution for individual user liability on social media. First, the Note addresses the

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technological innovations also affect how the legal profession operates. For instance, social media affects how judges manage cases and their courtrooms. This reality is evident with Judge Herbert B. Dixon's article outlining basic instructions to judges on how to operate an iPad. It specifically includes a section on emojis, titled, "Does My iPad Have 'Smileys'?" The section reads:

> Yes, if you are the type of person who inserts smileys into e-mails and other documents, you are in luck. They are called 'Emoji characters' and they're found on the built-in Emoji keyboard, which may take some effort to find. Look for a globe symbol next to the .?123 key . . . press and hold the globe symbol, and select Emoji. Instantly you will have a host of smileys and other figures at your disposal.

J. Herbert B. Dixon Jr., *iPad Wizardry for Beginners*, 52 JUDGES' J. 36, 38 (2013).

23. *See generally* Angelotti, *supra* note 21 (arguing that Twitter's platform provides users with the ability to easily publish defamatory statements). *See also infra* notes 32–35.

24. Angelotti, *supra* note 21 (listing new questions courts must address in Twitter defamation cases).

25. Federal legislation affecting social media offenses include the Communications Decency Act of 1996, 47 U.S.C. § 230 (2012); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012) [hereinafter the CFAA]; and the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2511 (2012). For state laws, *see infra* note 39.

26. *See, e.g.*, AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496 (W.D. Va. 2013).

27. The rise of social media has introduced legal claims arising from social media into the courts. Social media defamation claims have become such a large portion of legal disputes that scholars have developed new vocabulary to denote the rise and continued influence of such offenses. *See, e.g.*, Angelotti, *supra* note 21 (utilizing the term "Twibel" to denote libel claims arising from tweets posted on Twitter).

28. *See supra* notes 1–4 and accompanying text.

29. *See, e.g.*, 47 U.S.C. § 230 (2012) (immunizing Internet service providers for publishing user content); 18 U.S.C. § 1030 (2012) (criminalizing users for computer-related fraud; placing no responsibility on Internet service or content providers); 18 U.S.C. § 2511 (2012) (authorizing Internet providers to intercept electronic communications in certain circumstances; criminalizing users for intercepting electronic communications).

history of social media law in the U.S. legal system, specifically defamation claims and legislative acts to immunize social media websites. Next, it discusses a British court's finding of liability based on an emoji that was contained in a tweet and analyzes whether an emoji could trigger liability in the United States. Then, the Note juxtaposes the potential for individual user liability based on an emoji with the immunization granted to social media websites. To conclude, the Note proposes new federal legislation that will place responsibility on social websites to notify users of potential liability arising from social media use. The purpose of this Note is to lay out proactive steps the U.S. legal system must take to protect individual social media users and allow for the continued advancement of Internet communication services.

II. HISTORY

A number of civil and criminal offenses can occur on social media.[30] As no common law exists for social media offenses, U.S. courts have applied doctrines from other areas of the law to remedy these twenty-first century harms.[31] Courts have recognized

30. Some argue that the mere existence of social media is harmful to society. *See* Dianna Booher, *6 Ways Social Media Is Doing More Harm Than Good*, HUFFINGTON POST (July 23, 2014, 10:44 AM), http://www.huffingtonpost.com/dianna-booher/social-media_b_5375853.html.

31. Jay M. Zitter, *Annotation, Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R. 5th 169 (2000) ("The courts and legislatures have employed traditional defamation principles to regulate electronic and online defamation."). The evolution of social media defamation claims parallels the development of privacy law beginning in the late nineteenth century, where privacy law developed out of then-existing tort law. The legal field first recognized a need for privacy law with the advancement of technology, specifically yellow journalism and penny presses. *See* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); *see also* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY, INFORMATION, AND TECHNOLOGY 28 (3d ed., Wolters Kluwer Law & Business) (2011). Prominent scholars argue that these four categories of privacy are too narrow, and thus the judiciary's acceptance of them has stunted privacy law and remedial measures. *See* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2010).

defamation,[32] misappropriation of identity,[33] catfishing,[34] cyberbullying,[35] cyberharassment,[36] and revenge pornography[37] as

32. *See Defamation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining defamation as "[a] false written or oral statement that damages another's reputation"). Defamation on social media occurs when users post libel or slander, negligently or with actual malice, that damages another individual's reputation. *See generally* Jeffrey Elkin, *Cybersmears: Dealing with Defamation on the Net*, 9 BUS. L. TODAY 22 (2000) (detailing the evolution and prevalence of online defamation).

33. Misappropriation of identity is a primary concern on social media. It occurs either when users create false profiles, claiming to be another individual, or when users hack into existing profiles. Maksim Reznik, *Identity Theft on Social Networking Sites: Developing Issues of Internet Impersonation*, 29 TUORO. L. REV. 455, 465–66, 479 (2013). In severe cases, the fake user will publish lewd, humiliating, or otherwise personal remarks on the website, purporting to be the individual the account identifies. *See* Draker v. Schreiber, 271 S.W.3d 318, 320 (Tex. App. 2008) (noting that students created a fake social media account of their vice principal including "her name, photo, and place of employment, as well as explicit and graphic sexual references."). Notably, misappropriation of identity over social media is not the same as identity theft in the context of fraud; the difference has created problems identifying appropriate remedies for identity theft in the social media context. *See id.* at 321 (finding no remedy for misappropriation of identity on social media); *see also* United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (holding that the CFAA does not apply to identity theft in the social media context and leaving the plaintiff without remedy).

34. Most commonly, catfishing refers to one Internet user purposely engaging an unknowing and vulnerable victim into a fake online relationship. *See* Aisha Harris, *Who Coined the Term "Catfish,"* SLATE (Jan. 18, 2013, 4:00 PM), http://www.slate.com/blogs/browbeat/2013/01/18/catfish_meaning_and_definition_term_for_online_hoaxes_has_a_surprisingly.html. Catfishing may occur out of boredom or loneliness; however, in more drastic cases, catfishing occurs with intent to humiliate the victim or seek revenge. *Id.*; *see also* Molly McHugh, *It's Catfishing Season! How to Tell Lovers from Liars Online, and More*, DIGITAL TRENDS (Aug. 23, 2013, 3:00 AM), http://www.digitaltrends.com/web/its-catfishing-season-how-to-tell-lovers-from-liars-online-and-more/ (explaining different forms of catfishing and suggesting ways to avoid being catfished online).

35. *See What is Cyberbullying*, STOPBULLYING.GOV, http://www.stopbullying.gov/cyberbullying/what-is-it/ (last visited Feb. 8, 2015). Cyberbulling is "bullying that takes place using electronic technology." *Id.* It typically affects teenagers. *Cyberbullying Facts Summarizing What is Currently Known*, CYBERBULLYING RES. CTR., http://cyberbullying.us/facts/ (last visited Feb. 8, 2015) (reporting that nearly 16 percent of high school students have been victims of cyberbullying). In late 2014, cyberbullying made headlines when Monica Lewinsky spoke publicly against the negative effects of cyberbullying. *See* Dan Merica, *Lewinsky Makes Emotional Plea to End Cyberbullying*, CNN (Oct. 21, 2014, 2:19 PM), http://www.cnn.com/2014/10/20/politics/lewinsky-cyber-bullying/ (capturing Lewinsky's claim that in 1995 she became "patient zero" of cyberbullying as Internet users lashed out against her because of her reported affair with then President Bill Clinton).

