

# A New Review of the Criminal Law Regulation of Online Defamation

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**Abstract:** The application of Internet technology has changed the paradigm of defamation behavior. The determination of defamation act should adopt the single act theory, that is, "dissemination" should be the core element, and whether there is a "fabrication" act should not be the decisive determining factor of conviction. The essence of false information in the crime of defamation is its inconsistency with the facts, and its misleading nature makes false information work. And the possibility of infringement on the legal interests of the false information is the basis of punishment. The regulation of defamation acts should balance the relationship between the protection of reputation rights and freedom of expression, and the judgment of defamation acts against public figures should adhere to the principle of actual malice. The special identity attributes of public figures should be taken into account, and relatively loose standards should be adopted for the protection of their reputation rights. At the same time, insufficient protection of the reputation rights of public figures should be avoided. To determine the "serious circumstances" of online defamation, we should adopt the "accumulation to crime" approach, which can effectively solve the problem of using information networks to carry out a large number of low-hazardous behaviors, and the single act is not enough to constitute a crime, while the cumulative consequences or dangers reach the standard for conviction.

**Keywords:** Online defamation; False information; Right of reputation; Actual malice; Accumulation to crime

## 1 Presentation of questions: the online defamation under the "dual-layer society"

With the advent of the internet, the way humans live has been dramatically reshaped, featuring cyberspace as a crucial arena for human activities. At present, internet technology has already reached a highly interconnected stage, where the average netizen's sense of participation and agency in cyberspace is at an unprecedented level. However, the development of this technology is undoubtedly a double-edged sword; not only has it facilitated human life, but it has also been exploited by some criminals. Nowadays, cybercrime has completed an evolutionary process from targeting the internet as an object or a tool to using it as a space or site for crimes. The emergence of a "dual-layer society"—where cyberspace and the physical world coexist—has led to the seamless integration of human activities across both realms. This dual-layer society presents unique challenges and opportunities, as it allows for the free interplay of human activities between the virtual and the tangible, blurring the lines between the online and offline worlds, and challenging the traditional mechanisms for identifying

and punishing the crime of libel.

Defamation is the act of intentionally fabricating and disseminating facts to harm another person's character and reputation, and it is deemed a serious offense when the circumstances are severe. The development of internet technology has expanded the scope of human activities into the online space, which has become a hotspot for defamation due to the anonymity and efficiency of information transmission that cyberspace offers. The advancement of internet technology has not only altered the spatial dimensions of the crime of defamation but also profoundly influenced the patterns of online defamation. Some unscrupulous individuals regard the online space as a "land beyond the law," exploiting its public, anonymous, and convenient characteristics to use the information network as a new platform for criminal activities.<sup>[1]</sup> In the context of the convergence of the internet, communication networks, and broadcasting networks,<sup>[2]</sup> the "Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Defamation and Other Crimes Committed by

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Using Information Networks", which was officially implemented on September 10, 2013 ( hereinafter referred to as the "Interpretation on Online Defamation" ), has responded how to regulate online defamation behavior. The promulgation of the "Interpretation on Online Defamation" has regulated some new types of online crimes while also raising new issues in its application. How to accurately identify online defamation in practice is troubling judicial workers. For instance, there was "a case about Wang Shuai's post" in February 2009, Wang Shuai published a post on the Internet titled "Lingbao old farmer's drought resisting strategy", exposing the fact of illegal land expropriation in Lingbao City. The post rapidly attracted huge attention on the Internet. The Lingbao Public Security Bureau considers that Wang Shuai's behavior was suspected of libel crime, and in March of the same year, the city's criminal investigation team arrested Wang Shuai in Shanghai and detained him for eight days. But the case was subsequently dismissed on the grounds of acquittal. Given this, this paper, guided by the regulation of online defamation behavior in the "Interpretation on Online Defamation", delves into the nuances of the interpretation, undertakes a comprehensive doctrinal deconstruction of the application of online defamation, and explores the challenges posed by the "Interpretation on Online Defamation" in the context of "dual-layer society" and the complexities of legal regulation in cyberspace.

## **2 The determination of "fabricating facts to defame others"**

### **2.1 Defamation act: the behavior paradigm with "dissemination" as the core**

"Crime is act".<sup>[3]</sup> Beyond all questions, all crimes revolve around the act as the core element and the act is what delineates the overall operational structure of the crime. Hence, the establishment of the behavioral paradigm directly dictates the scope within which a crime is constituted. Particularly in the backdrop of the "dual-layer society", the determination and deconstruction of the act, which constitutes the elements of the crime, are

the most fundamental questions that necessitate certain answers.

#### **a. The debate between "compound act theory" and "single act theory"**

Regarding whether the act that constitutes the crime of libel is a compound act consisting of "fabrication plus dissemination", or if it requires only the single act of "dissemination", there is a debate between the theory of compound acts and the theory of single acts. The theory of compound acts posits that the crime of libel is not complete unless two distinct actions are taken: the initial fabrication of false facts and the subsequent dissemination of these facts to a third party. This theory emphasizes the malicious intent behind the creation of false information as well as the active effort to spread it, which are both necessary to cause harm to the aggrieved person's reputation rights. Supporters of this theory argue that the act of fabrication is a critical component of libel because it demonstrates a deliberate attempt to defame the victims. Without the element of fabrication, the act would not meet the threshold of criminality, as mere dissemination of true facts, no matter how damaging they are, does not constitute libel. It is generally granted that the behavioral paradigm of the crime of libel is a compound behavior of "fabricating plus disseminating", which is the prevailing academic opinion,<sup>[4]</sup> and it is also believed that this paradigm is affirmed by Article 246 of the Chinese Criminal Law.

