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## A STUDY OF CYBER-VIOLENCE AND INTERNET SERVICE PROVIDERS' LIABILITY: LESSONS FROM CHINA

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*Abstract:* Cyber-violence and harassment have been on the rise and have been a worrying trend worldwide. With the rise of blogs, discussion boards, and Youtube, we may become targets of false allegations or our movements and gestures may have been captured by modern technology at any moment to be broadcast on the Internet for a public trial of millions to judge. In China, netizens have resorted to cyber manhunt, known as the "human flesh search engine," to expose details of individuals who have violated social norms one way or another, achieving social shaming, monitoring and ostracism. Individuals concerned have little legal recourse to protect their reputation and privacy facing unwilling exposure in the Internet witch-hunt. Thus, this article studies the current legal position in China, and its inadequacy in the area of reputation and privacy protection. It argues for a system of notice and take down on internet service providers in the above two areas as a possible solution.

### I. INTRODUCTION

Cyberspace has been likened by many to be the "wild West,"<sup>1</sup> difficult to tame and unruly. Yet the great firewall of the Government of the People's Republic of China ["China"] has pinned down and filtered many freewheeling minds and spirits.<sup>2</sup> When we are confronted with the Orwellian nightmare of the Big Brother overseeing us, many overlook the fact that we have become Little Brothers monitoring each others' behaviour. With the rise of blogs, discussion boards, and Youtube, we may become targets of false allegations or have our movements and gestures captured by modern technology at any moment to be broadcast on the Internet for millions to watch and to criticize. The use of the Internet by private citizens to achieve social shaming, monitoring and ostracism, or for private revenge is gaining prominence in China.

The year 2007 brought several Internet scandals in China touching on defamation and privacy. These included a Peking University female graduate who allegedly appeared nude for philanthropic purposes while she

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<sup>1</sup> For discussion of the usage of the term, see Andrew P. Morris, *The Wild West Meets Cyberspace*, 48 THE FREEMAN: IDEAS ON LIBERTY (July 1998), available at [http://www.fee.org/Publications/the-Freeman/article.asp?aid=3446&print\\_view=true](http://www.fee.org/Publications/the-Freeman/article.asp?aid=3446&print_view=true).

<sup>2</sup> ACCESS DENIED 263-271 (Ronald Deibert et al. eds., The MIT Press 2008).

was studying abroad.<sup>3</sup> This, however, turned out to be a blatant lie.<sup>4</sup> In cases concerning privacy, the greater the truth, the greater the libel. Some Internet users were not content merely to expose perceived wrongful deeds, but they were determined to hunt down targeted individuals by triggering the “human flesh search engine.”<sup>5</sup> In Chinese, this is called *renrou sousuo*, literally meaning “the search for human flesh.” The human flesh search engine mobilizes “thousands of individuals with a single aim: to dig out facts and expose the social delinquents to the baleful glare of publicity”<sup>6</sup> in a cyber relay. This form of Internet witch hunting has exposed details of an unfaithful husband,<sup>7</sup> and of a hospital pharmacist deriving pleasure from torturing a kitten.<sup>8</sup> Recently in 2008, a twenty-one-year-old woman was hunted down for expressing scornful remarks to victims of the Sichuan earthquake.<sup>9</sup>

In many cases, *renrou sousuo* tears apart the lives of the individuals concerned. For instance, the young woman who showed callous disregard for earthquake victims was detained by police,<sup>10</sup> and both the unfaithful husband and the kitten-torturer were dismissed by their employers.<sup>11</sup> These recent events show that malicious speech and the Internet witch-hunt have escalated into a form of cyber violence, with the targeted individuals painfully feeling the adverse impact in real life. Yet, these individuals have little legal recourse to protect their reputation and privacy. Many have little money to wage a legal battle, but perhaps even more troubling, they do not know whom to sue, especially when Internet postings are mostly

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<sup>3</sup> See Wang Yang, *Bei da nü zhuang yuan bei wu zai bei ou liu xue shi luo juan* [Top Student from Beijing University Framed as Going Naked While Studying Abroad in Northern Europe], Apr. 6, 2007, <http://news.qq.com/a/20070406/001809.htm> (last visited Mar. 29, 2009) (discussed *infra* Part III).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Bai Xu & Ji Shaoting, “Human Flesh Engine”: An Internet Lynching?, XINHUA NEWS, July 4, 2008, available at [http://news.xinhuanet.com/english/2008-07/04/content\\_8491087.htm](http://news.xinhuanet.com/english/2008-07/04/content_8491087.htm). The term refers to the utilization of human participation on the Internet to filter search results and to identify specific individuals. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> For an account of the Wang Fei story, see Fan “*ren rou sou suo*” *di yi an kai ting* [The First Case Against Human Search Engine], THE BEIJING NEWS, Apr. 18, 2008, <http://www.thebeijingnews.com/news/beijing/2008/4-18/015@71632.htm> (last visited Oct. 22, 2008) [hereinafter *First Case Against Human Search Engine*].

<sup>8</sup> Wang min si tian suo ding nü mao xian yi ren, dang di xiang guan bu men zheng shi “shi qing you” [Netizens Identified the Kitten Killer Within Four Days, The Relevant Work Unit has Confirmed the Incident], S. WEEKEND, Mar. 9, 2006, at A7 [hereinafter *Netizens Identified the Kitten Killer Within Four Days*].

<sup>9</sup> Hannah Fletcher, *Human Flesh Engines: Chinese Vigilantes That Hunt Victims on the Web*, TIMES ONLINE, June 25, 2008, available at [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article4213681.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article4213681.ece).

<sup>10</sup> See *id.* (stating that the reason for her detention is not known).

<sup>11</sup> See *infra* Part III.2.b and III.2.c.

anonymous. Compounding this difficulty, the defamer or the privacy violator may not be a single person. Intrusion is often done collectively in a series of anonymous Internet postings by numerous "netizens." Some victims of defamation or privacy invasion have tried to sue the Internet service providers (ISPs), but this has proven to be an uphill battle.<sup>12</sup> Though the Internet may have given "the ultimate in free speech by giving voice to millions,"<sup>13</sup> it has also provided a means to disseminate false speech and intrude on people's privacy.

Thus, this article argues that an effective way to solve the current problem is to adopt a system of notice and take down on Internet service providers for defamation and privacy violations.<sup>14</sup> This article begins with Part II, a discussion of the current legal position in China. Part III critically examines China's current law and demonstrates its inadequacies for policing defamation and privacy violations. Part IV compares the regimes of the United Kingdom, the European Union, and the United States and argues that an effective approach requires that ISPs remove offending content upon receipt of actual notice. Such a system of notice and take down balances the right to free speech on the one hand and reputation and privacy on the other without resorting to the draconian intervention of criminal law. This solution respects the watchdog function of the Internet, while at the same time protecting private citizens from unfounded accusations and unwanted intrusions by anonymous posters and the Internet mob. Although this article focuses on the situation in China, hopefully, the Chinese story can become part of a larger study on tackling the growing and alarming worldwide trend of cyber harassment on the Internet.<sup>15</sup>

## II. AN OVERVIEW OF THE P.R.C. LEGAL FRAMEWORK ON THE PROTECTION OF REPUTATION AND PRIVACY

Before analyzing the Internet phenomenon, it is important to first map out the legal landscape in the area of privacy and reputation in China. While legal protection of a person's reputation is well entrenched, a person's right to privacy is uncertain.

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<sup>12</sup> See *infra* Part III.

<sup>13</sup> Laura Parker, *Courts Are Asked to Crack Down on Bloggers, Websites*, USA TODAY, Oct. 2, 2006, available at [http://www.usatoday.com/tech/news/2006-10-02-bloggers-courts\\_x.htm](http://www.usatoday.com/tech/news/2006-10-02-bloggers-courts_x.htm).

<sup>14</sup> See, e.g., Communications Decency Act, 47 U.S.C. §230(e)(2) (1996) (discussing ISPs' liability in defamation complaints). Under a notice and take down regime, once an ISP receives a notice of alleged right infringement, it must expeditiously take down or block access to the materials complained so as to avoid liability on its part.

