



Information Technology Law in the
Global Society

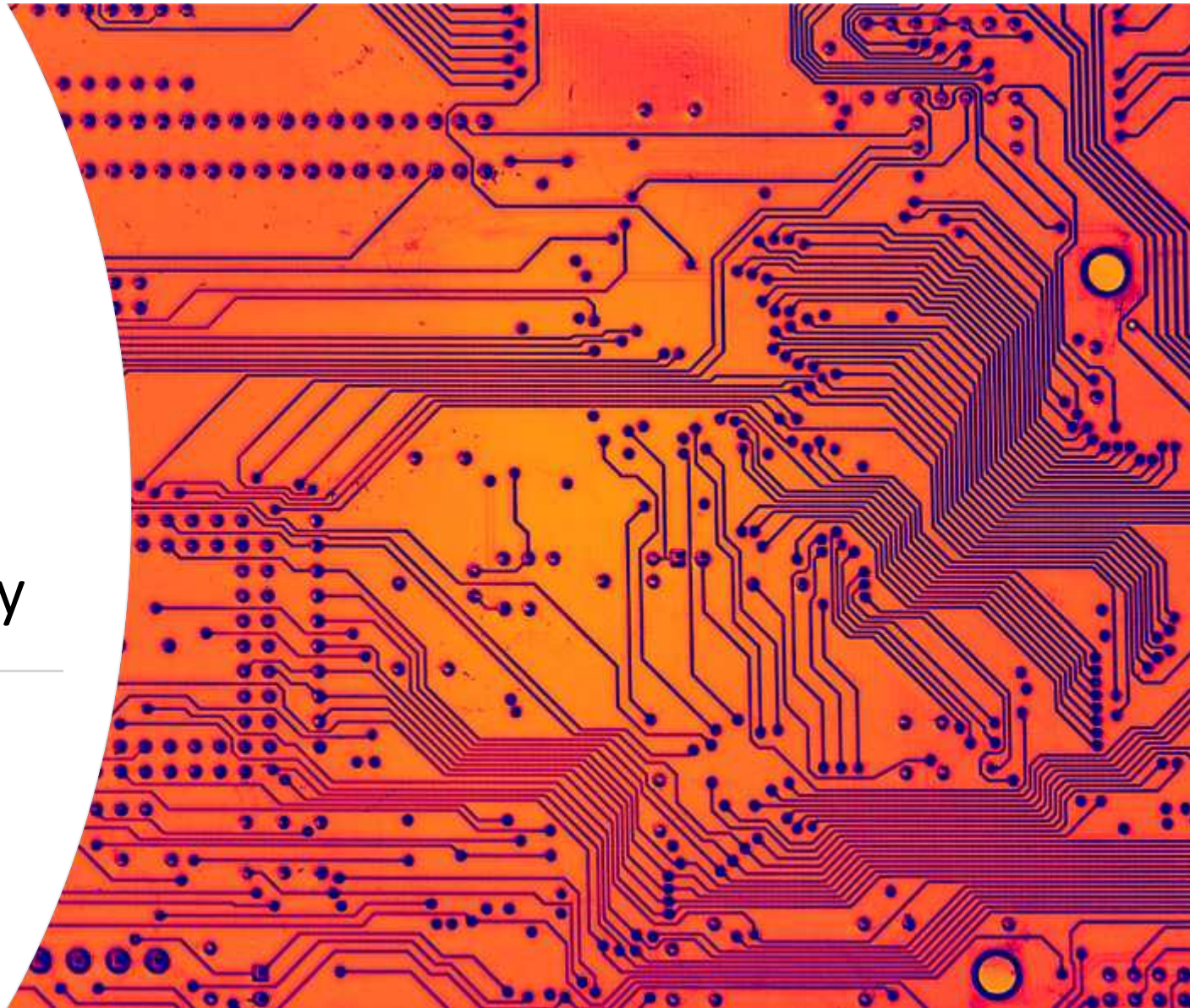
Defamation and Introduction to Intellectual Property