Conversely, the theory of single acts suggests that the dissemination of false and damaging facts is sufficient to constitute libel, regardless of whether the perpetrator fabricated the facts in effect. According to this view, the primary concern is focused on the harm to the victim's reputation, and the intent to defame can be inferred from the act of dissemination itself. Advocates of the single-act theory contend that it is the spread of false information, rather than the creation of it, that causes the damage. Therefore, the focus should be on the impact of dissemination rather than the process of creating false facts. As a result, the constitutive elements of the crime

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of defamation should not include the act of "fabrication". Instead, it should only encompass the single act of "dissemination". The phrase "fabricating facts to defame others" should be interpreted as "defaming others by using fabricated facts" or "using false facts to defame others".<sup>[5]</sup> This interpretation shifts the focus from the creation of false information to its use in the act of defamation.

The "Interpretation on Online Defamation" does not fully inherit the regulatory content of the criminal law on libel crime, and in the rule of "fabricating facts to defame others", it not only explains the definition of "defaming others by using fabricating facts" to encompass the combined act of "fabrication and dissemination",<sup>[6]</sup> but also stipulates that "those who are fully aware that the facts are fabricated and thus harmful to the reputation of other people, still knowingly disseminating through networks, with the plots reach to the egregious extent, shall be deemed to use fabricated facts to defame other people." This provision appears to acknowledge at the level of judicial interpretation that the act of "dissemination" alone may be sufficient for a charge of defamation. Nevertheless, some scholars contend that the provisions of this judicial interpretation are suspected to be a kind of "legal fiction", questioning its legitimacy in terms of the subject and suggesting it may involve analogical reasoning.<sup>[7]</sup> As a consequence, the promulgation of the "Interpretation on Online Defamation" has made the academic debate on the manner of action in the crime of defamation more complex. The resolution of this debate is of great significance for the conviction and defense in defamation cases.

#### **b. The promotion of "single act theory"**

Defamation should be based on "dissemination". The presence or absence of "fabrication" acts should not be a determining factor in conviction. Specific reasons are as follows:

First, what is infringing on legal interests in libel crime is the act of "disseminating" rather than the single act of fabricating. "Fabrication" refers to making up false facts out of thin air, while "dissemination" refers to

spreading the fabricated content by means of language or text.<sup>[8]</sup> According to traditional criminal law theory, the act of libel crime is constituted sufficiently by the perpetrator's fabricating false information firstly and spreading the false information secondly, that is, both fabrication and dissemination of false information are indispensable to the establishment of the crime of libel. The composite behavior pattern of "fabricating plus disseminating" is indeed enough to infringe on the legal interests of victims, but if the two behaviors are separated, only "disseminating" behavior is also enough to cause a substantial infringement on the legal interests of aggrieved persons.

The infringement of the crime of defamation on the legal interest is realized through the dissemination and diffusion of defamation information. If the defamation information is not transmitted in the end, it cannot cause substantial harm to the legal interests of the sufferers. On the contrary, even if the perpetrator does not participate in the fabrication of defamatory information, if he plays a vital role in the diffusion and dissemination of defamatory information, it will directly infringe on the legal interests of the victim. In other words, the act of fabricating without spreading is not enough to infringe on legal interests. The act of spreading without fabricating is sufficient to harm legal interests. Therefore, under the crime recognition concept oriented by the infringement of legal interests, actions that pose a real danger to legal interests should be considered as dissemination behavior. With the real-time and efficient transmission of Internet technical information, the social harm and infringement upon legal interests of this behavior will be more significant in cyberspace, and defamatory information can be fully spread in cyberspace in a very short time. This information transmission efficiency is incomparable to the real space, especially with the help of information forwarding by some "Internet authentication celebrities", even some false information can become a hot topic on the network.

Secondly, the claim that the crime of libel must

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involve both fabrication and dissemination is not conducive to the protection of legal interests. The network society not only provides a new space for human activities but also changes the way humans do them. People are no longer satisfied with the communication mode in real space and are expanding their communication behavior to cyberspace. While the development of network technology brings high convenience to human activities, it is also used by some lawbreakers. The openness and anonymity of the network space provide an "ideal" space for the spread of some defamatory information. Some defamatory information spread simultaneously in real space and network space, causing serious harm to the legal interests of aggrieved persons. Although it is normal for defamation to co-exist with fabrication and dissemination, single dissemination is becoming the most common behavior mode of defamation crime in the context of network society. Some defamatory information may be fabricated by others in the real space and then disseminated by the person who spreads the information in the online space, thereby causing serious harm to the legal interests of the victim. For example, someone fabricates a false defamatory message against colleague A, and colleague B, who has a grudge against A, posts it online. This defamatory message, through continuous forwarding and spreading, has an increasingly wide range of influence. In the continuous accumulation of harmful consequences, B's act of spreading has resulted in a substantial infringement on legal interests. If only those who commit both the acts of fabricating and disseminating are punished, it will undoubtedly lead to loopholes in criminal punishment, resulting in those who maliciously spread information and have caused substantial infringement of legal interests to escape criminal punishment.

Moreover, due to the characteristics of netizens, there may not be any intentional fabrication in the process of committing defamation. The number of netizens is huge, and there is a great span in age, educational level, and expression ability, and there is also a substantial difference in discernment ability. Even if the original information

is true, although it is not intentionally fabricated, it will gradually become distorted and eventually become false information in the process of being forwarded repeatedly due to the differences in expression of netizens and the characteristic of echoing others. If this false information is maliciously spread, it will have the consequence of infringing on others' legal interests. Therefore, it is not conducive to the realization of the protective function of criminal law to determine the crime of defamation only when both the acts of fabricating and spreading are present at the same time, and it will cause the scope of criminal punishment to be improperly narrowed down.