<sup>15</sup> For vivid accounts of other stories, see DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* (Yale Univ. Press 2007).

One's reputation is an enshrined right in the Chinese Constitution. Article 38 clearly states that "the personal dignity of citizens is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited."<sup>16</sup> In addition, under article 101 of the General Principles of the Civil Law of the People's Republic of China (GPCL):

[c]itizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.<sup>17</sup>

Article 120 of the same piece of legislation stipulates that:

[i]f a citizen's right of personal name, portrait, reputation or honour is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses.<sup>18</sup>

In addition, serious cases of slander or insult constitute criminal offences in China.<sup>19</sup> Police have the power to detain a person for up to ten days for insulting or slandering another person.<sup>20</sup>

While the Constitution upholds and the Criminal Law protects one's right to reputation and dignity, the legal ambit of privacy is far from clear, as evidenced by the Supreme Court's interpretations. According to article 140 of the Supreme People's Court's Interpretation of the GPCL in 1988, a person will be liable for revealing the personal details of another, where it causes harm to the latter's reputation, regardless whether this is done verbally or in written form.<sup>21</sup> Under the same article, the terms "personal

<sup>16</sup> XIAN FA art. 38 (1993) (P.R.C.), available at [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm).

<sup>17</sup> General Principles of the Civil Law of P.R.C. [GPCL] art. 101 (promulgated by the President of P.R.C., Apr. 12, 1986, effective Jan. 1, 1987) LAWINFOCHINA (last visited Mar. 29, 2009) (P.R.C.).

<sup>18</sup> *Id.*

<sup>19</sup> Criminal Law of the P.R.C. art. 145 (adopted at the Second Session of the Fifth National People's Cong., July 1, 1979, promulgated by Order No. 5 of the Chairman of the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) LAWINFOCHINA (last visited Mar. 29, 2009) (P.R.C.).

<sup>20</sup> Administrative Regulations on Penalties for Public Security art. 25 (promulgated by the Standing Comm. of the Tenth Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006) LAWINFOCHINA (last visited Sept. 22, 2008) (P.R.C.).

<sup>21</sup> Guidelines in Trial Implementation of the Supreme People's Court on Implementing the General Principles of Civil Law of P.R.C. [Guidelines in Trial Implementation] (promulgated Jan. 26, 1988, effective Jan. 26, 1988) LAWINFOCHINA (last visited Mar. 29, 2009) (P.R.C.). The status of the Supreme People's Court's Interpretation is almost equivalent to legislation in form and nature. Different from common law system, the Supreme People's Court in the P.R.C. has quasi-legislative and judicial interpretation functions. It may issue guidelines on legal interpretation binding on lower courts, or policy guidelines to executive organs. It can also set out legal principles in question-and-answer format for lower

dignity” and “right of reputation” include the concept of privacy.<sup>22</sup> What remains unclear is whether the provision recognizes privacy as a stand-alone right or treats it as a sub category of the right of reputation. Academics have argued that it is unsatisfactory to treat privacy protection as a subset of a reputation claim.<sup>23</sup> However, in another Supreme People’s Court’s Interpretation in 1993, the Court remarked that the defendant will be found liable for infringing another’s reputation if an unauthorized revelation of personal details has caused harm to a person’s reputation.<sup>24</sup> In 1998, the Supreme People’s Court indicated that a medical institution may bear tortious liability if it makes unauthorized disclosures of certain medical illnesses of a patient, and that disclosure harms the patient’s reputation.<sup>25</sup> In sum, the Supreme People’s Court’s three explanations could be interpreted to mean that the mere public disclosure of private facts may not be actionable if the disclosure was not accompanied by some harm to the injured party’s reputation.<sup>26</sup> This legal lacuna may partly explain why most litigation claimants, as discussed in Part III, prefer to sue for reputation damage rather than privacy protection. Despite the lack of legal consensus in the area of privacy protection, some lawyers are confident that privacy infringement should include public disclosure of private facts.<sup>27</sup>

As it presently stands, the legal doctrines for protecting reputation and privacy apply equally to the cyber world. Internet users are liable for producing, duplicating, releasing or disseminating content contrary to the basic principles of the Constitution.<sup>28</sup> The law forbids any insulting or

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courts. For detailed discussion, see ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 99-100 (Butterworths Asia 1992).

<sup>22</sup> See Guidelines in Trial Implementation and CHEN, *supra* note 21.

<sup>23</sup> CHENG XIAO, QIN QUAN XING WEI FA ZONG LUN [GENERAL PRINCIPLES OF TORT LAW] 220 (People’s Univ. Press 2008); YANG LIXIN, REN SHEN QUAN FA LUN [PERSONAL RIGHT LAW] 665-66 (The People’s Court Press 2002).

<sup>24</sup> *Question and Answer VII, Zui gao ren min fa yuan guan yu shen li ming yu quan an jian ruo gan wen ti de jie da* [Explanation of the Sup. People’s Ct. Regarding Some Questions on the Trial of Cases Concerning the Right of Reputation], SUP. PEOPLE’S CT. GAZ., June 15, 2004, LAWINFOCHINA (last visited Mar. 1, 2009) (P.R.C.).

<sup>25</sup> *Question and Answer VIII, The Interpretation of the Supreme People’s Court on Several Issues about the Trial of Cases Concerning the Right of Reputation* (adopted at the 1002<sup>nd</sup> meeting of the Judicial Committee of the Supreme People’s Court, July 14, 1998, promulgated and effective Sept. 15, 1998) LAWINFOCHINA (last visited Mar. 29, 2009) (P.R.C.).

<sup>26</sup> See Song Huang & Ruchan Ji, *Privacy Protection in China’s Cyberspace*, 17 (1) CHINA L. & PRAC. 29 (Feb. 2003).

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., Computer Information Network and Internet Security Protection and Management Regulations [1997 Regulations] art. 5(1) (approved by the State Council, Dec. 11, 1997, promulgated by the Ministry of Public Security, Dec. 30, 1997), available at [http://newmedia.cityu.edu.hk/cyberlaw/gp3/pdf/law\\_security.pdf](http://newmedia.cityu.edu.hk/cyberlaw/gp3/pdf/law_security.pdf) (original translation provided by the U.S. Embassy in Beijing); Regulation on Internet Information Service [2000 Regulations] Decree No. 292 of the State Council, art.

defamatory remarks against others or any infringement upon the lawful rights and interests of others in the cyber world.<sup>29</sup> All Internet information service providers (IISPs) must cease transmitting such information, keep the related personal records, and report the alleged illegal information to the relevant authorities.<sup>30</sup> By definition, IISPs include Internet service providers, access providers, content providers,<sup>31</sup> both those providers that charge for their services and those that offer their services free.<sup>32</sup> All IISPs are required to provide online users with quality services and to ensure the “legality” of the information that is provided.<sup>33</sup>

Seemingly, the current regulations should have provided a safe environment for Internet users to protect their reputational rights and possibly privacy rights. However, the burden on IISPs to act as gatekeepers is likely to be onerous. It is, in effect, asking them to act as judges to decide whether a complaint is valid or not. In addition, the law does not state the specific requirements for IISPs regarding collecting, storing, using, or disseminating personal information or data. Consequently, the relationship between IISPs and individuals is governed largely by principles of contract law, and IISPs can protect themselves easily from liability through exemption clauses.<sup>34</sup> This will be explained in great detail in the following discussion on the Internet frenzy and its resulting legal disputes.

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15(1) (promulgated by the State Council, Sept. 25, 2000, effective Sept. 25, 2000) LAWINFOCHINA (last visited Mar. 29, 2009) (P.R.C.).

<sup>29</sup> See 1997 Regulations art. 5(7); 2000 Regulations art. 15(8); Management Provisions on Electronic Bulletin Services in the Internet art. 9(8) (promulgated by the Ministry of Information Industry, Nov. 6, 2000, Decree No. 3, effective Nov. 6, 2000) LAWINFOCHINA (last visited Mar. 29, 2009) (P.R.C.) (applies specially to bulletin board service users).