Class 5

2 March 2020

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www.itlawcourse.online



Midterm Exam & Optional Final Paper

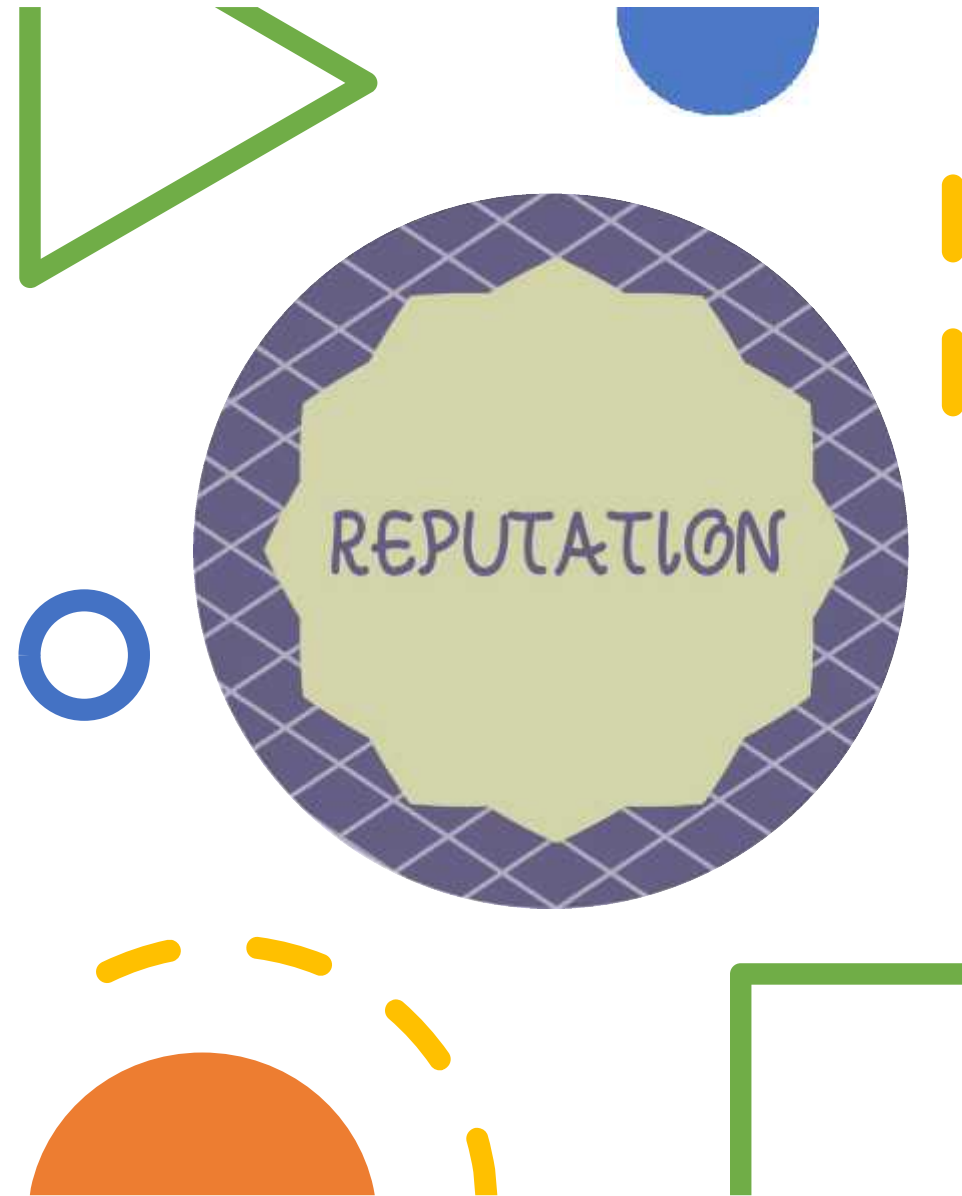
- Midterm Exam
 - 31 March 2020
 - Beginning next week, I will identify subject matter for the exam.
- Optional Final Paper
 - 3,00 to 5,000 words
 - Due 22 May 2020
 - Subjects for paper?





Part I - Neslavas celšana / Defamation

The Importance of
One's Reputation
Has Been Recognized
for a Long Time



Proverbs 22:1

**“A good name is to be chosen
rather than great riches, and favor
is better than silver or gold.”**

THE PROVERBS

CHAP. 1

a 1 Kin. 4:32

b ch. 2:1

c Gen. 39:7
Eph. 5:11

d Jer. 5:26

e Ps. 28:1

f Job. 4:14

g Job. 30:7

h 1 Tim. 6:10

alive as the grave; and
eas those that go down in
pit:

13 We shall find all
substance, we shall
houses with spoil.

14 Cast in thy
let us all have on

15 My son, f
the way with
foot from t

16 For s
and mal

17 S
spre



“The two most precious things this side of the grave are our reputation and our life. But it is to be lamented that the most contemptible whisper may deprive us of the one, and the weakest weapon of the other.”