36. Cyberharrassment is similar to cyberbullying, but the term cyberharassment is typically used to define online harassment perpetrated by an adult. *See Internet Safety for Kids: Cyberbullying and Cyberharassment*, GCF GLOBAL, http://www.gcflearnfree.org/internetsafetyforkids/cyberbullying-and-cyberharassment/1/ (last visited Sept. 17, 2016). Cyberharassment is the repetitive abuse of another online. Katharine Quarmby, *How the Law Is Standing Up to Cyberstalking*, NEWSWEEK (Aug. 13, 2014, 6:08 AM), http://www.newsweek.com/2014/

harms that occur on social media. Revenge porn is often viewed as the most severe action,[38] and some states have tried it as a criminal offense.[39] In addition to severity, these harms reach internationally,[40] and they most disproportionately affect members of traditionally disadvantaged groups, especially women.[41]

08/22/how-law-standing-cyberstalking-264251.html. A subset of cyberharassment is cyberstalking. *Id.* Cyberstalking, often—and perhaps more appropriately—referred to as "psychological terrorism," occurs when individuals use social media to annoy, harass, and/or threaten an innocent victim. *Id.* Scholars have identified three areas of cyberstalking: (1) direct communication; (2) indirect communication, circulated or posted online; and (3) misrepresentation online. *Id.*

37. Revenge pornography is the act of posting sexually explicit photos, videos, or other material of an individual onto social media without his or her permission, even if the material was originally captured with the individual's consent. Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247 (2015). Most commonly, revenge pornography occurs when a spurned lover seeks revenge by publishing intimate photos of their former lover online. *Id.* Social media websites dedicated to revenge porn exist, and they provide a platform for users to upload photos of nude individuals without consent. *Id.* In the most severe cases, the user will upload the name and contact information of the victim with the photograph. *Id.* End revenge porn advocates call the offense "non-consensual pornography" or "cyber rape." *See, e.g.*, *About*, END REVENGE PORN, http://www.endrevengeporn.org/welcome/ (last visited Feb. 8, 2015).

38. Revenge porn is seemingly more severe because it involves a lack of consent and implicates a global audience of offenders. In 2014, when hacker(s) found sexually explicit photographs of celebrity Jennifer Lawrence and published them online, Lawrence stated that the act itself was "a sex crime . . . a sexual violation." *Jennifer Lawrence: Photo Hacking was 'Sex Crime'*, DETROIT NEWS (Oct. 7, 2014, 1:51 PM), http://www.detroitnews.com/story/entertainment/people/2014/10/07/jennifer-lawrence-photo-hacking-sex-crime/16862365/ (quoting Lawrence). She then placed rightful responsibility on individuals other than the hacker(s), declaring: "Anybody who looked at those pictures, you're perpetuating a sexual offense. You should cower with shame." *Id.*

39. Although case law developed around social media has relied on tort law to bring claims against individual users and Internet service providers, recent scholarship advocates for the criminalization of some social media offenses. *See, e.g.*, Kitchen, *supra* note 37; Reznik, *supra* note 33; Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014) (founding their argument on the egregious nature of the act, the fundamental violation of privacy, and the need for deterrence). Courts are at the center of these debates and have taken different approaches in determining which offenses on social media amount to crimes. *Compare* United States v. Nosal, 642 F.3d 781 (9th Cir. 2011) (en banc) (declining to determine whether misappropriation of identity amounts to a criminal offense under the CFAA), *with* United States v. Rodriguez, 628 F.3d 1258 (11th Cir. 2010) (affirming the defendant's criminal sentence pursuant to the CFAA for identity misappropriation).

40. *See* Quarmby, *supra* note 36 (detailing a case where the victim, living in the United States, experienced cyberharassment from an individual living in Singapore).

41. Danielle Keats Citron, *Cyber Civil Rights*, 89 BOS. UNIV. L. REV. 61, 65 (2009) (illustrating that online harms "overwhelmingly target members of traditionally subordinated

A. Evolution of Defamation Claims in the United States

A common legal claim arising from social media is defamation. Defamation is the publication of a false statement concerning an individual that negatively affects his or her reputation.[42] To establish a cause of action for defamation, the plaintiff must prove the following elements: (1) publication; (2) the statement concerns the plaintiff; (3) falsity; (4) the requisite degree of fault; and (5) damage.[43] The fourth element—requisite degree of fault—depends on the plaintiff's status or the matter of the statement.[44] In most states, ordinary individuals need only show the publisher acted negligently in publishing the statement,[45] while public figures, or ordinary individuals if the statement is a matter of public concern, must prove the publisher published the statement with "actual malice."[46] Such standards have evolved within the confines of the

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groups, particularly women."). *See also Cyberbullying Facts Summarizing What is Currently Known*, *supra* note 35 (reporting that women are more likely to be victims of cyberbullying than men). *But cf.* Scott Stroud, *The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn*, 29 J. MASS MEDIA ETHICS 168 (2014) (questioning the statistics relied on by criminalization-of-revenge-porn advocates and suggesting that more men are victims of revenge porn and that women are more likely than men to engage in revenge porn, but not diminishing the negative effects of revenge porn regardless of gender). *See also* Scott H. Greenfield, *#RevengePorn: Real Numbers Show It's Not Really a Gender Issue*, SIMPLE JUST.: CRIM. DEF. BLOG (July 29, 2014), http://blog.simplejustice.us/2014/07/29/revengeporn-real-numbers-show-its-not-really-a-gender-issue/ (supporting Stroud's claims).

42. RESTATEMENT (SECOND) OF TORTS § 568 (AM. LAW INST. 1977).

43. *Id.*

44. *See infra* notes 45–47.

45. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). There are situations, however, where a private figure's defamation claim may require a showing of actual malice. For example, if the statement is on a matter of public concern, the plaintiff must prove actual malice. *Id.* at 344. Also, if the plaintiff is in the public arena regarding a certain public controversy or topic, he or she must prove actual malice. *Id* at 345.

46. N.Y. Times v. Sullivan, 376 U.S. 254, 280 (1964). The "actual malice" standard requires the plaintiff prove that the defendant published the alleged defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* In *New York Times*, the Supreme Court held that allegedly defamatory statements about public officials must be published with actual malice to impose liability. *Id.* Three years later, the Court extended the actual malice standard to public figures. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (holding that public figures must prove the defendant published the allegedly defamatory statement with actual malice to recover damages). These high standards make it difficult for plaintiffs who are public figures or officials to prevail on defamation claims. The biggest hurdle to overcome is proving that the defendant possessed knowledge or should have possessed knowledge that the statement was false. *See, e.g.*, *id.* (finding that the plaintiff, a

First Amendment,[47] largely established in contrast to the right to free speech.[48]

The judiciary has adapted these traditional elements of defamation to remedy defamatory statements posted on social media.[49] Most courts have readily found that statements posted on social media satisfy the publication element of defamation.[50] Similarly, courts apply the same analysis for the requisite degree of fault when determining whether the plaintiff must prove negligence or actual malice.[51] Courts have, however, been presented with nuanced issues while attempting to adapt existing law to social media communications. The judiciary has had to determine: (1) whether statements published on social media may be factual; (2) who is liable as the publisher; and (3) which new technological characters, such as emojis, may trigger liability.[52]

B. Determining Whether Statements Published on Social Media are Factual

The first element of defamation that presents an issue in social media defamation cases is falsity. In ordinary defamation case, the plaintiff must prove "falsity." In other words, they must show that the allegedly defamatory statement is a fact, not an opinion.[53] In

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public figure, was not able to recover damages for defamation, even though the defendant published a false statement).