Third, limiting defamation to dissemination does not extend the scope of punishment. Scholars who believe that the act of defamation must include both the act of fabricating and the act of disseminating may think that conviction for a single act of disseminating will result in an unlimited expansion of the scope of criminal punishment. In fact, this concern is not necessary, because the perpetrating act is only one element of the establishment of a crime, and whether a crime is established or not should be determined by combining subjective factors, responsibility ability, causality, and other factors. For example, subjective content that intentionally damages another person's reputation is an element of the libel crime, and only those who actively participate in spreading false information with the intention of damaging someone's reputation can be held accountable. This means that simply disseminating information with no malicious intent, even if it may damage someone's reputation, would not constitute defamation. Limiting the libel act to dissemination does not lead to an undue expansion of the scope of punishment. Because, in addition to the execution of the act, the crime of libel must be strictly limited by at least the following two key elements.

In the first place, the premise of spreading defamatory information is that the perpetrator has subjective intention. The determination of crime should adhere to the principle of the unity of subjectivity and objectivity. The

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establishment of the crime of libel requires the perpetrator to disseminate defamatory information objectively and requires the perpetrator to have intention as well, that is, the perpetrator knows that he spreads false facts that are enough to damage the reputation of others and hopes or allows this result to be realized. If the perpetrator does not know that he is spreading defamatory information, even if his spreading behavior damages the reputation of the victim, it cannot be identified as the crime of defamation. In the second place, the "disseminating" behavior is limited to serious circumstances. Not only does the perpetrator carry out the defamation act, but the establishment of the crime of defamation also requires the perpetrator's behavior to reach the degree of "serious circumstances", the number of times that the defamation information is reposted and viewed, and the serious consequences caused to the victim are all circumstances that affect the establishment of the crime of defamation. Therefore, even if the act of dissemination is regarded as the only consideration of the establishment of libel acts, it will not lead to an expansion of the scope of punishment for libel.

Fourthly, proving that someone intentionally fabricated information is quite challenging in practice. In comparison, the act of "dissemination" is a more concrete and observable behavior. On one hand, the act of dissemination has significant visibility and traceability. Once an individual carries out the act of dissemination, such as forwarding defamatory remarks or sharing defamatory content, it usually leaves a trackable trail in the physical space or on the internet. For instance, emails, social media posts, or public statements can all leave traces of the act of dissemination. To prove that a person intended to fabricate facts, it is necessary to demonstrate that they not only created false information but also knew it was false and intended to spread it as true, which typically requires direct evidence, such as witness testimony or the defendant's admission. Compared to the fabrication of facts, the act of dissemination often has more objective evidence. For example, the method and

timing of information dissemination can be documented and preserved, while the intent to fabricate is more challenging to prove with objective evidence. The act of dissemination is a clear action, where an individual conveys certain information to a third party, and this action itself is generally not in dispute.

## **2.2 Content of fabricated facts: false information**

The crime of libel requires the dissemination of false information that is harmful to the reputation of the aggrieved person. If the perpetrator disseminates true information that is harmful to the reputation of the aggrieved person, it cannot be identified as the crime of libel. If it meets the constitutive requirements of the crime of insult, it can be identified as the crime of insult. False information refers to factual information inconsistent with the facts or fictitious information.<sup>[9]</sup> The difficulty of the theory lies in how to determine whether a piece of certain information is false information, whether the information as a whole should be identified as false information as long as there is any content inconsistent with the facts, or whether the main content of the information should be false before it can be identified as false information?

### **a. The nature of false information: factual inconsistency**

While distinguishing the truth of information in practice is indeed complex, the primary basis for determining whether a piece of information is false is its inconsistency with the facts. However, the term "facts" does not encompass every detail related to an event or situation; otherwise, it would excessively expand the scope of identifying false information. After all, it is difficult to ensure that there are no changes in any details during the transmission of information, especially in the realm of Internet communication, "Everyone knows that there is no guarantee that the expression on the Internet is true".<sup>[10]</sup> But when there is a certain deviation in content between the disseminated information and the original factual information, the question arises: to what extent or with what specific characteristics must this deviation have to be classified as false information? Some scholars have attempted to summarize the essence of false information

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as "groundlessness," arguing that information with some factual basis but not completely consistent with reality should not be considered false.<sup>[11]</sup> However, the standard of "groundlessness" itself is rather vague, and according to this standard, it still cannot provide an operational basis for the judgment of false information. Moreover, the subjectivity in determining the factual basis and the potential bias in interpreting "facts" can further complicate the issue.

This paper holds that in the context of criminal law, the assessment of the truthfulness of information should be intricately linked to the legal nature of the information. Specifically, each piece of information contains one or several core elements, which are key to determining the legal nature of the information. If a piece of information, when retold, does not deviate from the original information in terms of these core elements, it should not be deemed as false information, even if there are some discrepancies in the details with the original information. Conversely, if the retold information contradicts the original information on these core elements, it should be identified as false information. To illustrate with a concrete example, suppose an accident occurred in City B at noon, resulting in three deaths and six serious injuries. In this case, the core elements that determine the legal nature of the information include the location and occurrence time of the accident, the nature of the accident, and the casualty situation. When further judging these core elements, we do not require the retold information to be completely consistent with the original information in every detail. What we are concerned with is whether the retold information can accurately reflect the essential characteristics of the event. For instance, if the original information indicates that the accident occurred at noon and the retold information mistakenly states it was in the evening, this does not constitute a deviation from the core elements because the retold information still conveys the occurrence and severity of the accident; therefore, this retelling should not be considered false information. However, if the retold information erroneously states

that only one person died, it fundamentally deviates from the severity of the accident as conveyed in the original information, and thus it is considered false information. In other words, for the retelling of the casualty situation, if the original information indicates that it is a major accident, then the retold information only needs to conform to this nature, without requiring the specific casualty figures to be completely consistent with the original information. Distinguishing true information from false information by comparing the core elements of the legal nature of information is highly operable in practice.