-- Charles Caleb Colton (1777-1832)

“It takes a lifetime to
build a good reputation,
but you can lose it in a
minute.”

-- Will Rogers (1879 – 1935)



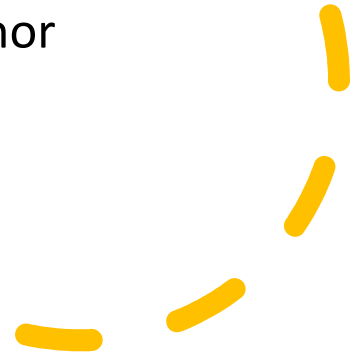


UNIVERSAL DECLARATION OF HUMAN RIGHTS

Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948

Article 12

No one shall be subjected to ... attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.



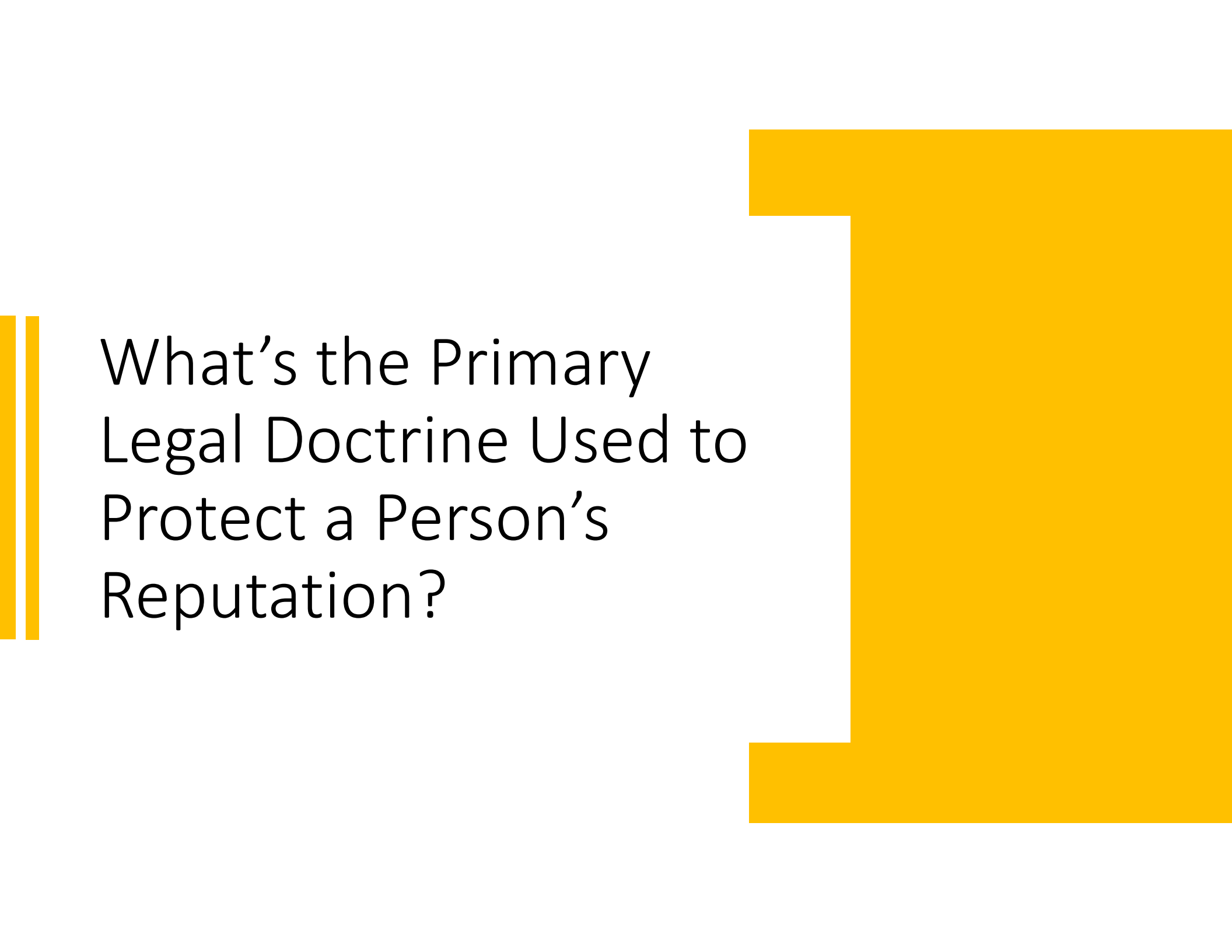


Article 10(2) – Freedom of Expression.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others....