47. U.S. CONST. amend. I.

48. *See Curtis Publ'g Co.*, 388 U.S. at 130 (finding that the First Amendment barred the plaintiff's defamation claim).

49. *See* Walsh v. Latham, No. SCV 251041, 2014 WL 618995, at *5 (Cal. Ct. App. 2014) ("[C]ommunication via the Internet does not justify the application of a different defamation standard."). *See generally* Elkin, *supra* note 32, at 24 ("The courts have held that the laws of defamation undoubtedly apply to false statements made over the Internet.").

50. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) ("AOL falls squarely within this traditional definition of a publisher."); GetFugu, Inc. v. Patton Boggs LLP, 162 Cal. Rptr. 3d 831 (Cal. Ct. App. 2013) (finding that a tweet satisfies the publication element of defamation).

51. *See* Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1289–93 (2014) (applying *New York Times* and *Gertz* to determine whether the plaintiff, who was defamed on social media, must prove negligence or actual malice).

52. *See infra* notes 51–138.

53. Matthew E. Kelley & Steven D. Zansberg, *In This Issue, Cover Story a Little Birdie Told Me, "You're a Crook": Libel in the Twittersphere and Beyond*, 30 COMM. LAW. 1, 35 (Mar. 2014). The determination between opinion and fact must be made to satisfy the element

Milkovich v. Lorain Journal Co., the Supreme Court established a two-prong test to determine falsity.[54] The Court held that to satisfy this element of defamation, the statement must (1) be "provable as false[,]"[55] and (2) "reasonably [be] interpreted as stating actual facts . . . ."[56]

In the context of social media, the second prong of the *Milkovich* test forces courts to consider how a reasonable user would interpret an allegedly defamatory statement. Different approaches exist, but the majority of jurisdictions view the totality of the circumstances, considering factors such as the context of the statement and the medium through which it was published.[57] For example, in determining whether a tweet can be reasonably interpreted as a fact, most courts consider the statement itself and whether the purpose of tweeting was to vent, joke, or relay facts.[58]

Although courts typically view social media websites as platforms for casual communication and not factual statements,[59] a recent case illustrates the potential reach of individual liability arising from social media. In *AvePoint, Inc. v. Power Tools, Inc.*,[60] a federal district court found a user liable for posting a tweet on Twitter that defamed a competing business' reputation.[61] In *AvePoint*, the defendant tweeted: "U know things are bad when the Evil Avenue's customers are dumping out of 3 year deals in year 2 to buy Axceler's

of falsity. RESTATEMENT (SECOND) OF TORTS § 568 (AM. LAW INST. 1977). If a statement is an opinion, it cannot be proven false, and thus cannot satisfy the elements of defamation. Kelley & Zansberg, *supra* note 53.

54. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

55. *Id.* at 19.

56. Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988); *accord* Milkovich 497 U.S. at 20.

57. *See* Patterson v. Grant-Herms, 2013 WL 5568427, at *4 (Tenn. Ct. App. Oct. 8, 2013) (considering the "entire circumstances" to find that the statements the defendant posted to Facebook and Twitter were opinions, even though the defendant "chose not to include the entire circumstances in her communications"). *See generally* Kelley & Zansberg, *supra* note 53, at 36 (explaining that courts consider social media communications "in their entire context").

58. *See generally* Kelley & Zansberg, *supra* note 53, at 36 (outlining the judiciary's approach to interpreting tweets and the publishers' intent).

59. *See id.* ("Judges in the cases for which opinions are available have more often than not held that allegedly defamatory tweets are expressions of opinion or otherwise not actionable.").

60. AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496 (W.D. Va. 2013).

61. *Id.* at 521.

ControlPoint!"[62] The court, with little analysis, found that this tweet was a factual statement because it could be proven true or false.[63]

Additionally, the court in *AvePoint* found that hashtags[64] contained within another tweet the defendant authored constituted an implied fact, and thus imposed liability.[65] The second tweet the defendant wrote commented negatively on the plaintiff's services and included the hashtag "#MadeinCHINA."[66] The court held that a reasonable Twitter user would interpret the tweet as an implied fact that the plaintiff's products were made in China.[67] The plaintiff, a United States military contractor, argued that with the hashtags, the tweet defamed their reputation, and the court found the defendant liable for defamation.[68]

C. Determining Who is Liable as the Publisher: Immunity for Social Media Websites

In addition to determining falsity, another nuanced issue social media defamation cases present is who published the statement, and thus, who is ultimately liable.[69] Early cases concerning Internet defamation revolved around whether to hold liable individual users who posted the statement or Internet service providers that provided the medium through which defamatory statements were published.[70]

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62. *Id.* at 508 (quoting Amended Complaint Exhibit D, AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496 (W.D. Va. May 9, 2013) (No. 7:13-cv-00035-GEC)).

63. *Id.* at 508–09 ("The court must also reject the defendant's argument that [Defendant's] Twitter post offered only an opinion. [Defendant's] statement . . . does not necessarily depend on his own point of view. Instead, the statement contains a factual assertion that is capable of being proven true or false."). *Cf.* Feld v. Conway, 16 F. Supp. 3d 1, 4 (D. Mass. 2014) (finding that a tweet uploaded onto Twitter which stated the plaintiff was "fucking crazy" was an opinion and therefore the tweet was not defamatory).

64. *The Twitter Glossary*, *supra* note 12 ("A hashtag is any word or phrase immediately preceded by the # symbol. When you click on a hashtag, you'll see other Tweets containing the same keyword or topic.").

65. *AvePoint*, 981 F. Supp. 2d at 507.

66. *Id.* at 520. The full tweet read: "@Axceler #ControlPoint #MADEINTHEUSA, The #SharePoint #RedDragon is #MADEINCHINA Long live #ControlPoint !!!! #ArmyStrong #AUSA2012." *Id.*

67. *Id.* at 507–08.

68. *Id.*

69. Elkin, *supra* note 32, at 24.

70. *Id.*

With the rise of social media, the legislature quickly adopted protections for Internet service providers, such as the Communications Decency Act (CDA)[71] and the Computer Fraud and Abuse Act (CFAA),[72] leaving individual users unprotected.

Since the enactment of the CDA,[73] Internet service providers (termed "interactive computer service[s]" in the CDA) are protected from liability for defamatory statements written by third parties.[74] Internet service providers are companies that provide services for Internet access, use, or participation.[75] Common Internet service providers in the United States include AT&T, Comcast, and Charter.[76] The CDA views these companies as hosts or intermediaries that merely provide access for individuals to use the Internet.[77]

The CDA distinguishes these Internet service providers from Internet content providers.[78] Internet content providers are websites that take part in publishing information online.[79] Common Internet content providers in the United States include Google, Yahoo, and Facebook—and most other social media websites.[80] In theory, content providers may be held liable under the CDA if they publish the statement, defined by the CDA as being "responsible, in whole or

71. 47 U.S.C. § 230 (2012).