<sup>30</sup> For example, 1997 Regulations art. 10(6), requires all Internet service providers and access providers to delete the unlawful content, cease transmission and report to the authority within 24 hours. Under 2000 Regulations art. 14, IISPs that offer news coverage and bulletin board services are required to keep a 60-day record of the information that they distribute, when it is distributed, and the Web address where the information is located. IISPs are similarly required to keep records of the time of use, accounts of Internet addresses or domain names, and dial-in telephone numbers of online users for 60 days. Administrative Provisions on Internet Audio-Visual Program Service art. 18 (adopted by the State Administration of Radio, Film and Television and the Ministry of Information Industry, Order No. 56 of Ministry of Information Industry, promulgated Dec. 20, 2007, effective Jan. 31, 2008) LAWINFOCHINA (last visited Mar. 29, 2009) (P.R.C.) (requiring all Internet audio-visual program service entities to immediately delete unlawful content, keep the relevant records and report the situation to the authorities. Unlawful content is listed under art. 16 of the said Provisions, which includes insulting, defaming other people and infringing the privacy of others).

<sup>31</sup> See *id.* art. 5.

<sup>32</sup> See *id.* art. 3.

<sup>33</sup> See *id.* art. 13.

<sup>34</sup> For example, Baidu search engine has exempted itself from any liability of negligence or tortuous actions. See Baidu, <http://www.baidu.com/duty/index.html> (last visited Mar. 29, 2009).

### III. REPUTATION AND PRIVACY VIOLATIONS IN THE VIRTUAL AND REAL WORLDS

Despite the uncertainty in this area of law, some victims of cyber defamation are determined to defend their reputation and privacy. The outcome for each legal battle is different. Those who choose to protect their reputation often press their claims against ISPs. As the discussion below will illustrate, the Chinese courts have yet to come up with a consistent approach to deal with these reputation claims. Individuals whose claims relate to their privacy interests face an even more daunting task. There is also a general reluctance to seek legal redress for privacy violations because doing so only calls additional attention to the person hoping to maintain his or her privacy. The following discussion begins with an analysis of claims to protect reputation on the Internet and continues with an examination of privacy disputes.

#### A. *Defending Reputation and Holding ISPs Liable*

To launch a legal action in reputational harm in China is akin to establishing a defamation action in common law.<sup>35</sup> Accordingly, the plaintiff has to prove that a libellous statement about him has been published<sup>36</sup> and that the libellous or defamatory statement was “calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule . . . or tending to lower the plaintiff in the estimation of right-thinking members of society generally.”<sup>37</sup> Underlying this logic is that the alleged defamatory statement is presumed to be false, and the defendant may rebut this presumption by establishing the truth of the statement.<sup>38</sup> The Chinese courts have adopted this plaintiff-friendly approach to a certain extent,<sup>39</sup> but as the following discussion will show a consistent judicial methodology has yet to emerge.

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<sup>35</sup> H.L. FU & RICHARD CULLEN, *MEDIA LAW IN THE PRC 192-193* (Asia L. & Prac. Publishing 1996). The Supreme People's Court in a 1993 explanation on reputation rights delivered the opinion that four issues must be addressed. Namely, they are whether the reputation of the victim is harmed, whether the act of the defendant is unlawful, did the unlawful act cause damage to reputation and whether the defendant was at fault. Fu and Cullen observed that in actual practice, the Chinese courts have essentially adopted the common law analysis on defamation.

<sup>36</sup> HELEN FENWICK & GAVIN PHILLIPSON, *MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT 1043* (Oxford Univ. Press 2006).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 *HARV. INT'L L.J.* 34-35 (2006).



The case of *Gao Xiaosong v. Yahoo! (Holdings) Hong Kong Ltd.* ["Yahoo! HK"]<sup>40</sup> provides an example of a Chinese court finding an ISP liable for defamation while attempting to balance the protection of freedom of speech and individual reputation.<sup>41</sup> Gao was a music producer. In 2000, newspapers clippings from printed media concerning the alleged role of Gao, a music producer, in the suicide of Junzi, a female pop singer, were made available on Yahoo!China website which was owned by Yahoo! HK. Six other reports concerning the sour relations between Gao and his manager, implying that Gao was a mean employer who had resorted to threats against his manager towards the end of their relationship were also made available on the website.<sup>42</sup> Gao sued his former manager and one of the printed media organizations that published the derogatory remarks.<sup>43</sup> Gao also brought legal action against Yahoo! HK for its role in making the articles available on the Internet.<sup>44</sup>

The Beijing District Court held Yahoo!China liable despite the fact that it had also published Gao's own statements, which clarified his position, and had removed all the defamatory content from its website before the trial began.<sup>45</sup> Essentially, the court viewed the case as a conflict between freedom of the press and reputation of the individual. Relying on articles 101 and 120 of the *General Principles of Civil Law*, the court determined that Gao's reputation had to be protected.<sup>46</sup> Although the Court found in Gao's favour, it struck a balance between freedom of the press and protection of an individual's right in its award of damages.<sup>47</sup> Yahoo! HK. was ordered to pay RMB122,818 in damages, only one-fifth of what Gao had asked for.<sup>48</sup>

While in the *Gao case*, the Beijing Court did not invoke any legal principles governing ISPs, a Nanjing Court adopted a slightly different approach in *Chen Tangfa v. Hangzhou Boke information & Technology Co. Ltd.*<sup>49</sup> Chen Tangfa was a professor at the School of Journalism at Nanjing

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<sup>40</sup> *Gao Xiaosong v. Yahoo! (Holdings) Hong Kong Ltd.* (Beijing Chaoyang District People's Ct., Dec. 19, 2003), available at <http://www.elaw.com.cn/article/11/422/2007/20071213194184.html>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* Gao asked for RMB\$50,000 for causing emotional and mental harm and RMB\$2818 for economic loss. *Id.*

<sup>49</sup> *Chen tang fa v. Hang zhou bo ke xin xi ji shu you xian gong si*, Nanjing Gulou District People's Court, Civil Litigation No. 9, July 20, 2006, [http://blog.sina.com.cn/s/blog\\_42726efa010005ua.html](http://blog.sina.com.cn/s/blog_42726efa010005ua.html) (last visited Mar. 29, 2009).

University.<sup>50</sup> In June 24, 2005, a student writing under the name K007 criticized Chen on the blog page (Blogcn) of the defendant company, accusing Chen to be a "terrible teacher using terrible materials."<sup>51</sup> When Chen raised the issue with the blog moderator of the defendant company and demanded deletion of the defamatory posting in October 2005, he was told that K007 had not violated any rules of posting.<sup>52</sup> Eventually, Chen brought a case before the Nanjing court, asking for RMB10,000 for damages to his reputation and dignity.<sup>53</sup> In August 2006, the Court ruled in favour of Chen and ordered the defendant company to delete all defamatory posting, issue a public apology on its website for ten days, and pay damages of RMB1000. The Nanjing Intermediate Court upheld the ruling.

The court based its decision on article 7 of the Decision of the Standing Committee of the National People's Congress Concerning Maintaining Internet Security,<sup>54</sup> stipulating that any harmful message on the Internet should cease to be transmitted and should be reported to the authority. The court interpreted "harmful message" to include messages that defame or insult another citizen. According to the court, the defendant was negligent in failing to terminate the transmission, report the transmission to the authority, and by not fulfilling its duty once the plaintiff complained.