Of course, although inconsistency with the facts is an essential characteristic of false information, whether a piece of information is considered false within the criminal law evaluation system also requires a comprehensive judgment in conjunction with other characteristics of false information, which may include but are not limited to the source of the information, the attributes of the information, and the potential impact of the information on the public.

**b. The mechanism of false information work: misleading**

The reason for which false information can capture people's attention, ignite discussions, and spread widely in society is its deceptive nature. Deception here implies that false information can lead people to believe that it might be true. It mimics the characteristics of genuine information, leveraging people's initial trust in the information to achieve widespread dissemination. If a piece of false information does not make people feel that it has some truth to it, then it will not cause social concern, and from the perspective of criminal law, it will not be considered false information. For instance, if someone posts online, "I'm so tired of work, I wish all the companies in the world would disappear," it is clearly an expression of venting emotions, and no one would genuinely believe it. Naturally, such a statement will not cause chaos in the social order. On the contrary, some murder threat information announced online by local terrorists that occurred in a certain country last year has

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attracted the attention and unease of the whole society because the act of murder has truly happened, thus giving the information a certain degree of credibility. In the era of information networks, everyone can voice their opinions to the entire network through the internet. The convenience of information dissemination also makes it possible for some people to vent their emotions online. Some individuals prefer to express their dissatisfaction with real society in cyberspace, revealing their positions and emotions. These actions do not constitute a substantial threat to social order. When dealing with such information, caution is required, and it is not advisable to blindly expand the identification of false information under the criminal law application system; otherwise, it would violate the principle of restraint in criminal law and improperly erode citizens' freedom of speech and expression.

**c. The basis of punishment for false information: the possibility of infringement on legal interests**

Not all false information should be subject to legal regulation, especially criminal law. The intervention of criminal law is usually based on the protection of public interests or individual rights. The possibility of harming legal interests is an important condition for criminal law to impose criminal penalties on false information, that is, criminal law only regulates false information that may cause harm to legal interests rather than simply punishing all false information. If a piece of information cannot possibly harm legal interests, even if it is false, it cannot be punished as false information under the criminal law system.

The absence of the possibility of harming legal interests due to false information can be divided into two scenarios: one is the absolute impossibility of harming legal interests, which means there is no possibility of causing harm under any circumstances. For example, if someone publishes a detailed description of a completely fictional extraterrestrial civilization online, a civilization with highly advanced technology and a unique social structure. In this case, although the information itself

is false, because the story is entirely fictional and has no connection with any individuals, organizations, or countries on Earth, and does not involve any real events or characters, it will not cause actual harm to legal interests. The other scenario is the relative impossibility of harming legal interests, which means there is no possibility of causing harm under specific scopes or conditions. For instance, in a private forum for science enthusiasts, a member posts a false review about a scientific invention that could potentially cause injury and describes some possible harmful consequences. Since this forum is private and the members are science enthusiasts who can discern the authenticity of the review, they will not blindly forward and spread it, so such discussions generally do not have an impact on the outside world. In this example, the false information is disseminated within a restricted group with common interests, and the audience has the ability to identify the truth, so it is not distributed and no legal interest harm is caused. However, if the false information posted within a specific group is used maliciously or spread to a wider audience, it can still cause actual harm to legal interests and may be subject to legal regulation.

To sum up, false information punished by criminal law must have the possibility of infringing on legal interests.

**3 Protection interests: the boundary between the right of reputation and freedom of expression**

In the network society, legal interests are faced with complex threats and challenges.<sup>[12]</sup> The popularization and low cost of the Internet are the reasons for the rampant rumors on the Internet. In the era of information networks, the right to publish information is fully liberalized. Every netizen can express his thoughts and make comments through the Internet platform, and every free citizen has the right to express his thoughts and convey information through language or text, but the content of information is not without any restrictions.

**3.1 Freedom of expression and reputational damage**

Freedom of speech, as an important hallmark of the progress of human society, refers to the freedom to

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express what one sees, hears, and thinks in a certain way or form.<sup>[13]</sup> It holds a pivotal position in the system of individual rights and is not subject to any unreasonable restrictions or interventions. Its exercise not only helps individuals express their opinions and share ideas but also promotes social communication and public discussion. It aids citizens in better participating in the management of national public affairs, driving national development and social progress. Therefore, modern democratic states attach great importance to the protection of citizens' freedom of speech and regard it as one of the basic rights of citizens stipulated in the law (usually the constitution). Our country's constitution also provides for the protection of citizens' freedom of speech. With the rapid development of Internet technology, the way humans communicate has undergone profound changes. Cyberspace, as a new platform for expression, provides the public with a more convenient, broad, and open place to speak. In cyberspace, people can freely express their views, exchange ideas, and even participate directly in the discussion of public affairs online. More people can actively exercise their freedom of speech through the Internet, and the ways of exercising it are also more diversified.

However, problems also arise, as the realization of individual freedom of speech often conflicts with other legal interests, especially with rights such as the right to privacy and the right to reputation. Privacy rights emphasize an individual's control and management over their peaceful private life, as well as intimate spaces, activities, and information that they do not wish others to know, free from intrusion by others. When free speech involves private information or activities, if it is disseminated, it may infringe upon someone's privacy. Similarly, when speech involves criticism or commentary about others, there is the potential to damage someone's reputation. Therefore, when the realization of freedom of expression conflicts with the legal interests of others, how to balance the relationship between interests is a perplexing issue. The handling of online defamation cases must clarify the relationship between freedom of

speech and the right to reputation. When dealing with the relationship between the two, the following three criteria should be adhered to:

First, freedom of expression is a particularly important right. Chinese and foreign scholars have extensively demonstrated the status and value of freedom of speech. Although there are some differences in the specific expressions, they all believe that freedom of expression has an irreplaceable and prominent position, at least in the realization of individual subject value and the improvement of national democratic rule. In the realization of personal value, freedom of expression helps us to "enhance knowledge and obtain truth".<sup>[14]</sup> Thoughts can only be sublimated through communication. In the process of speech expression, everyone's thoughts are expressed and conveyed through speech, and then a collision of views and ideas is formed. In the collision of ideas, we can summarize and discover the essence of facts, correct the erroneous views that have been formed, and constantly shape and improve our personal knowledge structure and value system. In this sense, freedom of expression is an indispensable right to ensure individual progress. At the level of perfecting national democratic rule, freedom of expression builds a bridge of communication and interaction between diverse groups in society and between the people and the state. A democratic country naturally has the right to allow citizens to freely express their opinions. The government is not a mechanical institution to formulate and implement policies, and the government's policy formulation must extensively solicit and respect public opinions. Freedom of expression is the basic premise for guaranteeing citizens' free expression of public opinions and ensuring the state's collection of people's true wishes. Citizens' freedom of expression can not only supervise and restrict the government's ability to perform its duties according to the law but also provide suggestions and contribute wisdom to policy formulation. In conclusion, freedom of expression is an especially important right.

Secondly, the realization of freedom of expression

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should not violate the right of reputation. The right of reputation is a kind of personality right, and reputation is a comprehensive evaluation of the subject's morality, ability, reputation, and other aspects. Reputation is related to the realization of a person's value,<sup>[15]</sup> and a violation of reputation is generally carried out through insults, slander, privacy disclosure, and other forms. Defamation is an act in which the perpetrator degrades and destroys the victim's right to reputation by spreading some fictional facts. Defamation is based on the expression of the perpetrator's speech. Therefore, the determination of defamation faces a balance between freedom of expression and the destruction of the right of reputation. It is the right of freedom of expression to convey one's own views and propositions through speech, but when a certain speech makes others feel unpleasant, should the right to freely exercise freedom of expression be restricted to a certain extent? This is the crux of clarifying the relationship between freedom of expression and the right to reputation.

Citizens exercising their freedom of speech is the cornerstone of a democratic society and is protected by various laws and human rights conventions. However, this freedom is not without limits, especially when it infringes upon the legitimate interests of others. When an individual intentionally uses speech to infringe upon the legal interests of others, such as through defamation or invasion of privacy, and the circumstances are severe, the exercise of this freedom of speech should be denied. The internet, as a public domain, has become an important space for expression, where freedom of speech is exercised more comprehensively, but at the same time, it also provides a place for the rapid spread of harmful speech and the infliction of damage. Therefore, in the information age, the protection of freedom of speech should not be absolute. The internet is not a place outside the law, and individuals must be responsible for their speech online, just as they are responsible for their actions in the real world. "Internet freedom" should also be subject to legal constraints, and the protection of the right to reputation should not be diminished in the Internet age. In summary,

although freedom of speech is a fundamental right, it must be exercised responsibly, taking into account the privacy rights of others.

Third, the protection of rights should maintain a balance between freedom of expression and the right of reputation. There is no doubt that freedom of expression and the right to reputation are both important contents of the civil rights system, and the protection of the two should not be biased. In the era of "three networks integration", the expression of speech is more convenient, but the phenomenon of using the Internet to slander and insult others is also showing an increasing trend, and the introduction of "Interpretation on Online Defamation" is under such a social background. Legal or even criminal regulation of the abuse of freedom of expression does not mean limiting the exercise of freedom of expression. On the contrary, the purpose of justice is to better guarantee the realization of freedom of expression.<sup>[16]</sup> Truly free speech and expression spaces must be built on the basis of mutual respect among subjects and no deliberate distortion of facts. Information explosion is not equal to the full exercise of freedom of expression. If a large amount of information is false information, or even defamatory information that infringes on the victim's right to reputation, such an information environment is not conducive to the realization of freedom of expression. As a consequence, the exercise of freedom of expression is not in conflict with the full respect for others' legal interests and the protection of others' rights of reputation, and the two are mutually fulfilling in essence.

However, it should be noted that the characteristics of rights and changes in the social environment will have an impact on the relationship between rights. In particular, the rapid development of information network technology has profoundly changed the social structure and communication environment, and the development of network technology has had a certain impact on the relationship between freedom of expression and the right to reputation. The language is extraordinarily rich in meaning, and a word often has various semantics, even

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the same word will have completely different meanings in different contexts. In addition, other interveners process and tamper with the original information in the process of speech transmission, so that once the speech is separated from the original publisher, it is easy to produce content that deviates from the original intention. Information network technology has expanded the dissemination scope of information in all aspects. Once a piece of information is published on the Internet, it can spread to many regions of the world in a noticeably short time. At the same time, once the information is published, visitors can reprocess and spread the information, and the transmission scope and path of the information cannot be completely controlled by the original publisher. The huge amount of information on the Internet makes it difficult for netizens to distinguish between true or false, and the superposition of these factors makes the complete authenticity of information seem to be a luxury, but this does not mean that false information has obtained a legitimate basis. Combined with the development reality of the network society, a more reasonable approach at present should be to provide a relatively relaxed environment for freedom of expression. It is not appropriate to blindly expand the scope of recognition of reputation infringement. Of course, if the perpetrator's speech materially damages the victim's reputation right, the perpetrator's behavior should still be punished by law.

### **3.2 Defamation against "public figures": application of the actual malice principle**

A public figure is a person who is deeply involved in the process of solving important public problems, or who, because of his or her fame, has been influential in a widely publicized event.<sup>[17]</sup> The identity attributes of public figures make their behaviors often exposed to the public, and their words and deeds are often in the public domain. In addition, the identity attributes of public figures are often associated with the power conferred by their positions. Therefore, the public has the right to supervise some public figures and even to make criticism and suggestions. Article 41 of our country's Constitution

affirms the right of our citizens to criticize and make suggestions to any state organ or country functionaries. Criticism and suggestions about public figures may sometimes be untrue and may even have a certain negative impact on their personal reputation. Whether this situation can be regarded as defamation is a problem to be solved in the determination of defamation crimes against public figures. The essence of this problem is to explore whether the standards for determining defamation crimes against public figures are different from those against general subjects. Academic circles generally believe that due to the identity of public figures, the standards for establishing libel acts against public figures should be more stringent.