72. 18 U.S.C. § 1030 (2012).

73. 47 U.S.C. § 230. *See generally* Hope Eckert, Note, *The First Amendment in Cyberspace: No Place for Analogies*, 1 U. PITT. J. TECH. L. & POL'Y 2 (2001) (recognizing that the government was largely motivated by the "Great Cyberporn Panic" in drafting and passing the CDA and other early Internet regulations).

74. 47 U.S.C. § 230(c)(1) ("No 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."); *see id.* § 203(f)(2) (defining "'interactive computer service' [as] any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.").

75. 47 U.S.C. § 230(f)(3).

76. Sig Ueland, *20 Top Internet Service Providers*, PRACT. ECOMMERCE (Dec. 12, 2011), http://www.practicalecommerce.com/articles/3225-20-Top-Internet-Service-Providers.

77. 47 U.S.C. § 230(f)(2).

78. 47 U.S.C. § 230(f)(3) (defining "'internet content provider' [as] any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.").

79. *Id.* § 230(f)(3).

80. *Internet Publishing, Broadcasting & Search Portals Report Summary*, HOOVERS, http://www.hoovers.com/industry-facts.internet-publishing-broadcasting-search-portals.1904.html (last visited Oct. 12, 2016).

in part, for the creation or development" of the allegedly defamatory statement.[81]

Despite the plain language of the CDA, courts have adopted various tests under the CDA that largely serve to immunize social media websites.[82] For example, some courts consider whether the Internet content provider passively publishes third party content. Under this approach, if the social media website is in any way passive, it cannot be held liable.[83] Also, courts focus on the term "development" as provided in the CDA definition of an Internet content provider. These courts find that if a third party user creates and posts the statement, then the social media website did not develop it—and therefore, is not liable.[84] Many courts also justify granting broad immunity based on the purposes set forth in the CDA, arguing that to promote Internet development, social media websites must be protected.[85] With such interpretations, victims of social media defamation face scrupulously high standards in actions against social media websites, often leaving them without recourse.[86]

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81. 47 U.S.C. § 230(f)(3).

82. *See* Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'") (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

83. Fair Hous. v. Roommates.com, 521 F.3d 1157, 1166 (9th Cir. 2008) (holding an Internet content provider liable because it required users to publish certain information to their profiles and thus was not passive in publishing content to its website).

84. *See. e.g.*, *id.* at 1167–68 (finding that an Internet content provider did not "develop" the statement when it edited user-created content); F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1197–97 (10th Cir. 2009) ("[T]o be responsible for the development of offensive content, one must be more than a neutral conduit for that content.").

85. "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran*, 129 F.3d at 330 (considering the purpose behind the CDA in granting immunity to Internet service providers). *See also* 47 U.S.C. § 230(b) (stating that the policy behind the CDA is "to promote the continued development of the Internet . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

86. *See, e.g.*, Kimzey v. Yelp Inc., 21 F. Supp. 3d 1120, 1123 (W.D. Wash. 2014) (holding that a website that hosted online reviews was entitled to immunity under the CDA, reasoning that "classifying user characteristics into discrete categories and collecting responses to specific essay questions does not transform an interactive computer service into a developer of the underlying misinformation."); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 260 (4th Cir. 2009) (finding the Internet service provider immune under Section 230

A Fourth Circuit case of first impression illustrates the broad immunity granted to social media websites under the CDA. In *Jones v. Dirty World Entertainment Recordings, LLC*,[87] Jones, a high school teacher and cheerleader for a professional football team, brought state defamation claims against Nik Lamas-Richie in his capacity as manager of www.TheDirty.com, an online, user-generated tabloid.[88] The website enables users to upload comments, then Richie or a member of his staff selects which comments to publish to the site.[89] Before publishing, Richie edits the comment and often adds his own editorial comment, designating any such addition with the electronic signature "—nik[.]"[90]

Jones fell victim to Richie's website when users began posting photos of her with men and commenting on her attractiveness and past relationships.[91] While editing and selecting comments to publish to the website, Richie added his own commentary to each.[92] One of his comments read, "Why are all high school teachers freaks in the sack?[—]nik[.]"[93]

After Jones' repeated requests to Richie to remove his and users' harassing comments[94] and Richie's subsequent refusals, Jones filed suit. She alleged defamation, arguing that Richie and Dirty World were liable as publishers because Richie participated in selecting which posts to publish, encouraged the posts, and added his own comments to the published statements.[95] The court disagreed. It held

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of the CDA because it was not involved in creating the defamatory part of the statement, as the provider did not sufficiently contribute to the content); *Zeran*, 129 F.3d at 332 (finding that AOL was a publisher, but granting immunity pursuant to the CDA because AOL is an Internet service provider). *But cf.*, *Roommates*, 521 F.3d at 1175 (holding a housing locator site not immune under the CDA because the site required users to publish certain information to their profiles).

87. Jones v. Dirty World Entm't Recordings, LLC, 755 F.3d 398 (6th Cir. 2014).

88. *Id.* at 401–02.

89. *Id.* at 403.

90. *Id.*

91. *Id.* at 403–05.

92. *Id.*

93. *Id.* at 404. Other commentary by Richie included: "why go after one ugly cheerleader when you can go after all the brown baggers[]" and "[f]or a second yesterday I was jealous of those high school kids for having a cheerleader teacher, but not anymore.—nik" *Id.*

94. *Id.* (explaining that Jones sent over twenty-seven emails to Richie and even had her father personally contact Richie before she sought legal counsel).

95. *Id.* at 402.

that Richie's participation did not cause the website to reach the level of an Internet content provider.[96] The court found that Richie and Dirty World were Internet service providers under the CDA and could not be held liable.[97]

Such broad immunization comes with its costs and benefits. Proponents of the legislation claim the CDA is "one of the most valuable tools for protecting freedom of expression and innovation on the [I]nternet . . . ."[98] One Internet service provider even lists the statute on its website, citing the CDA as the reason it has never lost a defamatory action brought against it.[99] Legal scholars, however, have critiqued case law's interpretation of the CDA, arguing it grants immunity too broadly.[100] The Eastern District of Virginia recently supported this view when it reluctantly dismissed a defamation claim against a social media website.[101] In the opinion, the court warned of the negative repercussions caused by broad interpretations of the

96. *Jones*, 755 F.3d at 409–11 (explaining that the term "development" in the CDA's definition of Internet content providers is narrowly confined); *see* 47 U.S.C. § 230(f)(3) (defining Internet content provider as a website that is "responsible, in whole or in part, for the creation or *development* of [the] information . . . .") (emphasis added).

97. *Jones*, 755 F.3d at 410 (noting there are "limited circumstances under which exercises of [traditional publisher] functions are not protected[]" under the CDA).

98. *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Feb. 9, 2015).