Not everyone who suffers reputational harm has had the same legal success as Gao and Chen. *Zhang Keke v. Tianya Company*<sup>55</sup> provides a counter example to the claimant-friendly decisions discussed above. An anonymous author posted a message on the Tianya discussion board alleging that Zhang, a popular singer in China, led a loose life, had an abortion, and used her body to climb the social ladder to fame.<sup>56</sup> As Zhang did not know the identity of the defamer, she sued Tianya Company for RMB500,000, claiming damage to her reputation and privacy violations.<sup>57</sup> In 2008, the Beijing Intermediate Court held that Tianya, as a host of the bulletin board discussion was not in a position to decide whether the content of the disputed posting was true or not.<sup>58</sup> In fact, the Court found that it would be

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Decision of the Standing Committee of Nat'l People's Congress Regarding the Safeguarding of Internet Security (adopted Dec. 28, 2000 by the 19th Sess. of the Standing Comm. of the Ninth Nat'l People's Cong.), available at <http://www.chinaeclaw.com/english/reaArticle.asp?id=2386>.

<sup>55</sup> Wang Yang, *Wang lu hong ren zhang ke ke gao tian ya bai su* [Famous Zhang Keke Lost Her Case Against Tianya], BEIJING TIMES, Apr. 22, 2008, at A6.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

unfair to require the ISP to investigate the truth of a particular complaint and allegation.<sup>59</sup> The Court further held that because Zhang claimed the disputed content was entirely false, there could not be any privacy infringement.<sup>60</sup>

The ruling in *Zhang* demonstrates the difficulties for persons whose reputation have been damaged by an internet posting in obtaining legal redress. The Chinese courts need to be aware that original internet postings are often done anonymously. This necessarily makes it difficult for claimants to identify defendants. Furthermore, in refusing to delineate the extent of ISPs' responsibility for defamatory content and ruling that ISPs should not be asked to bear the investigatory burden, the Courts have left the claimants with no one to bring a legal action against.

Another pressing problem for victims of defamatory remarks is that many cannot afford to pursue litigation in the courts. The story of Peking University graduate Zhang Ying was one of the biggest internet scandals of 2007 and illustrates the challenges associated with pursuing litigation in the courts. Zhang Ying allegedly appeared nude in order to raise money while studying overseas.<sup>61</sup> The story first appeared along with supposed naked photos of Zhang in March of 2007 on a North American website catering to overseas Chinese.<sup>62</sup> Within a week, various websites widely distributed the story in China.<sup>63</sup> In early April of 2007, a Chinese website called Xinmin.cn issued reports that the story was in fact false and the photos were fake.<sup>64</sup> Zhang also learned about the allegations against her in April while she was living as a student in Canada. Infuriated and embarrassed, Zhang returned to China in early July of 2007 to explore the possibility of suing the various ISPs.<sup>65</sup> She formally complained to the police, hoping they would commence a legal action.<sup>66</sup> Zhang also requested that the concerned ISPs

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> For an account of the Zhang Ying story, see Wang Yang, *supra* note 3.

<sup>62</sup> The story was first posted in the website of Zhong Hua Wang (Chinese People Web), <http://www.wuca.net/>, see Wang Peng & Shi Yi, *Bei da nü sheng bei wu guo wai luo ben, bei po zhong duan liu xue hui guo wei quan* [Female Graduate Of Peking University Alleged to Go Naked Abroad Was Obligated to Interrupt Her Study and Return to China to Defend Her Right], July 27, 2007, [http://news.xinhua.com/edu/2007-07/24/content\\_6420749.htm](http://news.xinhua.com/edu/2007-07/24/content_6420749.htm) (last visited Oct. 22, 2008).

<sup>63</sup> *Id.*

<sup>64</sup> Wang Yang, *supra* note 3. The story was initially posted at XinMin Web (New Citizens Web), <http://news.xinmin.cn/domestic/shehui/2007/04/06/297073.html> (last visited Jan. 31, 2009).

<sup>65</sup> *Bei da nü liu xue sheng bei wu "luo ben" an, nü zhu jue yi wei se qing mo te* [The Heroine Appears To Be An AV Model In The Case Where A Female Peking University Graduate Studying Abroad Was Alleged To Go Naked], Aug. 1, 2007, [http://news.xinhuanet.com/edu/2007-08/01/content\\_6458564.htm](http://news.xinhuanet.com/edu/2007-08/01/content_6458564.htm) (last visited Mar. 29, 2009).

<sup>66</sup> *Bei da nü sheng "luo ben" tu pian zai xian, jing fang zheng ju bu zu zan wei shou li* [The Pictures Reoccur About The Female Graduate of Peking University "Going Naked," But Police Refuse To

delete the defamatory content, restore her reputation, apologize, and compensate her for the damages she suffered but this was to no avail.<sup>67</sup> The managers of the various websites explained to Zhang that they did not know who first posted the photos and story.<sup>68</sup> At the time of writing of this article, alleged naked photos of Zhang could still be found on the web.<sup>69</sup> Despite the seemingly comprehensive legal remedies available under both civil and criminal laws in China, Zhang was completely helpless.

The story of Chen Caishi in Jiangsu province offers another example of outrageous reputational harm suffered from defamatory Internet postings.<sup>70</sup> Chen was not only the victim of serious false statements, but she also became a criminal suspect as a result of the allegations made against her.<sup>71</sup> In July of 2007, Internet postings on Tianya.cn, Sina.news, and Rednet.cn accused Chen of torturing her six-year-old stepdaughter.<sup>72</sup> Chen was described as the “most wicked stepmother in history.”<sup>73</sup> According to the web postings, the girl’s condition was so bad that she suffered from bone fractures in her spine and bruises all over her body.<sup>74</sup> The story was also covered by the provincial television station.<sup>75</sup> The local police questioned Chen about the allegation<sup>76</sup> but after further investigation, the hospital confirmed that the girl was suffering from leukaemia and that the Internet “rumour monger” was actually a family friend who wanted to raise funds to help the family by catching public media attention.<sup>77</sup> Eventually, with the financial help of various donors from different parts of China, the girl was able to receive medical treatment in Shanghai.<sup>78</sup> Unfortunately, this white lie was told at Chen’s expense; she suffered from severe mental distress, contemplated committing suicide and at one point knelt down in front of a

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*Investigate Due to Lack Of Sufficient Evidence*], July 27, 2007, [http://news.xinhuanet.com/edu/2007-07/27/content\\_6438702.htm](http://news.xinhuanet.com/edu/2007-07/27/content_6438702.htm) (last visited Mar. 29, 2009).

<sup>67</sup> *Id.*

<sup>68</sup> Wang Peng & Shi Yi, *supra* note 62.

<sup>69</sup> *Bei da nü sheng “luo ben” tu pian zai xian*, *supra* note 66.

<sup>70</sup> The account of Chen Caishi was taken from Yang Gengshen, “*Shi shang zui du hou ma*” *zai ci jian zheng wang luo bao li* [“*The Most Wicked Step Mother in History*”—*Another Proof of Internet Violence*], July 25, 2007, <http://www.mediawatch.cn/GB/75688/6029643.html> (last visited Mar. 1, 2009); and Wang you bao liao: “*liu sui nü bei hou ma du da*” *nei mu* [*The Inside Story of the Torture of a Six Year Old Girl*], [http://shehui.daqi.com/ztnew\\_index/245558/1/index.html](http://shehui.daqi.com/ztnew_index/245558/1/index.html) (last visited Mar. 1, 2009).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

media camera, and begged the media and the public to restore her innocence.<sup>79</sup>

### B. *The Uphill Battle to Protect Privacy*

Efforts to halt Internet defamation and insult have been met with mixed results. The fight to protect privacy, however, is a cause almost doomed to fail from the outset for a number of reasons: first, it is hard to establish a cause of action because a plaintiff must prove the public disclosure of private information has caused actual reputational harm. Second, bringing a legal claim will inevitably bring more attention to the plaintiff's life, thus risking further exposure and embarrassment.