Emphasis added.





What's the Primary
Legal Doctrine Used to
Protect a Person's
Reputation?

The Tort (Delict) of Defamation

- Defamation: oral or written communication of a false statement about another that unjustly harms their reputation and may constitute a tort or crime.
- The Internet complicates efforts to prevent or control defamation because of:
 - Ability to spread statements widely, anonymously, and at no cost.
 - Borderless nature of Internet.
 - Semi-permanent nature of the Internet.





Defamation under Latvian Law

REPUBLIC OF LATVIA
SUPREME COURT
SENATE



Latvia Civil Law Article 2352

- Each person has the right to bring court action for the retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.
- If information, which injures a person's reputation and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person's reputation and dignity, is included in a document, such document shall be replaced. In other cases, a court shall determine the procedures for retraction.
- If someone unlawfully injures a person's reputation and dignity orally, in writing or by acts, he or she shall provide compensation (financial compensation). A court shall determine the amount of the compensation.



Krimināllikums

Latvia's Criminal Law



157.pants. Neslavas celšana

(1) Par apzināti nepatiesu, otru personu apkaunojošu izdomājumu lišu izplatīšanu iespiestā vai citādā veidā pavairotā sacerējumā, kā arī mutvārdos, ja tā izdarīta publiski (neslavas celšana), —

soda ar piespiedu darbu vai ar naudas sodu.

(2) Par neslavas celšanu masu saziņas līdzeklī —

soda ar īslaicīgu brīvības atņemšanu vai ar piespiedu darbu, vai ar naudas sodu.

Section 157. Defamation

(1) For a person who knowingly commits intentional distribution of fictions, knowing them to be untrue and defamatory of another person, in printed or otherwise reproduced material, as well as orally, if such has been committed publicly (defamation),

the applicable punishment is community service, or a fine.

(2) For defamation in mass media,

the applicable punishment is a temporary deprivation of liberty or community service, or a fine.



Nils Ušakovs atbild uz žurnālistu jautājumiem

Photo: Anete Bērziņa/LTV

Investigative journalists call for changes to Latvia's defamation law

February 12, 2019, 11:19 | Society

Authors: [eng@lsm.lv](#) (Latvian Public Broadcasting)