99. *Complaint Review: Want to Sue Ripoff Report? Want to Sue ED Magedson Founder of Rip-off* [sic] *Report?*, RIPOFF REP. (Jan. 16, 2011), http://www.ripoffreport.com/r/want-to-sue-ripoff-report-want-to-sue-ed-magedson-founder-of-rip-off-report/tempe-arizona-85280/ want-to-sue-ripoff-report-want-to-sue-ed-magedson-founder-of-rip-off-report-can-i-get-fa-244724 ("If you are considering suing Ripoff Report because of a report which you claim is defamatory, you should be aware that to date, Ripoff Report has never lost such a case. This is because of a federal law called the Communications Decency Act or 'CDA,' 47 U.S.C. 230.").

100. *See, e.g.*, Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9, 51 (1999) ("In defining the protections afforded by the CDA, the courts have nearly foreclosed the possibility of recovery for Cyber-Libel."); Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007) (arguing that the CDA is outdated and unfair and advocating that Internet service providers be held liable for defamatory statements over which they had sufficient control).

101. Directory Assistants, Inc. v. Supermedia, LLC, 884 F. Supp. 2d 446 (E.D. Va. 2012).

CDA.[102] It granted the website immunity, however, because "under the CDA the [c]ourt's hands are tied."[103]

Notably, broad immunity for social media websites also exists for identity theft on social media. Paralleling the CDA for defamation claims, the Computer Fraud and Abuse Act (CFAA)[104] fails to hold social media websites responsible for misappropriation of identify claims.[105] Unlike the CDA, however, the CFAA does not expressly grant immunity to Internet providers. Instead, the CFAA focuses on individual users, criminalizing computer-related fraud.[106]

The CFAA has created its own universe of critiques.[107] In part because it was enacted before the Internet existed,[108] the CFAA is overbroad[109] and overly narrow.[110] For example, a Harvard fellow was prosecuted under the CFAA for downloading JSTOR articles to share publicly,[111] yet an adult bully was exonerated after coxing a pregnant teenage girl into committing suicide.[112] For

102. *Id.* at 453 ("The prospect of blanket immunity for those who intentionally redistribute defamatory statements could have widespread and potentially catastrophic consequences for individuals and entities alike.").

103. *Id.*

104. 18 U.S.C. § 1030 (2012).

105. *Id.*

106. *Id.*

107. *See, e.g.*, *Summary of Aaron's Law*, https://www.wyden.senate.gov/download/?id=2CF5A4DC-D36D-4F19-B97A-8D79E856F895&download=1 (last visited Sept. 18, 2016) ("The Computer Fraud and Abuse Act (CFAA) is a sweeping anti-hacking law that criminalizes many forms of common Internet use and allows breathtaking levels of prosecutorial discretion that invites serious overuse and abuse."); Justin Peters, *Congress Has a Chance to Fix Its Bad "Internet Crime" Law*, SLATE (Apr. 24, 2015, 5:47 PM), http://www.slate.com/articles/technology/technology/2015/04/aaron_s_law_why_it_s_needed_to_fix_the_horrendously_bad_cfaa.html.

108. Peters, *supra* note 107 (mocking how when Congress enacted the CFAA, "'computer crime' was as problematic as 'moon crime,' in that both primarily existed in the realm of fiction.").

109. *Summary of Aaron's Law*, *supra* note 107 (explaining that the vagueness of the CFAA can lead to prosecution for "lying about one's age on Facebook, one's looks on Craigslist, or letting one's friend log into their Pandora account . . . .").

110. *See infra* note 112.

111. *See* Ruth Reader, *3 Years After Aaron Swartz's Death, Here's What's Happened to Aaron's Law*, TECH.MIC (Jan. 11, 2016), https://mic.com/articles/132299/3-years-after-aaron-swartz-s-death-here-s-what-s-happened-to-aaron-s-law#.ocaJ39ehZ.

112. *See* United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009). In *United States v. Drew*, Drew, a middle-aged woman, misappropriated the identity of a high school boy to engage in a fake romantic relationship with a high school girl, initiate a breakup, and cause the victim severe emotional harm. *Id.* Drew's actions, which included telling the girl through the fake

misappropriation of identity, no federal cause of action exists[113] to hold individual users who steal identities on social media liable.[114] Again, victims of these social media offenses are left without any remedy.[115]

Despite such immunity granted by legislation, social media websites may still be involved in litigation through subpoenas. Plaintiffs often seek assistance of social media websites in providing

boy's profile that "the world would be a better place without her in it[,]" culminated with the suicide of the adolescent girl. *Id.* at 452. The United States prosecuted Drew, claiming Drew's violation of the social media website's terms of service—which prohibited harassment, fake profiles, and offensive comments—constituted a crime under the CFAA. *Id.* at 451. A California jury found Drew guilty, but the judge vacated the verdict, relying on the void-for-vagueness doctrine to hold that the CFAA could not sustain Drew's conviction. *Id.* at 463–64. Interestingly, although Drew and her victim were residents of O'Fallon, Missouri, the State of Missouri refused to press charges; the State of California intervened to file charges against Drew for violations of the CFAA. Gordon Gibb, *Internet Fraud of the Worst Kind: Cyber Bullying*, LAWYERSANDSETTLEMENTS.COM (Dec. 1, 2008, 7:15 AM), http://www.lawyersand settlements.com/features/internet-technology/internet-fraud-cyberfraud-cyberbullying.html#. VNiA-WR4qSM.

113. While the Federal Government fails to hold social media websites responsible for online offenses, some state legislatures are taking action. New York, Texas, and California have enacted laws criminalizing identity theft on social media. In 2010, New York became the first state to amend its penal code to include criminal liability for misappropriating another's identity online. N.Y. PENAL LAW § 190.25(4) (McKinny 2008) ("A person is guilty of criminal impersonation in the second degree when he . . . [i]mpersonates another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another . . . ."). Shortly thereafter, California adopted criminal liability for Internet impersonation. CAL. PENAL CODE § 528.5(a), (d) (West 2011) ("[A]ny person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means . . ." commits an offense that can be punished "by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment."). In 2011, the Texas legislature followed suit. TEX. PENAL CODE ANN. § 33.07(a) (West 2011) (mandating that a person commits an offense if they ". . . (1) create a web page on a commercial social networking site or other Internet website; or (2) post or send one or more messages on or through a commercial social networking site or other Internet website . . ." with the intent to defraud). The Texas statute went a step further in laying out the actions taken by wrongdoers that may create liability, which include creating a web page without the person's consent and posting or sending messages on a site in order to impersonate another without their consent. *Id.*

114. *See* Draker v. Schrieber, 271 S.W.3d 318 (Tex. App. 2008). In *Draker*, student-defendants created a fake user profile on social media, claiming to be Draker, and uploaded sexually explicit commentary to the account. *Id.* at 320. Attempting to circumvent immunity granted by the CFAA, Draker sued claiming intentional infliction of emotional distress. *Id.* The court, however, found that Draker could not establish all of the elements and affirmed the trial court's order granting the students' motion for summary judgment. *Id.*

115. *Id.* at 326 (Stone, J., concurring) ("[T]here is, in fact, no remedy for their damages.").

real names and contact information of anonymous users.[116] If social media management is unwilling to voluntarily disclose users' information, as most websites' policies suggest,[117] victims will often seek court subpoenas for companies to provide personal information of the alleged tortfeasor.[118]

D. New Technology that Triggers Liability: Emojis

A third nuanced issue social media defamation presents is interpreting the meaning of new forms of written communication available on technology. For example, in *AvePoint, Inc. v. Power Tools, Inc.*[119] a U.S. court imposed liability for defamation based on a hashtag for the first time.[120] A similar character denoting emotion on social media is an emoji.[121] The U.S. judiciary has not yet seen a case to determine whether an emoji, like a hashtag, may impose liability.[122]

Although unprecedented in the United States, a British court has held that an emoji can trigger liability for defamation on social media. In 2013, in *McAlpine v. Bercow*,[123] a British court heard a case between prominent politician Lord McAlpine and popular political figure Sally Bercow.[124] The controversy began in 2012, when the British Broadcasting Corporation (BBC) reported that one of the

116. *See generally* Elkin, *supra* note 32, at 24 (describing how social media websites are often involved in defamation litigation despite not being named as defendants).