Freedom of expression is not the protection of criminal acts, this issue has been discussed above, but we should also be vigilant about the problem of "a conviction based on speech", especially some "libel cases" that have appeared on the Internet in recent years. Take "the case about a useless branch secretary" of Guizhou province as an example. Ren, a resident of a community in Bijie City, was dissatisfied with the new property company passing the probation period while the community did not open the owners' meeting and said in the WeChat group that the community secretary was a "useless branch secretary", so he was taken away from Guiyang and detained for 3 days by the Qixingguan Branch of the Bijie Public Security Bureau. Thereafter, Ren submitted an administrative reconsideration. The Bijie Public Security Bureau issued a notice after verification, that the subpoena procedure was illegal. The administrative punishment decision made by the Qixingguan Branch against Ren was revoked according to law, and the police station director and the police officer involved in the case were suspended for investigation. Such cases have raised alarms about the problem of law overapplication that criminalizes criticism of public figures.

The rise of network technology has given birth to the phenomenon of participation in politics and administration through networks. Citizens have realized a wider range of channels to participate in politics and administration

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through the Internet. Network participation in politics and administration not only satisfies the common people's desire to participate in national governance but also delivers a lot of folk wisdom for national governance. The characteristics of the status of a public figure determine that a more strict stance and standard should be adhered to in judging whether a public figure has been subjected to defamation, not only because the role of a public figure voluntarily exposes him to public scrutiny, but also because, compared with ordinary citizens, he has a wider range of official channels to help him explain and refute when he has suffered defamation. Citizens' right to criticize does not mean the right to accuse state organs and their staff of correct facts.<sup>[18]</sup> The lack of opportunities and ability to know the truth leads some people to inevitably have certain deviations when criticizing public figures, and such deviations should be tolerated to protect the important right of freedom of expression. Excessive regulation of freedom of expression will lead to a shrinking of expression.

In view of the special identity attributes of public figures, both at home and abroad have adopted moderately easy methods to determine the crime of libel against public figures. Meiklejohn even proposed "the principle of absolute freedom of public policy discussion", that is, as long as it is "for the public" speech, absolutely can not be restricted.<sup>[19]</sup> But Meiklejohn's determination standard is more than absolute, which is not conducive to the protection of the reputation of public figures. The principle of actual malice, which has been adopted in some foreign jurisdictions for judging defamation of public figures, is an important legal principle. This article believes it has reference value. Originating from the 1964 U.S. Supreme Court case "New York Times Co. v. Sullivan", it was further developed in subsequent cases. The actual malice standard emphasizes the intent behind the publisher's actions, considering defamation to be established only if the publisher knew the content was false or acted with reckless disregard for the truth. Improper expressions about public figures are only subject

to the crime of defamation if they meet the condition that "the publisher knew the expression was false or recklessly disregarded the truthfulness of the expression".<sup>[20]</sup>

The principle of actual malice strikes a good balance between freedom of speech and the right to the reputation of public figures, and it has its rationality. Specifically: Firstly, this principle takes into account the special identity attributes of public figures and adopts a relatively relaxed standard for the protection of their right to reputation. It protects the freedom of speech of the media and the public, preventing the suppression of free speech by the misuse of defamation charges, which has significant social significance for the development of the country. Information about public figures on the internet is always difficult to verify, and the ability of ordinary people to discern is limited. According to the standards for identifying online defamation against ordinary people, if the information is false and ordinary people spread it online based on the mentality of participating in politics and governance, it can constitute the crime of online defamation if the situation is serious, which may easily lead to a "chilling effect." However, the use of the "actual malice" principle can reduce the public's concerns as long as there is no intention of "knowingly saying what is false" when making statements about public figures, it does not constitute defamation. Secondly, although public figures should be tolerant of public supervision and criticism due to their own identity attributes, malicious defamation will be punished according to the "actual malice" principle, which to some extent avoids the phenomenon of insufficient protection of the right to reputation of public figures. Some scholars have argued that the "actual malice" principle may lead to a "reduction of private rights," that is, reducing the legal protection of public figures' personal reputation interests to accept media questioning and even criticism without malice, which will inevitably lead to judicial injustice.<sup>[21]</sup> This article believes that the right of the media to criticize and make suggestions is actually a collection of individual citizens' freedom of speech rights. The "actual malice"

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principle does not require a "reduction of private rights," but contains the underlying logic that when individual interests conflict with collective interests, individual interests should appropriately yield.

#### **4 The determination of "serious circumstances": the application of the identification path of "accumulation to constitute the crime"**

The establishment of libel crime requires "serious circumstances", and the "serious circumstances" content of "using information networks to defame others" is specified in Article 2 of the "Interpretation on Online Defamation",<sup>[22]</sup> including the number of times the defamatory information has been viewed and reposted, the harmful consequences to the aggrieved persons, and the fact that it has been subject to administrative punishment. The most controversial one in the article is the provision on the number of clicks, views, and reposts of defamatory information, that is, "the same defamatory information has actually been clicked, viewed more than 5,000 times, or forwarded more than 500 times". There are various opinions in the academic circle on whether the content of this provision is reasonable and its application.