Usually, privacy violations on the Internet take the form of unauthorized publication of photos, use of images, and dissemination of personal contact information or other information. Though under article 100 of the General Principles of the Civil Law, a person has rights to limit the use of his or her image,<sup>80</sup> the person cannot claim legal damages in China unless the unauthorized use of the image was for commercial gain.<sup>81</sup> Furthermore, unless the person can show actual harm to reputation resulting from the public disclosure of private information, one may not be able to bring an independent action for privacy. As mentioned earlier in Part II, China has not fully established or recognized the claim to privacy protection.<sup>82</sup> As a result, victims suffering from blatant forms of privacy violation may have to resort to bringing actions for reputation protection, as in the case of Wang Fei, discussed below.<sup>83</sup>

In addition, victims may feel completely helpless to fight back when they have been condemned as social outcasts, delinquents, or even culprits. Based on the facts of cases in this area, this article divides the cases into three main categories: 1) Egao, mischievous and reckless action, done mainly out of amusement and entertainment; 2) exposure of perceived social or moral wrongs; and 3) attack on social dissidents who hold unpopular

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<sup>79</sup> *Id.*

<sup>80</sup> See GPCL art. 100. Image right is a continental law concept confirmed by GPCL art. 100. The right refers to one's right to control the use of one's image and likeness and GPCL art. 100 confirms this right in China.

<sup>81</sup> Guidelines in Trial Implementation art. 139 stipulates that anyone for commercial gain, and uses the image of another in advertisement, trademark, window shop decoration and other means without consent, shall be liable for infringing another's image right. See Guidelines in Trial Implementation art. 139. For further discussion, see YANG LIXIN, *supra* note 23, at 539-40; and CHENG XIAO, *supra* note 23, at 196-98. The requirement of commercial gain is likely to be an attempt to strike the balance between freedom of expression and the right to respect one's autonomy.

<sup>82</sup> See *supra* Part II and text accompanying notes 21-27.

<sup>83</sup> See *infra* Part III.B.2.b.

views in society. Victims in the second group are unlikely to fight for their own legal rights because they are wrongdoers or perceived wrongdoers, whereas victims in the last group may be intimidated into silence as the more they fight back, the more they are attacked by the Internet mob.

### 1. *Intruding Privacy for the Sake of Amusement*

Egao is a Chinese term denoting a particular type of Internet behaviour that maliciously or recklessly targets a specific individual.<sup>84</sup> Egao can take textual, visual, audio and video forms on the Internet, and it has enjoyed unprecedented popularity in China since 2006.<sup>85</sup> Very often, it takes the form of teasing but can escalate into bullying. In a famous 2003 example, an anonymous photographer spotted Qian Zhijun, a sixteen-year-old school boy on his way to attend a road safety class. Qian was fat with a pudgy face and weighed over one hundred kilograms.<sup>86</sup> The photographer posted his picture on the Internet and dubbed him as "Little Fatty."<sup>87</sup> Pictures of Qian's face were then superimposed onto the images of Mona Lisa, Jackie Chan, and one of the presidential conks on Mount Rushmore.<sup>88</sup> Qian and his family, angry at being the victims of Egao, seriously contemplated lodging a legal action, but it was nearly impossible for them to identify all the violators. Since graduating from high school, Qian has worked as an ordinary gas station service man, whose image still has been regularly tracked on the Internet, with a hit rate in the tens of millions.<sup>89</sup> Qian was so famous that *The Independent* in the U.K and *Reuters News* covered his story.<sup>90</sup>

The "Shanghai Lovers," ridiculed for sharing a romantic moment in public, provide another example of the negative consequences of Egao.<sup>91</sup> In 2008, in a subway station in Shanghai, the young couple was caught kissing

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<sup>84</sup> Zhou Yongming, Address to City University Hong Kong: Egao: Visual Carnival and Iconoclasm in Chinese Cyberspace (Nov. 19, 2007) (discussing the phenomenon of Egao from an anthropological perspective).

<sup>85</sup> *Id.*

<sup>86</sup> Clifford Coonan, *The New Cultural Revolution: How Little Fatty Made It Big*, THE INDEPENDENT, Nov. 16, 2006, available at <http://www.independent.co.uk>. Qian's family expressed the wish to sue but did not know whom to sue. The story was also discussed in SOLOVE, *supra* note 15, at 44-45.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The account of the Shanghai lovers incident is from *Kissing Couple Sue Shanghai Metro Over Internet Video*, <http://afp.google.com/article/ALeqM5hPYu0452xuziZSRqhF8Za5nkEFAg> (last visited Mar. 29, 2009); *Qing lu yong wen shi pin wang shang liu chuan yi zao di tie zhan jian kong* [Clip of Kissing Couple Circulating on the Internet], Jan. 16, 2008, <http://news.sina.com.cn/s/2008-01-16/041914752613.shtml> (last visited Mar. 29, 2009).

passionately for nearly three minutes.<sup>92</sup> Although they thought they were alone, in actuality their kissing was captured on the closed circuit television of the subway station.<sup>93</sup> The clip was posted on Youtube and KU6<sup>94</sup> most likely by the subway station staff since there were side comments from them.<sup>95</sup> The young couple brought legal action for violation of privacy against the subway company.<sup>96</sup> The young man caught kissing on camera resigned from his employment. The cause of his resignation is not hard to guess considering that Chinese society largely frowns upon public display of passion.

Little Fatty and the Shanghai Lovers may win our sympathy, convincing us that they and others like them should be able to bring privacy violation claims successfully. After all, the harassment and violations they were forced to put up with constitute bullying of the most insidious kind. Other cases engender different reactions, for example those in which the behaviour of the people photographed is socially or morally reprehensible.

## 2. *Internet Trials Going Wild and the First Case of Human Flesh Search Engine before the P.R.C. Court*

Though certain behaviours in society may be lawful, they can still violate the accepted social norms of the majority. Violating these norms may mean facing social sanctions, comparable to, if not worse than, legal punishment. Animal torture and infidelity in marriage provide two recent examples of legal behaviour that stirs the moral condemnation of angry netizens.

The “Kitten Killer” scandal of 2006 began when pictures of a woman using her high heels to kill a small kitten on the pavement circulated on the Internet, shocking netizens deeply.<sup>97</sup> Though animal torture is not a crime in China, the pictures created a huge uproar.<sup>98</sup> A virtual warrant was issued by netizens to hunt down the kitten killer.<sup>99</sup> Later, it was discovered that a hospital pharmacist, Wang Yu, was the woman in the pictures.<sup>100</sup> It was also

<sup>92</sup> *Id.* *Clip of Kissing Couple Circulating on the Internet*, *supra* note 91.

<sup>93</sup> *Id.*

<sup>94</sup> KU6 is the Chinese version of Youtube.

<sup>95</sup> *See Kissing Couple Sue Shanghai Metro Over Internet Video*, *supra* note 91.

<sup>96</sup> *Id.*

<sup>97</sup> *Nüe mao nü zi fa biao dao qian xin* [Public Apology from the Kitten Torturer], BEIJING NEWS, Mar. 16, 2006, <http://news.thebeijingnews.com/china/2006/0316/014@167629.htm> (last visited Mar. 29, 2009) [hereinafter *Public Apology*].

<sup>98</sup> *Netizens Identified the Kitten Killer Within Four Days*, *supra* note 8.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

discovered that a company catering to the tastes of a group of sadistic animal torturers videotaped the kitten killing.<sup>101</sup> Many called for Wang's personal details—name, address, and work unit.<sup>102</sup> Within four days, she was identified and her personal details exposed.<sup>103</sup> Eventually, the hospital she worked for suspended her. Both the hospital and Wang issued a public statement. In her statement, Wang apologized and actually thanked the netizens for reprimanding her.<sup>104</sup> Though Wang explained that she was under immense pressure from a failed marriage,<sup>105</sup> this explanation hardly qualified as a mitigating factor. Not surprisingly, no one ever raised the issue of her privacy violations. The netizens regarded her as an unforgivable culprit.<sup>106</sup> It was only right then for her to apologize and even show gratitude for the “friendly admonition” by others.<sup>107</sup>

Another example of “punishing” culprits involved an unfaithful husband. An aggrieved wife in Beijing jumped to her death in 2007 after discovering that her husband, Wang Fei, had been unfaithful.<sup>108</sup> Before her suicide, the wife disclosed her frustration and her reason for her suicide on her blogs, placing the blame on Wang.<sup>109</sup> After her death, many netizens were so angry at Wang that they searched for, collected, and eventually disclosed the personal contact information of Wang, his family, and the third party who allegedly broke up the marriage.<sup>110</sup> Death threats were left outside Wang and his parents' home, and Wang resigned from his job in the face of social pressure.<sup>111</sup> Since the death of his estranged wife at the end of 2007, Wang has not been able to find work as a designer.<sup>112</sup> The situation was so bad that in March 2008 he decided to sue the website providers for damage to his reputation and privacy violations.<sup>113</sup> The defendants of the lawsuit included Zhang Leyi (a close friend of his estranged wife who established the website of Oriochris.cn), Daqi.com and Tianya.cn.<sup>114</sup> These three sites hosted discussion of the incident, and had posted the personal

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *Public Apology*, *supra* note 97.