117. *See id.* (explaining that most website policies state that the website will not distribute users' personal information unless required by law).

118. *See id.* (noting the utility of subpoenas in social media defamation cases).

119. AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496 (W.D. Va. 2013) (finding a Twitter user liable for posting a tweet that defamed a competing business' reputation).

120. *Id. See also* Kelley & Zansberg, *supra* note 53; Steven P. Mandell & Catherine L. Gibbons, *Recent Developments in Media, Privacy, and Defamation Law*, 50 TORT TRIAL & INS. PRAC. L.J. 515, 529 (2015).

121. *See supra* notes 15–17 and accompanying text.

122. In September 2016, however, emojis included in a Facebook post led to probation in Illinois. *See Emojis Taken as Threat Against Officer Lead to Probation for Peoria Man*, CHI. TRIB. (Sept. 17, 2016, 6:24 AM), http://www.chicagotribune.com/news/local/ breaking/ct-emojis-threat-peoria-20160917-story.html ("A Peoria man pleaded guilty to threatening a police officer based on the emojis he included in a Facebook post has been sentenced to more than two years of probation.").

123. McAlpine v. Bercow [2013] EWHC (QB) 1342.

124. *Id.*

abusers in a recently publicized child sex abuse case was "a leading Conservative politician from the Thatcher years . . . ."[125] The BBC did not explicitly name Lord McAlpine,[126] but individuals who heard the report quickly linked him to the allegations.[127] Many took to social media and let their assumptions go viral, posting tweets on Twitter and statuses on Facebook connecting Lord McAlpine to the alleged sexual abuse.[128] Sally Bercow[129] took part and tweeted "Why is Lord McAlpine trending? *Innocent face*[.]"[130]

At the time of her tweet, Bercow had over fifty-six thousand followers.[131] Many of her followers re-tweeted[132] the tweet, vastly expanding the number of individuals who read the statement.[133]

Media sources later determined that the allegations against Lord McAlpine were unfounded.[134] Having already suffered damage to his reputation, Lord McAlpine threated to sue the BBC and any Twitter user who insinuated he was a pedophile in their tweets—including Bercow.[135] Lord McAlpine's threats led to numerous settlements, but Bercow refused to settle.[136] She denied any wrongdoing and refuted the idea that her tweet was libelous.[137] Bercow even went so far as to

125. *Id.* [15].

126. Lord McAlpine may be most well-known for his counsel to Margaret Thatcher during her reign as Prime Minister of the United Kingdom. *Id.* [17].

127. *Id.* [71], [83].

128. *See* Keir Simmons, *BBC Scandal: Wronged Ex-Politician Vows to Sue Twitter Users Who Spread Sex Claims*, NBC NEWS (Nov. 16, 2012, 8:56 AM), http://worldnews.nbcnews.com/news/2012/11/16/15216344-bbc-scandal-wronged-ex-politician-vows-to-sue-twitter-users-who-spread-sex-claims (noting the "very long list" of users who posted comments linking Lord McAlpine to the crime).

129. Sally Bercow is the wife of Speaker of the House of Commons John Bercow. In England, she lives in the public spotlight and, as a popular political figure, often serves as the topic of discussion in general media. *Id.* [10].

130. *Id.* [3], [7] (noting "that the words 'innocent face' are to be read like . . . [an emoji].").

131. *Id.* [10].

132. *See The Twitter Glossary*, *supra* note 12 ("Retweet (v.)[:] The act of sharing another user's Tweet to all of your followers . . . .").

133. *McAlpine*, EWHC 1342 (QB) at [59].

134. *Bercow in Court for McAlpine Case*, BRAINTREE & WITHAM TIMES (May 15, 2013), http://www.braintreeandwithamtimes.co.uk/uk_national_news/10422917.Bercow_in_court_for_McAlpine_case/.

135. *Id.*

136. *Id.* Notably, Lord McAlpine donated the damages received from his settlements to charity. *Id.*

137. Simmons, *supra* note 128 (listing a tweet Bercow wrote that stated her initial tweet was not libelous). Although numerous other "high-profile Tweeters," such as comedian Alan

mock Lord McAlpine, posting follow-up tweets maintaining her innocence.[138]

Despite Bercow's confidence, Lord McAlpine filed suit against her, alleging defamation. Lord McAlpine had two theories supporting his claim: (1) in its natural and ordinary meaning, the tweet meant he was a pedophile; and (2) the tweet by innuendo meant he was a pedophile.[139]

At the preliminary hearing, the court found that Bercow intended the innocent face emoji to be ironic.[140] The court interpreted the emoji as a "stage direction,"[141] meaning that readers were directed to picture the publisher's (Bercow's) face as innocent when posing the question. The reasonable Twitter user—the standard adjudicated by the court—would have interpreted the emoji as ironic and asking an insincere question.[142] Thus, the tweet was reasonably understood to be "the finger of blame[,]"[143] accusing Lord McAlpine of being the pedophile that recent media news was discussing.[144] Since by then the allegations linking Lord McAlpine to the sexual abuse were proven to be untrue, the court found that Bercow's tweet was defamatory.[145] After the court found Bercow liable, she finally agreed to admit fault

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Davies and writer George Monbiot, tweeted allegedly defamatory remarks implicating Lord McAlpine in sex abuse claims, these individuals apologized to Lord McAlpine publicly and privately, and some agreed to do charity work. Ben Dowell, *McAlpine Libel: 20 Tweeters Including Sally Bercow Pursued for Damages*, GUARDIAN (Nov. 23, 2012, 10:08 EST), http://www.theguardian.com/ tv-and-radio/2012/nov/23/mcalpine-libel-bercow-monbiot-davies.

138. One tweet read: "I guess I'd better get some legal advice then. Still maintain was not a libelous [sic.] tweet—just foolish." Simmons, *supra* note 137. Another read: "Now counting coins in piggy bank coz Lord McAlpine will probably sue my a**." Steve Nolan & Sam Greenhill, *Speaker's Wife Sally 'to Be Sued by Lord McAlpine' over Tweet that Fed Paedophile [sic.] Frenzy (So Why Won't She Stop Twittering?)*, DAILY MAIL (Nov. 11, 2012, 9:09 EST), http://www.dailymail.co.uk/news/article-2231288/Lord-McAlpine-sue-Sally-Bercow-pointing-finger-Newsnight-investigation.html.

139. *See* McAlpine v. Bercow [2013] EWHC (QB) 1342, [33].

140. *Id.* [84].

141. *Id.* [7].

142. *Id.* [57], [84].