##### **4.1 The response to the negativism**

Some scholars have raised doubts about the criteria for the crime of online defamation as stipulated in the "Interpretation of Online Defamation," arguing that the method of defining the number of clicks, views, and forwards of defamatory information does not scientifically reflect the social harmfulness of the act. In practice, the severity of harm caused by defamatory remarks can vary greatly. Sometimes, even though the number of clicks or views has reached the legal standard, the actual damage may be minor, yet it is still deemed as a crime. Conversely, even if the number of clicks or views has not reached the legal standard, the actual damage may be very severe, yet it cannot be subject to criminal punishment, this could violate the principle of proportionality between crime, guilt, and punishment. Such a purely quantitative method may not meet the requirements for conviction and sentencing. Some scholars believe that using quantitative

standards as the basis for conviction may lead to objective imputation of guilt. Other scholars have pointed out that "five hundred times" or "five thousand times" and similar figures are merely formal standards. This paper argues that these views all have certain cognitive biases and respond to them collectively.

##### **a. Refutation of "objective imputation"**

The crime of defamation is a circumstance-aggravated crime with damage factors included in the specific constitutive elements.<sup>[23]</sup> The seriousness of the circumstances of defamation is a crucial factor in judging whether the crime of defamation is established. Therefore, it is crucial to clarify the circumstances of online defamation for the determination of the crime of defamation. From the perspective of the degree of infringement upon legal interests, the more people know the defamation information, the deeper the harm to the victim will be, which is an important criterion to determine whether the circumstances of the crime of defamation are serious or not. The provisions on the number of clicks, browsing, and forwarding of defamation information in the "Interpretation on Online Defamation" are based on such standards.

The number of clicks, views, and shares that defamatory information receives is a relatively direct and important metric for assessing the breadth of information dissemination in the digital age. However, some scholars argue that using standards such as click-through rates and the number of shares to determine whether a defamation act constitutes a crime is unreasonable. They believe that it is the actions of others that decide whether a person has committed a crime, which clearly violates the fundamental spirit of the application of criminal law,<sup>[24]</sup> Moreover, once information is released onto the Internet, it spreads in terms of speed and scope is beyond the control of the publisher. Relying on objective indicators, such as the number of clicks for conviction, could lead to a situation where a person is deemed guilty based on outcomes they cannot control, which raises suspicions of objective imputation. Additionally, using quantitative indicators as

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the standard for criminalization could also be exploited by malicious individuals, such as manipulating click and share counts to falsely accuse someone of defamation. This paper believes that the aforementioned interpretations are not reasonable for the following reasons.

First, the infringement of defamatory information on the legal interests of the aggrieved person is generally realized through the intervention of others (third parties), that is to say, through the dispersal and dissemination of defamation information by other people. The information causes the infringement of the legal interests of the aggrieved person, which is the characteristic of the crime of defamation and is unavoidable. It is not convincing of the criticism that based on the behavior of others, according to the number of clicks, views, and reposts of defamatory information, it is determined whether a person has committed a crime or not, which is stipulated in "Interpretation on Online Defamation". Secondly, once the information is published, it may be out of control and spread freely, which is basic common sense. The information publisher already knows the direction of information dissemination when he or she is publishing the information. Therefore, once the defamatory information is published, the aggrieved person's right to reputation is in danger of being infringed at any time, and the behavior of the perpetrator's information publication itself has the nature of infringement on legal interests. The publication of defamatory information by the perpetrator is the basis of the infringement of the aggrieved person's legal interests, and the browsing, clicking, and forwarding of information by others are all premised on the publication of information by the perpetrator. The establishment of the crime of defamation requires sufficient constitutive elements. Therefore, the number of clicks, browsing, and forwarding of defamatory information as the basis for criminalization will not fall under "objective imputation".

#### **b. Negation of "formal standard theory"**

In addition to the view of "objective imputation", some other scholars believe that "serious circumstances" is a substantive standard, but the "Interpretation on Online

Defamation" interprets the substantive standard as "five thousand", "five hundred" and other formal standards, which only consider the spread scope of defamatory information, but do not consider the credibility of defamatory information,<sup>[25]</sup> which can be called "formal standard theory". At the same time, there are also views that the standard for determining "serious circumstances" stipulated in the "Interpretation on Online Defamation" is too simple and rigid, which is not conducive to combating online defamation acts but restricts citizens' freedom of expression.<sup>[26]</sup> Such a provision is not rigorous, and may either expand the scope of the establishment of crimes or improperly limit the scope of the establishment of crimes, specifically: First, although a piece of certain information meets the quantity requirement of a crime, if it is clicked, viewed, or forwarded by the same person, the result caused by malicious clicks or malicious promotion of a same person will be borne by the information publisher, which obviously violates the principle of the compatibility of crime and punishment,<sup>[27]</sup> and will expand the scope of crime identification. Secondly, after defamatory information is published on the Internet, the information can be viewed on some platforms without clicking, so the number of clicks cannot correspond to the real number of clicks,<sup>[28]</sup> which will lead to an improper limitation of the identification of crimes.

First of all, the opinion that the "Interpretation on Online Defamation" adopts the formal standards of "five thousand" and "five hundred" without considering the credibility of defamation information has theoretical loopholes because information with no credibility can hardly be identified as defamation information in criminal law, and the information itself cannot be the object of regulation of defamation crime, and this is not a theoretical problem that should be solved at the stage of judging the "seriousness of the circumstances". The very term "formal standard" is therefore problematic.

Secondly, the way to regulate "serious circumstances" in the "Interpretation on Online Defamation" will not cause improper expansion or excessive limitation of the

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scope of punishment. Once the information is put out publicly on the Internet, it will face the possibility of being clicked, viewed, and forwarded by an unspecified majority of people. After being forwarded by the clicker or viewer, the original information will experience the possibility of being clicked, viewed, and forwarded repeatedly. Through such a cyclic operation, once the defamatory information is published on the Internet, it is difficult to completely remove it anymore. There is always danger and the potential for harm to the aggrieved person. The development of Internet technology has contributed to the formation of a "dual-layer society". Online defamation can be spread both in real space and in cyberspace. Defamation information disseminated in cyberspace is likely to spread to real space, and defamation information in real space may also be spread again in cyberspace, forming a phenomenon of simultaneous dissemination of defamation information both in real society and cyberspace. The harm to the victims is even more profound. Therefore, the characteristics of network defamation make the act itself serious, and this identification method will not restrict citizens' freedom of speech and expression and will not lead to the expansion of the scope of punishment.