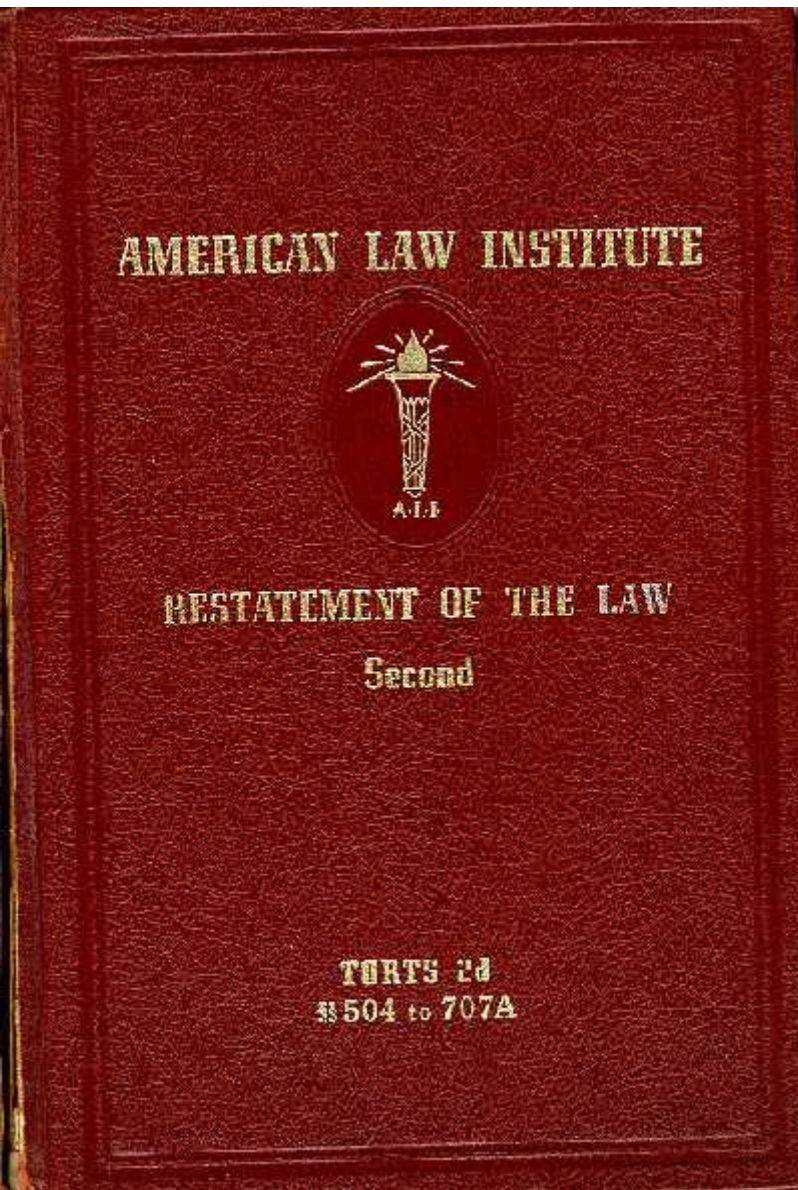


Investigative journalism group [Re:Baltica](#) is urging the new Saeima to revise Latvia's defamation laws in order to stop what it describes as a waste of police time and public money.

Two prominent politicians, Riga mayor Nils Ušakovs (himself a former journalist) of the Harmony party and Aldis Gobzems (until recently the prime ministerial hope of the KPV LV party) have both failed in their efforts to bring criminal proceedings for defamation against the journalists of [Re:Baltica](#) during the last twelve months.

Defamation in United States Law





Defamation is a Matter of State Law

- To establish civil liability for defamation the claimant must prove:
 - a. a false and defamatory statement concerning another;
 - b. an unprivileged publication to a third party;
 - c. fault amounting at least to negligence on the part of the publisher
 - d. [with respect to the act of publication]; and
 - e. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of the Law of Torts Section 558

But is subject to limits of the First Amendment to the US Constitution.



Traditional Distinction between Libel & Slander

- Written vs. spoken defamation.

LIBEL


SLANDER

Defamation Per Se

- As in English law, the laws of most U.S. states consider certain types of false statements to be so innately harmful that they are treated as “defamatory per se.”
- When someone makes a statement that is “defamatory per se,” the allegedly injured party is presumed to have suffered damage and is not required to prove actual injury.
- Statements that are defamatory per se:
 - Indications that a person was involved in criminal activity
 - Indications that a person had a "loathsome," contagious or infectious disease
 - Indications that a person was unchaste or engaged in sexual misconduct
 - Indications that a person was involved in behavior incompatible with the proper conduct of his business, trade or profession.

HARMFUL

HARMFUL



Defenses to Defamation Liability under U.S. Law



Defenses: Truth

- **Truth.** Truth is an absolute defense to defamation.
- **“Substantial” Truth.** The fact that a statement contains “slight inaccuracies of expression” does not make the statement “false” for purposes of a defamation action.
- **False innuendo:** “In certain circumstances even a technically true statement can be so constructed as to carry a false and defamatory meaning by implication or innuendo. Where a publication implies something false and defamatory by omitting or strategically juxtaposing key facts, the publication may be actionable even though all of the individual statements are literally true when considered in isolation.” *Martin v. Hearst Corp.*, 777 F.3d 546 (2d Cir. 2015).



Defenses: Opinion

- Generally, a person cannot be held liable for defamation based upon a mere statement of opinion.
- Why not? The free exchange of ideas and opinions is essential to a free society. This affords "breathing space" to ensure "that debate on public issues [is] uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- But how do we distinguish opinion from fact?
 - Facts are information that can be objectively verified as true or false.
 - Opinions are subjective & cannot be objectively verified or proved to be true or false.



Defenses: Consent

- If defendant can show plaintiff consented to publication of alleged defamatory statement or statements, this is a complete defense.



Defenses: Absolute Privilege

- Cannot be the basis for a defamation action.
- Statements made by witnesses, lawyers, & judges while in court, and for government officials' statements made while in session.

Absolute Privilege



- Statements made in some special contexts are not defamatory unless made with “malice”—lacking reasonable purpose or with reasonable cause, or made with knowledge they were false, or with a reckless disregard for the truth.
- Person making statement has legal, moral or social duty to make it & recipient has corresponding interest in receiving it.
 - Newspaper report on matter of public concern.
 - Credit reporting.
 - Former employer gives opinion to prospective employer about job seeker.