143. *Id.* [72].

144. *Id.* [7].

145. *Id.* [90].

and settle the case.[146] In the end, the emoji cost her over twenty thousand dollars.[147]

McAlpine signifies the growing influence of social media in the context of defamation claims worldwide. Even with different legal doctrines for defamation between England and the United States,[148] *McAlpine* shows that social media users need to be more cautious with their online publications. Legal scholars who address *McAlpine* portray the case as a cautionary tale,[149] but few use the case to directly ask whether an emoji could trigger liability under U.S. defamation law—and perhaps none take that question seriously.[150]

In one article, Matthew Kelley and Steven Zansberg address *McAlpine* but provide a limited analysis of U.S. courts that have held Twitter users liable based on an emoji.[151] Kelly and Zansberg begin discussing *McAlpine* with a sweeping disclaimer, stating: "[A] case with the same facts should be dismissed under U.S. law . . . ."[152] The authors support this proposition with a brief footnote, listing U.S.

146. Kunal Dutta, *Lord McAlpine Libel Row with Sally Bercow Settled in High Court*, INDEPENDENT (Oct. 22, 2013), http://www.independent.co.uk/news/uk/crime/lord-mcalpine-libel-row-with-sally-bercow-settled-in-high-court-8896773.html.

147. Bercow settled for fifteen thousand pounds, equivalent to over twenty-three thousand five hundred dollars. Dutta, *supra* note 146. Notably, this figure most likely does not tell the whole story. Throughout the controversy, Bercow likely also suffered emotional stress, public humiliation, and loss of reputation. She also likely paid sizable attorney and court fees in connection with the litigation and settlement negotiations. Thus, in reality, the emoji probably cost her much more than one lump sum.

148. The primary difference between England and the United States in analyzing defamation claims is the First Amendment. U.S. CONST. amend. I. Unlike the United States, England does not have an explicit right to free speech. Without a defined right to free speech, victims of defamation in England are much more likely to succeed in litigation. Victims of defamation over social media under U.S. law, however, have higher standards to overcome and are therefore less likely to succeed in court. *See generally* GEORGE B. DELTA & JEFFERY H. MATSUURA, § 11.04 DEFAMATION AND THE INTERNET AROUND THE WORLD (Aspen Publishers, 3d ed. 2013) (discussing different analyses applied for online defamation throughout the world).

149. *See* Zia Akhtar, *Social Networking, Libel and Legal Liability*, 12 J. INTERNET L. 3, 7 (2014) (claiming that *McAlpine* in the English context "presents a risk of using applications such as [emojis] and such devices displayed over the Internet to reveal the state of mind or intention behind a [T]weet.").

150. *See* Kelley & Zansberg, *supra* note 53 (mentioning *McAlpine* briefly, but failing to critically analyze its implications under U.S. law).

151. *Id.*

152. *Id.* at 36.

cases that hold a published question never attaches liability.[153] Although Kelly and Zansberg's analysis addresses *McAlphine* more than other scholars' work, which overlook *McAlphine* entirely, the main takeaway is the same: *McAlpine* presents a cautionary tale imploring users to be more careful on social media.[154]

III. ANALYSIS

The rise of social media has left courts playing catch-up when attempting to remedy social media offenses. The context of defamation showcases how social media has largely adapted to existing law. This context also provides a lens through which to understand the nuanced issues social media presents in otherwise traditional defamation claims. Courts have had to determine whether statements published on social media are factual, who is liable as publisher under a claim, and which new technological characters may trigger liability.[155] Taken together, these nuanced issues may soon lead to unlimited liability for individual social media users. The legal field must understand these nuances of social media defamation in order to begin to repair the potentially grave effects upon social media, the Internet, and the global community.

Traditional defamation claims provide a suitable lens through which to view social media offenses, yet scholars overlook severe negative implications developing from the evolution of social media law. For example, although scholars herald *McAlpine* as a cautionary tale of online defamation,[156] no scholar seems to take their own advice. Seemingly only one legal work addresses whether a case like *McAlpine* could impose liability in the United States.[157] This article dismisses the possibility that a tweet like Bercow's—containing a question and an emoji—could trigger liability, citing U.S. case law to

153. *Id.* n.34.

154. *Id.* at 11 ("[T]he case should caution those who transmit communications overseas (*i.e.*, anything posted on the Internet) that disparages foreign nationals."). *See also* Akhtar, *supra* note 149, at 10 (using *McAlpine* as evidence to support the argument that "[t]he power of the malicious author in a society that now relies on electronic media as the medium of information cannot be underestimated.").

155. *See supra* Part II.

156. *See* Akhtar, *supra* note 149; Kelley & Zansberg, *supra* note 53.

157. Kelley & Zansberg, *supra* note 53.

support the conclusion that U.S. courts do not recognize questions as defamatory statements.[158] Such a limited analysis falls short.

In *McAlpine*, the court explicitly refutes the notion that Bercow's tweet was a sincere question.[159] The court's entire rationale was premised on finding that the emoji in the tweet was intended to be, and was in fact, interpreted by readers as ironic.[160] Understanding the emoji to be a stage direction of irony led to the court's understanding that the text within the tweet was not intended to be a question,[161] despite the structure of the sentence ending with a question mark.

In understanding that the court did not interpret the tweet as a question, the cases Kelley and Zansberg rely on (holding that questions cannot be defamatory)[162] do not apply. Instead, a proper analysis falls under the *Milkovich* test, a two-prong test to determine whether the statement is a fact or an opinion, satisfying the falsity element of defamation.[163] Under this proper analysis, *McAlpine* is analogous to *AvePoint*.[164]

In *AvePoint*, the court found liability based on a defamatory tweet that contained hashtags.[165] The court reasoned that the hashtag, "#MadeinCHINA,"[166] implied that the plaintiff's products were not made in America but in China. Acknowledging that customers would likely be reluctant to purchase the plaintiff's products if made in China, the court found that a reasonable reader would have interpreted the hashtag to be a factual statement.[167] Since the factual statement was then proven false, the defendant was liable to the plaintiff for defamation.[168]

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158. Kelley & Zansberg, *supra* note 53.
159. *McAlpine v. Bercow*, [2013] EWHC 1342 (QB).
160. *Id.*
161. *Id.*
162. Kelley & Zansberg, *supra* note 53.
163. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19, 25 (1990) (holding for a statement to be actionable under defamation, it must be (1) "provable as false," and (2) "reasonably be interpreted as stating actual facts").
164. AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496 (W.D. Va. 2013) (holding defendant liable for a defamatory tweet).
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

Under the court's rationale in *AvePoint*, an emoji within a tweet may trigger liability under U.S. law. Considering the facts of *McAlpine* and setting aside the standard of actual malice under U.S. law,[169] a court may interpret the emoji in *McAlpine* similar to how the court in *AvePoint* interpreted the hashtag. As *AvePoint* allowed a hashtag as a new form of electronic communication to signal an implication of fact,[170] so too might a court allow an emoji—another new form of electronic communication—to signal an implication of fact. Considering Bercow's tweet, a U.S. court plausibly could find that the emoji signaled Bercow knew why Lord McAlpine was trending; thus, the tweet factually implied that Lord McAlpine was the pedophile.