Finally, due to the complexity of information network technology and the extensive and untraceable scope of information transmission, it is unrealistic to accurately estimate the number of clicks, views, and forwarding of defamation information, but this does not affect the status of the number of clicks, viewing, and forwarding in the identification of "serious circumstances" of online defamation. Counting the number of clicks, views, and other engagement metrics for defamatory information on the internet is not just about obtaining a numerical value. The real purpose is to provide a more intuitive and quantitative reference to estimate the spread of the defamatory information. The extent of the spread is directly related to the degree of infringement on the legal interests of the aggrieved person, reflecting the coverage and impact of the defamatory information among the

general public. Therefore, even if this numerical value may be subject to some deviation due to technical factors on certain websites, it should not negate the rationality of this standard for determination.

#### **4.2 The expansion of the identification path of "accumulation to constitute the crime"**

The conditions for the establishment of a crime stipulated in the criminal law of Germany, Japan, and other countries of the continental law system are only qualitative, not to quantify, and the quantitative task is left to the judiciary to complete. Compared with the conditions for the establishment of a crime in continental law system countries, the conditions for the establishment of a crime stipulated in our criminal law are both to qualify and quantify. Under such a legislative model, the seriousness of the circumstances is one of the conditions for the establishment of some constitutive elements of crime. Serious circumstances can be reflected by criminal means, methods, time, consequences, and other factors. Under the background of an information network society, some new cyber crimes need to be repeatedly implemented and continuously accumulated to achieve the conditions for the establishment of serious circumstances. In other words, the use of information networks to carry out a large number of low-harm behaviors, although the low-harm behavior alone is not enough to establish a crime, the cumulative harmful consequences or risks meet the standards of criminalization. This phenomenon is called the "accumulation to constitute a crime" type of new cybercrime.<sup>[29]</sup>

The "Interpretation on Online Defamation" defines acts that reach a certain number of clicks, views, and reposts as "serious circumstances", in line with the characteristics of the crime constitution in new cybercrime. In the specific identification of network defamation acts, we should fully grasp the compositional characteristics of new cybercrimes, and implement the principle of compatibility of crime, responsibility, and punishment. It is necessary not only to avoid undue leniency but also to avoid excessive limitation of the

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scope of criminal establishment. In order to achieve the aforementioned purposes, the following two issues need to be clarified:

First, the number of "actual" clicks, browsing, and forwarding of the same defamatory information refers to the number of clicks, browsing, and forwarding of persons other than the actor, that is, the number of browsing, clicking, and forwarding of the actor himself is not included. Some people think that the number of clicks and browsing times of the victim and the website management personnel should also be deducted,<sup>[30]</sup> but this view is unreasonable. Because once the defamatory information is published, it is likely to be spread, which makes the defamatory information in a state known to an unknown majority. The click, browsing, and forwarding of the defamatory information by the sufferer and the website management personnel, will not affect the dangerous state, or the establishment of the crime, of course.

Secondly, the obscurity of the website where defamatory information is posted does not preclude the establishment of the crime of defamation. Even the most obscure and little-known websites can be browsed, and once defamatory information is published on these sites, it is in a state of public exposure. The interconnected nature of the internet means that content from one site can easily be linked to or shared on another, hence defamatory information is always at risk of being forwarded to other websites. Moreover, the current search engine capabilities are extremely powerful, almost indexing the content of all websites, so no matter how concealed a website is, there is always a chance that defamatory content can be accessed through search when people actively looking for information related to the topic. With the continuous development of technology, a website that is obscure today may not remain so in the future, and the potential for defamatory information to be accessed and disseminated always exists. Therefore, the lack of fame of the website where defamatory information is posted does not affect the possibility of the information being clicked on, viewed, or shared, and does not deny the potential

harm that the defamatory information may cause.

## 5 Conclusion

This article aims to delve into the issue of criminal regulation of online defamation in the context of a "dual-layer society". In today's society, with the rapid development of information technology, the internet has become another space for human activities, forming what is known as the "dual-layer society" in conjunction with the real world. The characteristic of the "dual-layer society" lies in the close interweaving of the virtual world and the real world, where the two influence and permeate each other. This intermingling makes online defamation behavior more covert and destructive. On one hand, the anonymity of the internet allows defamers to easily conceal their true identities, thereby evading legal sanctions; on the other hand, the extensiveness of the network allows defamatory information to spread rapidly within a short time, causing great damage to the reputation of the defamed. Compared with traditional defamation, online defamation has undergone significant changes in terms of means, methods, and outcomes. Firstly, the dissemination channels of online defamation are more diverse, including not only traditional forms such as text and images but also multimedia forms such as video and audio, making defamatory information more vivid and realistic. Secondly, the impact range of online defamation is more extensive, quickly spreading to all parts of the country and even globally. Lastly, the consequences of online defamation are also more severe, often causing irreparable damage to the defamed.

As a crucial instrument for upholding social justice and order in the digital era, criminal law must evolve to meet the new trends in crime brought about by advancements in technology. The defamation crime system needs to be improved and its doctrine reviewed in response to the major changes in online defamation. This will help to address new problems with the way the crime is applied, define what constitutes false information and defamation, and strike a balance between the rights to one's reputation and freedom of speech. It is imperative

to make reference to some international concepts that hold significance. Only in this way can the criminal law maintain the fortress of justice in the digital age and uphold social harmony and stability.

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