Defenses: Retraction

- Many states permit defendants to reduce their liability for defamation if they properly comply with the state's retraction statute.
 - Some statutes require statement to have been made in good faith.
 - Some require retraction within a set period of time.
 - Many expressly require retraction to be as prominent as the original, defamatory statement.

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 **Routledge**
Taylor & Francis Group

 Check for updates

RETRACTED ARTICLE: Liberalization, Regulatory Delays and Vulnerability to Systemic Banking Crisis

Mekki Hamdaoui

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ABSTRACT

This work aims at contributing to the improvement of the early warning systems of banking crises using a new approach accounting for model uncertainty. We show that a multinomial logit model based on Bayesian model averaging (BMA) is a good strategy to predict banking crisis. To do this, we argue that differences in vulnerability to banking crisis can be largely explained by an asymmetry between financial market evolution and regulation update on a sample of 49 developed and developing countries between 1980 and 2010. When markets are liberalized, competition pushes banks to take more risks and take advantage of regulatory delays that increase crises probabilities. Our empirical evidence supports this crisis probability is higher in country liberalizing their banking system when regulation is not updated. We developed an early warning system for systemic banking crises based on the multinomial logit model. Its main difference to existing prediction models and its contribution to the literature is that it is intended to identify and resolve what is called by Bussiere and Fratzscher ([2006], 'Towards a new early warning system of financial crises', *Journal of International Money and Finance*, 25(6), 953-973) as post-crisis bias in binomial models and to develop a new methodology of leading indicators selection based on BMA. Overall, our model predicts all banking crises during our sample period.

ARTICLE HISTORY

Received 28 March 2017
Accepted 15 November 2017

KEYWORDS

banking crisis; regulatory delays; financial liberalization; early warning system; multinomial logit model; prediction; developed and developing economies; Bayesian model averaging

1. Introduction

The years 1990-2010 were marked by serious banking crises in most countries. Bank rescue and reorganization operations have resulted in very large fiscal and social costs. Non-performing loans of domestic and international banks led to the insolvency of credit institutions in several countries, given strong interconnection among nations in the aftermath of liberalization and globalization movements.

The Crime of Defamation in the United States

- No U.S. federal law imposes criminal penalties for defamation.
- 23 states and 2 territories do have criminal defamation/libel/slander laws.
- But they must be careful in applying these laws.



Criminal Defamation: Meet Robert Freese

- Prosecuted for criminal defamation in the U.S. state of New Hampshire in 2017.
- Under a pseudonym, he posted comments on a local newspaper's Facebook page about a retiring police officer: "the dirtiest most corrupt cop that I have ever had the displeasure of knowing . . . and the coward Chief Shupe did nothing about it."
- The statute provides: "A person is guilty of a class B misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule."
- After he was arrested & charged, the County Attorney found a lack of "actual malice" & police dropped the charges.
- Freese sued for violation of his 1st Amendment rights & received a settlement of US\$17,500.



Defamation under the U.S. Constitution

- *New York Times v. Sullivan*, 376 U.S. 254 (1964): Supporters of Martin Luther King Jr. criticized police in Montgomery, Alabama, for mistreatment of civil rights protesters. Police commissioner sued.
- Supreme Court held that a newspaper could not be held liable for making false defamatory statements about the official conduct of a public official unless the statements were made with “actual malice.”
- Actual malice means publisher of statement either knew the statements were false or acted with reckless disregard for whether they were true or false.
- Supreme Court Justice William Brennan wrote: “erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive.”




Above: the opinion article that led to the *New York Times v. Sullivan* decision.


Expansion of “Actual Malice” Requirement in U.S. Law

- *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974): applied the rule in the *New York Times* case to “public figures.”
 - General purpose public figure: one who has “assumed roles of especial prominence in the affairs of society.”
 - Limited purpose public figure: a person who “draw[s] attention to himself in order to . . . influence the public with respect to any issue.”
- *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988): a public figure must prove actual malice to recover for intentional infliction of emotional distress as a result of a parody in a magazine.