<sup>108</sup> For an account of the Wang Fei story, see *First Case Against Human Search Engine*, *supra* note 7.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> For a copy of the writ of summons, see <http://cache.tianya.cn/publicforum/content/no11/1/539720.shtml> (last visited Jan. 31, 2009).

<sup>114</sup> *Id.*



contact information for Wang, his family, and the alleged third party.<sup>115</sup> Wang claimed he was entitled to RMB135,000 in damages.<sup>116</sup>

In December 2008, the Beijing Court delivered its judgment holding Zhang and Daqi.com liable for causing Wang's emotional distress.<sup>117</sup> Zhang was ordered to pay RMB5000 (about US\$735) and Daqi had to pay RMB3000 (about US\$441).<sup>118</sup> Tianya.com was found not liable because it had removed the objectionable materials and information within a reasonable time.<sup>119</sup>

Though the amount of damages maybe nominal, the significance of this case cannot be underestimated. For the first time, a Chinese court addressed the issue of cyber violence, referring specifically to the alarming trend of using the human flesh search engine to hunt down individuals.<sup>120</sup> In addition, the court also addressed the issue of privacy directly.<sup>121</sup> It called for privacy protection reform from the Ministry of Information Industry shortly after delivering the judgment.<sup>122</sup>

In its decision, the court explained that privacy referred generally to a person's private interest and personal relations, including one's personal life, personal information, personal space, secrets, and any aspect of life that an individual would not like to share with the world.<sup>123</sup> Hence, any unauthorized disclosure or dissemination constitutes a violation of a person's privacy interests.<sup>124</sup> It was therefore wrong for Zhang to disclose the personal contact information of Wang on his site, and equally unacceptable for Daqi.com to allow the involved parties to invade the privacy of Wang by revealing his and his family members' personal information.<sup>125</sup>

While the court affirmed Wang's right to privacy, ironically, it also condemned his unfaithful behaviour.<sup>126</sup> The court stated that spouses should

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Wang Fei v. Zhang Leyi, Daqi.com and Tianya.com, No. 10930, (Beijing Chaoyang Dist. People's Ct., Dec. 18, 2008) <http://www.chinacourt.org:80/html/article/200812/18/336418.shtml> (last visited Mar. 29, 2009).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Beijing to Ministry of Information Industry, Proposal for Stricter Supervision of the Internet, (Beijing Chaoyang Dist. People's Ct., Dec. 18, 2008) ([chinalaw@hermes.gwu.edu](mailto:chinalaw@hermes.gwu.edu) discussion board) (P.R.C.).

<sup>123</sup> See Wang Fei v. Zhang Leyi, Daqi.com and Tianya.com, No. 10930 (Beijing Chaoyang Dist. People's Ct., Dec. 18, 2008), available at <http://www.chinacourt.org:80/html/article/200812/18/336418.shtml>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

remain faithful to their partner, referencing the Chinese Marriage Law.<sup>127</sup> In its opinion, not only did Wang act against the spirit of the Marriage Law, he had also offended the moral standard of society. In this respect Wang was condemned by the Court.<sup>128</sup>

With the mixed message of calling for legal protection of privacy on the one hand, but condemning the private life of an individual on the other, it is uncertain what the scope of privacy protection under the law will be. The Beijing Chaoyang District People's Court's attitude may even suggest that those who would like to claim privacy protection before Chinese courts should come with clean hands. Perhaps at this juncture legislative intervention would be best to resolve this legal uncertainty.

### 3. *The Internet Hunt for Social "Dissidents"*

Chinese netizens have not limited their activities to punishing morally reprehensible conduct; they are equally keen to condemn those who trumpet their own self-righteousness.

In a 2007 television interview, Zhang Shufan, a thirteen-year-old high school girl in China condemned the use of the Internet as a means for promoting violence and disseminating pornography.<sup>129</sup> Angry netizens immediately attacked her, mobilized public opinion, and utilized the human search engine to track down the teenage girl.<sup>130</sup> Within five days, 1,200 postings existed with her personal information, running on twelve full web pages on the bulletin discussion board, commonly known in China as BBS, or Baidu.<sup>131</sup> Her picture was posted, information about her was requested, and stories demonstrating how she was not as pure and wholesome as she presented flooded the Internet.<sup>132</sup> Baidu intervened after eight days of Internet frenzy by netizens.<sup>133</sup> The web company decided to freeze posting

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> The account was from *Xiao xue sheng: Wang ye hen huang hen bao li* [Pupil: Web Pages Are Very Pornographic and Very Violent] (posted Jan. 7, 2008), <http://epaper.xkb.com.cn/view.php?id=184695> (last visited Mar. 29, 2009).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Zhang expressed her views on Dec. 12, 2007 on CCTV. The first posting to attack her took place that evening. Other attacks followed until Jan. 8, 2008 when Baidu intervened and prevented further discussion. It was only on Jan. 16, 2008 that posting was allowed. See Yang Xuan, "E gao shi jian" jing shi shen me? [What Does This Egao Incident Show?], PEOPLE'S DAILY, Jan. 8, 2008, at 11 (posted Jan. 11, 2008), [http://paper.people.com.cn/rmrb/html/2008-01/11/content\\_38069275.htm](http://paper.people.com.cn/rmrb/html/2008-01/11/content_38069275.htm) (last visited Mar. 29, 2009).

for eight days although it continued to allow viewing.<sup>134</sup> Baidu explained that it did this to protect the interests of the girl and “to maintain healthy discussion” on its site.<sup>135</sup>

As incidents discussed in this article have illustrated the punishment that netizens choose to levy on social misbehaviour or delinquency often takes the forms of humiliation, embarrassment or even harassment. So-called “social delinquents” may be ostracized from their social circles or banished from their communities, as was the Kitten Torturer. In extreme cases, online attacks may turn into real life violence as in the case of the Wang Qiangyuan.<sup>136</sup> At a 2008 rally as the Olympic games approached, Wang Qiangyuan, a Chinese student studying at Duke University expressed sympathy for the Tibetan independence movement.<sup>137</sup> Because of her stance, netizens labelled her a traitor.<sup>138</sup> Not only did they expose her personal contact on the Internet, they also distributed her parents’ information.<sup>139</sup> Death threats were left outside her residence in the U.S. and her parents’ home in China.<sup>140</sup>

The Internet’s immense potential for abuse, evidenced by the cases discussed above, demands an appropriate legal framework to address defamatory postings and invasions of privacy.

#### IV. ALTERNATIVE APPROACHES IN EUROPE AND THE U.S.

China is not alone in facing the rising challenge to reputation and privacy on the Internet. Appropriate regulation of Internet speech must protect freedom of expression, clarify what forum should be used to launch a legal action for defamation or privacy violation, and tackle the problem of enforcing judgments in this area.<sup>141</sup> While the last two issues are beyond the scope of this paper, this part of the article concentrates on searching for the right balance between protecting of freedom of expression on the one hand and respecting personal rights of reputation and privacy on the other. In particular, this part focuses on reaching the right equilibrium between

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<sup>134</sup> Baidu, *Gong gao: Guan yu zhang shu fan ba de wei hu shuo ming* [Notice: Declaration on Protection Zhang Shufan], Jan. 8, 2008, <http://tieba.baidu.com/f?kz=308107848> (last visited Oct. 22, 2008).