Admittedly, this logic may reach beyond existing case law, but therein lies the fundamental problem. Individual users of social media do not know what may trigger liability. Bercow did not know, and it is unlikely that the two billion social media users consider whether an emoji may impose liability before each post. Courts are failing to provide notice of potential liability to billions of people because the judiciary is merely reacting to new electronic communications.

Emojis triggering liability for defamation on social media should concern the ordinary social media user. The only proactive measures taken in the context of social media law is immunizing social media providers, as seen in the CDA. These immunities—which courts are only expanding upon—do not prevent harms, mitigate offenses, or provide remedies. Instead, statutes like the CDA attempt to take social media websites out of the picture. When an offense occurs and the victim seeks recourse, the victim is only able to pursue the individual user who authored the statement. At first, this scenario may seem fair—individuals should be responsible for their own publications. But considering this new universe of technology, social media, and emojis, and realizing how ordinary users are unaware of

169. Under U.S. defamation law, Lord McAlpine would have had to meet the standard of "actual malice" because he is a public official. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 280 (1964). Thus, it would have been much more difficult for Lord McAlpine to succeed in U.S. courts. *Id.* This analysis, however, is outside the scope of this Note. The Note analyzes Bercow's tweet under U.S. law to determine whether an emoji may impose liability, regardless of standards of actual malice or negligence.

170. *AvePoint*, 981 F. Supp. 2d 496.

the potential for liability, the scheme enacted under the CDA is flawed. Congress' proactive measures to immunize social media websites, which has led to courts' reactive measures holding individuals liable, has collectively hung two billion social media users out to dry.

IV. PROPOSAL

The legal profession—especially social media law scholars—must view the outcome of *McAlpine* as a warning sign. *McAlpine* was a case of a Twitter user (Bercow) posting an off-handed remark about a trending scandal.[171] When Lord McAlpine began mentioning defamation, Bercow paid no mind. Even when Lord McAlpine settled claims with other Twitter users and discussed litigation against Bercow, she was so unaware of the potential for liability that she encouraged litigation.[172]

Bercow's mocking behavior likely came from her confidence in knowing that she did not intend the statement to be defamatory. Such behavior also illustrates a complete lack of awareness that an emoji, even one depicting innocence, could trigger liability for over twenty thousand dollars. As Bercow immediately settled the case after the preliminary hearing's ruling in favor of Lord McAlpine,[173] it is likely she would have apologized sooner and perhaps not even posted the tweet had she had any idea it could trigger liability in court.

In addition to the proposal for legal academics, Congress must enact new federal legislation that comprehensively addresses social media offenses. Bercow's story illustrates the flaws of a reactive judiciary in an era of growing social media. Bercow had no notice and no reason to assume that an emoji she posted in a tweet could trigger liability for defamation. Narrating Bercow's story in this light emphasizes a main issue in our social media law and forces us to seek better solutions.[174]

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171. *McAlpine v. Bercow*, [2013] EWHC 1342 (QB).

172. *Id.* (referencing Bercow's later tweet taunting Lord McAlpine by encouraging him to sue her). *See also supra* note 138 and accompanying text.

173. Dutta, *supra* note 147.

174. The evolution of social media law parallels the development of privacy law beginning in the late nineteenth century, and further supports the proposal for new federal legislation. The

First, new legislation must enact a policy that focuses on holding Internet content providers, which include social media websites like Facebook and Twitter, responsible for social media offenses. In providing the platforms through which users are susceptible to liability, and profiting from the free flow of information, social media websites should bear responsibility for harms perpetrated on their websites.

Second, new legislation must require social media content providers to notify users of potential liability and provide models on how to avoid liability on their websites. At a minimum, new federal legislation must require Internet content providers to properly notify users of the potential for liability. Such notification cannot amount to boilerplate terms of agreement when first creating an account, as many already have. Instead, notification should be updated frequently to account for new electronic characters and explain to each user existing claims and potential claims for liability resulting from social media offenses under the law. In addition, such notifications should include models illustrating to users how to avoid and prevent harms online.

Third, new legislation must impose a penalty scheme for failing to provide adequate notice. Failure to provide proper and current notice should lead to fines imposed by the government. If a website continuously fails to notify users in an appropriate manner and shows

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legal field first recognized a need for privacy law with the advancement of technology, specifically yellow journalism and penny presses. *See* Warren & Brandeis, *supra* note 31. Similar to social media, penny presses made information easily available to the masses. It drastically altered daily life in the nineteenth century and gave rise to new forms of defamation in the legal context. Warren & Brandeis, *supra* note 31. Privacy law eventually developed into four distinct tort claims: (1) intrusion upon seclusion, (2) public disclosure of private facts, (3) false light, and (4) appropriation. *See* William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); *see also* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY, INFORMATION, AND TECHNOLOGY 28 (3d ed. 2011). These four claims developed outside of then-existing tort law, exactly how social media claims have developed outside of traditional defamation claims. Warren & Brandeis, *supra* note 31, at 197–98. Prominent scholars have argued these four categories of privacy are too narrow, and thus the judiciary's acceptance of them has stunted privacy law and remedial measures. *See* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2010). The parallels between privacy torts and social media torts, and the inadequacies of privacy law that exist today, supports the proposal of new legislation, as social media law cannot be limited to existing common law claims.

no signs of compliance, the government ought to have the authority to dismantle the site.

Fourth, the new legislation should mandate that social media websites are listed as defendants if a defamation claim arising from its website is brought in court. Including social media websites as defendants would allow courts to determine on a proportionality scheme the amount the user *and* the social media website are liable. Instead of placing all responsibility on one person, the mandate would force courts to include social media websites within the discussion. It would allow courts to actually consider the totality of the circumstances—which exist beyond one user and one computer. And, it would allow courts to award victims of social media defamation more appropriate remedies, regardless of a liable author's potentially limited means. This mandate would also incentivize social media websites to actively prevent offenses on their sites. It would not only ensure compliance with notification requirements, but also encourage websites to implement their own systems to deter harm.

Such new legislation could have many benefits. For one, it would bring social media websites into the conversation regarding online defamation, as they should have been from the start. Also, the penalty scheme and mandate requiring social media providers be listed as defendants in litigation would incentivize Internet content providers not only to notify users of potential liability but also to actively prevent social media harms. The legislation would further deter harm when individual users are notified of potential liability. Thus, new legislation is a reasonable, necessary, and important step in establishing an enduring framework that protects social media users while allowing for the continued advancement of Internet communication.

V. CONCLUSION

To mitigate, deter, and/or prevent social media defamation, the legislature must better include and focus on Internet content providers. Considering the implications of litigation developing from social media offenses and how, currently, individual users are the main parties held liable, requiring Internet content providers to better notify users of liability arising from social media and requiring them to participate in litigation is the only practical solution.

As Sally Bercow best articulated in a tweet following her settlement with Lord McAlpine: "I have apologized sincerely to Lord McAlpine in court—I hope others have learned tweeting can inflict real harm on people's lives."[175] The goals of new legislation are to have social media websites teach users that online engagement can inflict harm on others, and to prevent cases—like *McAlpine*—where users have to learn the lesson themselves.

175. Sally Bercow (@SallyBercow), TWITTER (Oct. 22, 2013, 4:07 AM GMT), https://twitter.com/sallybercow/status/392608216393064448.