Some Special Legal Issues in Online Defamation Cases

- Jurisdiction.
 - Anonymity of person who allegedly defamed claimant.
 - Applicable law in cross-border disputes.
 - Intermediary liability.
- 

Jurisdiction of Courts of EU Member States over Cross-Border Tort Claims

- In the European Union, the “Brussels I Regulation (Recast)” determines the courts of which EU Member State have jurisdiction to decide on a civil and commercial dispute where there is an international element. See [Regulation \(EU\) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#). [\[Link to Latvian text\]](#)
- The general rule, under Art. 4(1) of Brussels I is that a defendant should be sued in the courts of the Member state where he is domiciled.
- However, Recital 15 of the Regulation recognizes that there are “a few well- defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor.”
- Article 7(2) of the Brussels I Regulation (Recast) provides that, “A person domiciled in a Member State may be sued in another Member State: ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”





Jurisdiction: Where Does the Harmful Event Occur Under Art. 7(2) of Brussels I Regulation (Recast)? -- Victim's "Center of Interests"

- Under the Brussels I Regulation (Recast), the place where the harmful event occurs includes **both** the place where the event giving rise to the damage takes place **and** the place where the harm is suffered. *Bier v Mines de potasse d'Alsace*, Case C-21/76 (ECJ 1976).
- "Given that the impact which [defamatory] material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his **center of interests**, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice." *eDate Advertising GmbH*, Cases C-509/09 and C-161/10 (2011).
- For a natural person, the center of interests will normally be the Member State of his habitual residence.
- However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, if other factors (e.g., pursuit of a professional activity) establish a particularly close link with that State.

Jurisdiction in Online Defamation Cases: A Key Decision of the Court of Justice of the European Union

- An Estonian company (BOÜ) and its employee (Ms Ilsjan) filed defamation claims in an Estonian court against Svensk Handel AB (Svensk), a Swedish trade association. Svensk had placed BOÜ on a blacklist and stated on its Sweden-based website that BOÜ “deals in lies and deceit.” The court dismissed the case for lack of jurisdiction.
- Eventually the case was referred to the CJEU, which held, with respect to corporations and other legal persons, that:
 - “[A] legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located.”
 - “[T]he centre of interests of ... a [legal] person must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to **the place where it carries out the main part of its economic activities.**”
 - Claims for removal of defamatory content and for correction of wrong information may be heard only by courts with jurisdiction to rule on the entirety of an application for compensation for damage.



Bolagsupplysningen OÜ, Ingrid Ilsjan v Svensk Handel AB (BOÜ/Ilsjan), Case C-194/16 (CJEU 17 October 2017) [\[Link to Latvian Text\]](#)

[illegible]

Part II – Introduction
Intelektuālais Īpašums / Intellectual Property

Features of Intellectual Property Rights

- **Intangible**. Often defined as an intangible property right over the results of an intellectual or creative activity.
 - Includes a broad spectrum of legal doctrines whose subject matter, policy justifications, and protections differ considerably from one another.
- **Negative in character**. IPRs authorize their owner through legal means to stop others from performing restricted acts.
 - An IP right grants the owner of an intangible good the legal right to prevent others from using or exploiting that good under certain circumstances.
 - IP right holder doesn't necessarily have the affirmative right to use the innovation. E.g., novel drugs: a patent isn't enough to permit sales; must be approved by drug safety authority.
- **Limited Duration**. IP rights generally expire after a set period of time & enter the "public domain."
 - Public domain: the state of belonging or being available to the public as a whole, especially through not being subject to intellectual property or other legal restrictions



Patents

Can be obtained for inventions that

- (i) are new,
- (ii) involve an inventive step, and
- (iii) are capable of industrial application.

Patents may apply to products or to processes, i.e, methods for doing or obtaining something.

Must be applied for.