<sup>135</sup> *Id.*

<sup>136</sup> See *Duke University Student Wang’s Father Says He Doesn’t Need Police Protection*, CHINA DAILY, Apr. 24, 2008, available at [http://www.chinadaily.com.cn/china/2008-04/24/content\\_6642160.htm](http://www.chinadaily.com.cn/china/2008-04/24/content_6642160.htm).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Eric Barendt has elaborated on all three issues, see ERIC BARENDT, FREEDOM OF SPEECH 464-472 (2006).

imposing liability on ISPs and granting them immunity. Given China's political environment of one party leadership, it is important to note that the argument advanced here rests on the premise that actions brought by citizens against ISPs will be brought in their private capacity, rather than by "public figures" or government officials. As mentioned above, one major hurdle in bringing legal action against violators is that often the victims do not know whom to sue.<sup>142</sup> This problem persists because postings are typically anonymous and because usually the "Internet mob," rather than any one individual, is responsible for the offending content.<sup>143</sup> Thus, imposing liability on ISPs becomes a viable option.

Overseas experience, especially with Internet defamation litigation, provides valuable lessons for our discussion. In the United Kingdom, *Godfrey v. Demon Internet* established a rule under which the ISP would be held liable for defamatory content unless it could successfully invoke the innocent disseminator defence.<sup>144</sup> In *Godfrey*, the plaintiff brought an action against an American service provider for a defamatory posting by an unknown person.<sup>145</sup> The plaintiff notified the managing director of Demon, the service provider, and asked them to remove the message; Demon failed to do so.<sup>146</sup> In deciding the liability of the IISP, the Court relied on the United Kingdom Defamation Act of 1996,<sup>147</sup> which provides that a person has a defence to a defamation claim if the defendant shows that he or she was not the author, editor, or publisher of the statement, that he or she has taken reasonable care in relation to its publication of that statement and that the defendant did not know or have reason to know that he or she caused or contributed to the publication of the defamatory statement.<sup>148</sup> Though the Court held that the defendant was not a publisher for purposes of the statute, it determined that Demon could not claim immunity after receiving notice of the posting.<sup>149</sup> The case was widely criticized as being too stringent on ISPs.<sup>150</sup>

Since *Godfrey*, developments in English ISP liability law have forged ahead in a new direction. Now, the United Kingdom is bound by the

<sup>142</sup> See *supra* Part III.A and Part III.B.

<sup>143</sup> For examples, see discussion on the Little Fatty story and Kitten Killer scandal, *supra* Part III.B.

<sup>144</sup> *Godfrey v. Demon Internet*, (1999) 4 All E.R. 342 (Q.B.). The innocent disseminator defence requires the IISP to prove that it did not have knowledge of the defamatory statement.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> UK Defamation Act, 1996, ch. 31 (Eng.).

<sup>148</sup> *Id.* § 1(1).

<sup>149</sup> *Godfrey*, 4 All E.R. 342.

<sup>150</sup> See Diane Rowland, *Free Expression and Defamation*, in HUMAN RIGHTS IN THE DIGITAL AGE 66 (Mathias Klang & Andrew Murray eds., 2005).

European Union standard under the Electronic Commerce Regulation of 2002 (“EC Directive”).<sup>151</sup> The EC Directive defines the circumstances in which internet intermediaries should be held accountable for material they host,<sup>152</sup> cache,<sup>153</sup> or carry but which they do not create.<sup>154</sup> In effect, it provides a “safe haven” exemption for ISPs’ when they are mere conduits,<sup>155</sup> unless they have actual knowledge of unlawful activity or information<sup>156</sup> and have failed to act expeditiously to remove the materials.<sup>157</sup> Article 15 of the Directive clearly stipulates that there is no general duty for ISPs to monitor information that passes through, or is hosted on, their systems.<sup>158</sup>

In 2006, English Courts had the opportunity to delineate the circumstances under which ISPs would be held liable in defamation litigation in *Bunt v. Tilley*.<sup>159</sup> In *Bunt*, the plaintiff brought a defamation action against six defendants, including three ISPs.<sup>160</sup> Considering *Godfrey* and the EC Directive, the Court held that for an ISP to be held responsible for defamatory publication, there must be “knowing participation.”<sup>161</sup> A passive role in facilitating postings is not sufficient to incur liability.<sup>162</sup> Distinguishing *Godfrey* from the case at bar, the Court ruled against the plaintiff because he failed to give actual and effective notice to the defendant ISPs.<sup>163</sup> In effect, *Bunt v. Tilley* established a notice and take down legal framework.

By comparison to European standards, the U.S. is often seen as liberal and protective of free speech. In the United States, § 230(1)(c) of the Communications Decency Act of 1996 exempts ISPs from defamation liability, stating that “no provider or user of an interactive computer service shall be treated as the publisher or speaker as of any information provided by another content provider.”<sup>164</sup> In the controversial case of *Zeran v. America Online, Inc. (AOL)*, postings appeared on an AOL message board glorifying

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<sup>151</sup> The Electronic Commerce (EC Directive) Regulations, S.I. 2002/2013 (U.K.), implementing the Council Directive on Electronic Commerce, 2000/31/EC, art. 14, 2000 O.J. (L 178/1)(EC), available at <http://www.opsi.gov.uk/si/si2002/20022013.htm>.

<sup>152</sup> Council Directive on Electronic Commerce, 2000/31/EC, art. 14, 2000 O.J. (L 178/1)(EC).

<sup>153</sup> *Id.* art. 13.

<sup>154</sup> *Id.* art. 12.

<sup>155</sup> *Id.* art. 12.

<sup>156</sup> *Id.* art. 13.

<sup>157</sup> *Id.* art. 14.

<sup>158</sup> *Id.* art. 15.

<sup>159</sup> *Bunt v. Tilley*, (2006) EWHC 407 (QB), available at <http://www.bailii.org/ew/cases/EWHC/QB/2006/407.html>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* ¶ 23.

<sup>162</sup> *Id.* ¶ 36.

<sup>163</sup> *Id.*

<sup>164</sup> 47 U.S.C. §230 (1996).

the Oklahoma City bombing in 1995 and linking the plaintiff to it.<sup>165</sup> Soon after, the plaintiff received death threats and abusive phone calls.<sup>166</sup> He complained to AOL and requested that the messages be removed but AOL refused to retract the original message and failed for several days to remove it.<sup>167</sup> Eventually, he filed a lawsuit against AOL for the allegedly defamatory postings.<sup>168</sup> Yet the Court of Appeals ruled that AOL was an interactive computer service and by definition not liable.<sup>169</sup>

In light of the decision, claimants resort to obtaining customer information from ISPs in order to sue the customers directly. This tactic is known as "Strategic Lawsuits Against Public Participation" (SLAPP).<sup>170</sup> Certain U.S. state courts support this approach. For instance, in *Doe v. Cahill*, the Delaware Supreme Court ruled that if a claimant can produce facts sufficient to defeat a summary judgement motion, he or she may then obtain the identity of an anonymous defendant from an ISP through the compulsory discovery process.<sup>171</sup> The Western District of Washington reached a similar ruling in *Doe v. 2TheMart.com, Inc.*, in which the Court held obiter that anonymous speech must be balanced against the reputation of the claimant.<sup>172</sup> The Washington court considered whether a claimant seeking a defendant's identity must withstand a motion to dismiss to file a discovery request,<sup>173</sup> or, whether he can obtain the identity information by simply convincing the court that he "ha[s] a legitimate, good faith basis to contend that he may be the victim of conduct actionable in the jurisdiction," and that the "subpoenaed identity information [is] centrally needed to advance the claim."<sup>174</sup> Because of the expense of SLAPP litigation, it is more often used by corporations affected by "vituperative and scurrilous cybersmears."<sup>175</sup>

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<sup>165</sup> *Zeran v. America Online, Inc. (AOL)*, 29 F.3d 327 (4th Cir. 1997).

<sup>166</sup> *Id.* at 329

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> SLAPP stands for strategic lawsuits against public participation. For discussion on SLAPP litigation in the context of defamation litigation in the United States, see Rowland, *supra* note 150, at 67-69.

<sup>171</sup> *Doe v. Cahill*, 884 A.2d 451 (2005).

<sup>172</sup> *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). The plaintiff lost the case on the ground that the anonymous speaker was a non-party.

<sup>173</sup> *Id.* at 1094 (referencing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 576 (N.D.Cal. 1999)).

<sup>174</sup> *Id.* at 1094 (referencing *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va.Cir.Ct. 2000)).

<sup>175</sup> Rowland, *supra* note 150, at 68.

The above discussion compared the English and American approaches to regulating Internet speech, and demonstrated that they strike a different balance between the claimant's rights to privacy and reputation and the ISP's responsibility for hosted content. In evaluating the two, Eric Barendt has argued forcefully that the English approach is preferred because it provides a more effective remedy than the American one, especially when victims are facing blatantly unfounded and malicious allegations.<sup>176</sup> For instance, such an approach would have provided an effective remedy for Zhang Ying, the university student who was helpless in the face of allegations that she had gone naked to raise funds.<sup>177</sup>

So far, our analysis has concentrated on Internet defamation disputes, yet the adoption of a notice and take down region is equally apposite for privacy protection on the Internet. Rather than imposing on ISPs the onerous burden of policing privacy violations in each individual case, a notice and take down system holds ISPs responsible only for content they are notified invades a person's privacy. At present, no international legal consensus for privacy and data protection exists.<sup>178</sup> Though the United States has developed its own privacy rules protecting individuals from government interventions, an equivalent set of comprehensive rules in the private sector does not exist.<sup>179</sup> In contrast, the European Union approach, contained in the EC Data Directive, governs all collecting or processing of personal information when there is no individual consent. Major economies, including the U.S, also accept the EU standard.<sup>180</sup>

Under article 2(a) of the EC Data Directive,<sup>181</sup> personal data is defined as "any information relating to an identified or an identifiable natural person." An identifiable person is one "who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic,

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<sup>176</sup> BARENDT, *supra* note 141, at 466.

<sup>177</sup> See *infra* Part III.1.

<sup>178</sup> ROLF H. WEBER, REGULATORY MODELS FOR THE ONLINE WORLD 154 (2002).

<sup>179</sup> Privacy legislation in the U.S. tends to be sector specific. See, e.g., Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522, 2701-2711 (1986), Telephone Consumer Protection Act, 47 U.S.C. §227 (1991), Video Privacy Protection Act, 18 U.S.C. §§ 2710-2711 (1988), and Children's Online Privacy Protection Act, 15 U.S.C. §6501 (1998). For discussion and comparison on data protection law between the U.S. and Europe, see WEBER, *supra* note 178, at 157.

<sup>180</sup> For discussion on the US-EU Safe Harbor Privacy Accord, see WEBER, *supra* note 178, at 157-60; and MARK BERTHOLD & RAYMOND WACKS, HONG KONG DATA PRIVACY LAW: TERRITORIAL REGULATION IN A BORDERLESS WORLD 35-36 (2003).

<sup>181</sup> Commission Directive 95/46/EC, art. 2(a), 2003/EC of the European Parliament and of the Council of Oct. 24, 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, O.J. (L 281), 23/11/1995 P.0011(EC)31-0050, available at <http://eur-lex.europa.eu>.

cultural, or social identity.”<sup>182</sup> Namely, the provision protects a person’s name, birth date, address, and telephone numbers as personal data. In addition, article 8 of the said Directive protects special categories of personal data by requiring explicit consent from the individuals concerned on data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and any data concerning health or sex life. These defined categories provide an easy and ready-made formula for ISPs to remove information upon receiving complaints, while at the same time allowing the exchange of ideas without sacrificing personal security and individual privacy.

If the PRC decides to adopt a notice and take down regime, it also should implement complimentary personal data protection legislation. Commissioned by the government, Professor Zhou Hanhua<sup>183</sup> and his team submitted the Experts’ Suggestions Draft on National Data Protection Law to the National People’s Congress in 2005.<sup>184</sup> The report suggested establishing a regime to protect the use, gathering and disclosure of personal information, applying to both government authorities and other private data processors.<sup>185</sup> While it is uncertain whether and to what extent the PRC will adopt the recommendation, hopefully, the *Wang Fei Case* (the unfaithful husband case mentioned earlier) will provide an impetus for legislative reform.

## V. CONCLUSION

While the Internet has offered immediacy, anonymity, and accessibility to many, it also has brought unprecedented challenges in the form of defamatory postings and harassment claims.<sup>186</sup> Despite the common perception that the Internet has been strictly controlled by the PRC

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<sup>182</sup> *Id.*

<sup>183</sup> The Director of the Institute of Law at the Chinese Academy of the Social Sciences in the P.R.C.

<sup>184</sup> For discussion of the background and a summary of the major points of the proposal, see Graham Greenleaf, *China Proposes Personal Information Protection Act*, PRIVACY L. & BUS. INT’L NEWSL. 1, 3-6 (Feb. 2008); and Graham Greenleaf, *Enforcement Aspects of China’s Proposed Personal Information Protection Act*, PRIVACY L. & BUS. INT’L NEWSL. 1, 11-14 (Apr. 2008). Suggestions have also been made by Zhu Zhigang, member of the Standing Committee of the National People’s Congress to criminalize cyber-manhunting. See *Letting Loose Fair Game in Cyberspace*, CHINA DAILY, Aug. 28, 2008, available at [http://www.chinadaily.com.cn/china/2008-08/content\\_6976852.htm](http://www.chinadaily.com.cn/china/2008-08/content_6976852.htm).

<sup>185</sup> *Id.*

<sup>186</sup> Bradley Allan Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L. J. Pocket Part 41 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1081634](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081634). In the article Areheart writes about the situation in the United States but his analysis applies equally to China.



authority,<sup>187</sup> as this article has revealed, there is also a vast and unregulated terrain of online activity in which individuals are at the mercy of the human flesh search engine.

With more than 250 million netizens in China,<sup>188</sup> the impact of online witch-hunts of targeted individuals is likely to be huge and devastating. Recent events, as highlighted in this article, demonstrate that online ridicule, condemnation, and targeting of individuals can easily spill into a form of violence in the real world, causing enormous emotional distress, tangible economic loss, and threats to personal safety. The Internet has immense potential to tear a person's life apart. The Internet has proven to be a double-edged sword, empowering many with unprecedented access to information, but also stripping many of the reputation and privacy to which they are entitled. It is high time to develop the law to tackle the problematic use of information gathering and distribution. Protecting individuals' rights must be weighed against the competing needs of allowing legitimate public discussion and dissemination of information of public concern. In this battle between private individuals and the Internet mob, the best viable option is for ISPs to delete false allegations and personal information on a notice and take down basis. A clear delineation of what constitutes personal information under the law will be essential for the swift, fair, and easy operation of ISPs under a notice and takedown legal framework. Abuse of freedom is an impediment to the long march to democracy. Though advances in political freedom may be modest at this stage, individual's rights in civil areas of reputation and privacy should not be unduly sacrificed.

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<sup>187</sup> *China Internet Control Unacceptable—European Commissioner*, FORBES, June 20, 2008, <http://www.forbes.com/feeds/afx/2008/06/20/afx5137222.html> (last visited Mar. 29, 2009); and *All Content Related to China*, OPENNET INITIATIVE, <http://opennet.net/country/china> (last visited Mar. 29, 2009).

<sup>188</sup> CHINA INTERNET NETWORK INFORMATION CENTER, STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA 22 (2008), <http://www.cnnic.cn/download/2008/CNNIC22threport-en.pdf> (last visited Feb. 19, 2009).