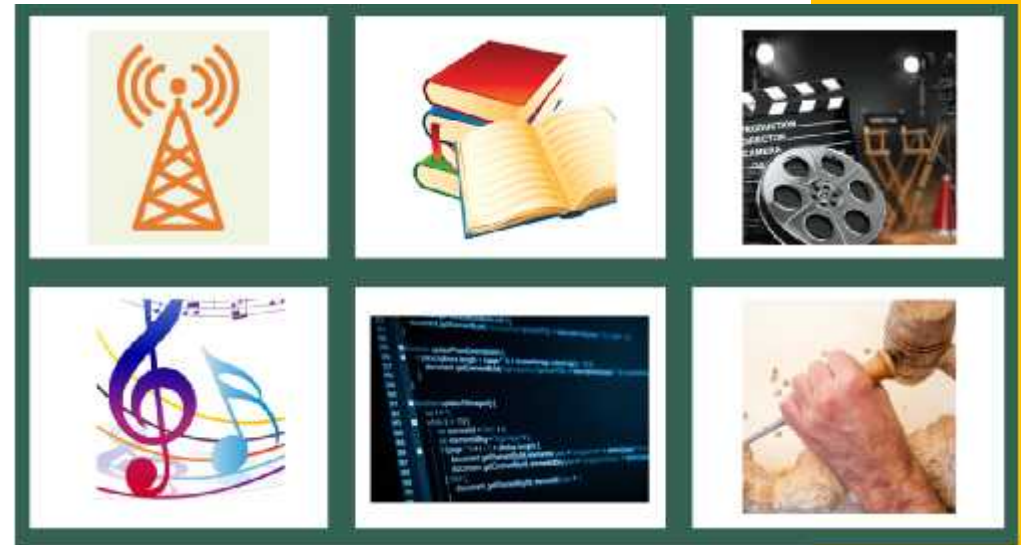
Grant exclusive rights to the owner to make, use, offer for sale, sell or import a product or a process based on the patented invention.

Exclusive rights endure for 20 years from the “priority date” (typically 1st date of filing patent application).



Copyright

- Protects original literary, dramatic, musical or artistic works; sound recordings, films, or broadcasts; and the typographical arrangement of published editions.
- Most “works” must be the author’s “own intellectual creation.”
- Exclusive rights of copyright apply only to the “expression” of an idea, not to the idea itself.
- Copyright, unlike a patent right, arises automatically and without registration when the work is recorded.
- For literary, dramatic, musical,





Database Right


- Special IP right introduced by European Union directive in 1996.
- Database rights protect investments made in compiling databases.
- The database is not required to possess a “creative” element.
- Protects databases against unauthorised extraction and re-utilisation of their content

Trademarks

- Signs that are capable of distinguishing goods or services of one person or entity from those of others, including words, designs, letters, numerals, or the shapes of goods or their packaging.
- It is possible to register trademarks both nationally and on an EU-wide basis.



Industrial Design Rights



Protect the appearance of a product, which results from attributes such as its shape, colors or materials.

Designs are not protected insofar as their appearance is wholly determined by their technical function

The EU has harmonized industrial design protection across EU countries and introduced the Community design that offers unitary protection across the EU through a single procedure.



Trade Secrets

Trade secret' means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Trade Secrets Directive (EU) 2016/943

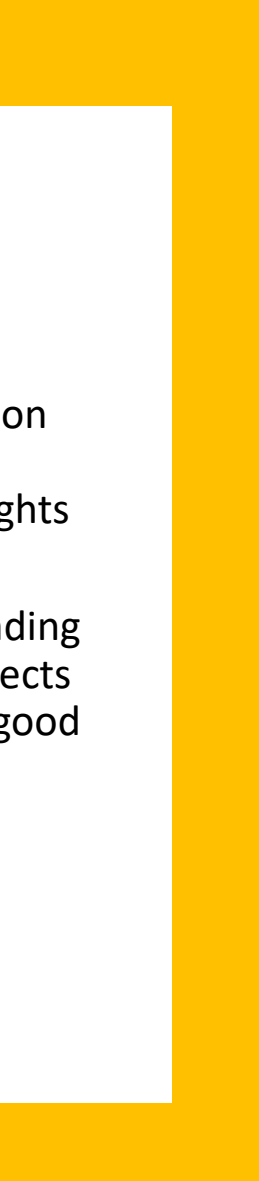


Other IP Rights

- Moral rights of authors.
- Rights in performances.
- Protection for layouts of integrated circuits.
- Plant variety rights.
- Geographic indications / appellations of origin.
- Etc.



Exhaustion of IP Rights

- Limits on the rights to control distribution and resale of a good after it has been legitimately put on the market by the rights holder(s) in a specific territory.
 - Once a good has been marketed, depending on the territory, the IPRs (or certain aspects of it) are said to be exhausted, and the good may be re-exported (known as parallel trade).
- 



Licensing of IPRs

- IP right holder grants permission to use the property.
- May be oral or written.
- A violation of the license often infringe the underlying IPR and is also a breach of contract.

IPRs and Digitization

- Ease of infringement.
- New ways to be creative.
- New models of IP





Reading for Next Week

Chapters 9 and 10 of Andrew Murray,
INFORMATION TECHNOLOGY LAW: THE LAW &
SOCIETY.