



Application of Defamation Laws to the Internet

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As more and more human conduct appears online, questions often arise concerning whether and how to apply to the Internet the legal principles developed for the offline world. One specific area where these questions arise is the area of defamation – the legal doctrine that allows a person to sue in court and recover damages from someone making false statements that harm the plaintiff's reputation.¹ What rules apply when allegedly defamatory statements are made online?

This memorandum concludes that allegedly libelous statements made online are usually evaluated by the same standards as statements made offline, with some nations adopting by legislation special rules defining the liability of various online service providers.

The starting point: What is illegal offline remains illegal online

In general, there is a consensus across jurisdictions that, at least as a starting point for legal analysis, what is illegal or subject to civil liability offline remains illegal or subject to civil

¹ This description of defamation is based on the law in the United States, but the concept of defamation is internationally recognized. Article 12 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Definitions of defamation vary from country to country, but a full exploration of those variances is beyond the scope of this memo. The focus of this memo is on the following question: Assuming that there is a certain set of liability rules for defamation in the print and broadcast media, how should they be applied to Internet speech?

The law in the US and of many other countries distinguishes between two kinds of "defamation:" (1) "libel," which is defamation in writing; and (2) "slander," which is defamation by speaking. Under some legal systems, the distinction is important. For example, under English law, a plaintiff is required to prove special damages in order to recover on a claim of slander. No proof of special damages is required in a libel action. Older English cases held that unscripted words spoken over the radio were not permanent enough to constitute libel, and were thus classified as slander. Presumably, a message posted to an electronic bulletin board would be deemed sufficiently "permanent" to be counted as libel. The situation with messages in the context of instant messaging services such as Internet Relay Chat or various point-to-multipoint audio and video transmissions could be less certain. In the United States, the size of the audience rather than the permanence of the medium seems to be the key factor under current law in distinguishing libel and slander.

liability online. Among other benefits, this approach ensures that, as much as possible, the law is consistent and predictable regardless of technology. Also, by ensuring that current law provides at least a starting point for resolving disputes in the information age, it helps promote the development of the Internet. Innovation and development of the Internet would be slowed down if every Internet activity had to await the adoption of an Internet-specific law to give it a legal framework.

While many Internet-related legal issues can be addressed under already established doctrines, technological changes undoubtedly affect the case-by-case application of various legal doctrines or distinctions, and may require new approaches. The challenge posed by the Internet in any area of the law is deciding what elements of existing law can be applied to the Internet and what merits development of special rules.

In particular, it is difficult to establish global standards for speech on the borderless medium of the Internet, as different cultures have different ideas of what kind of expression is legally protected or subjects the author to liability. In the context of the Internet, these differences among legal systems often emerge in terms of jurisdictional disputes: what country's courts have jurisdiction over a particular claim? The choice of jurisdiction may determine what law applies and thus may determine whether a particular statement is defamatory.

There has been an increase in the number of defamation cases arising from expression on the Internet, leading to some debate about how to deal with the unique issues posed by this technology. Some analysts have proposed drastic changes to the law.² Others favor the creative application of familiar rules of law to online cases. This memo concludes that drastic changes are not needed and that many principles established for expression published offline are also applicable to allegedly defamatory expression made available to online audiences.

Issues in Defamation Cases

-- "Publication"

In some legal systems, a defamatory remark is not actionable unless it has been "published." This term does not refer to literal publication by a commercial publisher -- instead, it simply means the showing of the defamatory material to a third party. (If I say something false about you to you only, and nobody else, the defamation has not been "published;" if I say something false about you to a third person, that is "publication.") The law requires publication to a third party before defamation liability will attach, and it is arguable whether such publication

² Some courts have concluded that the legislature needs to adopt new statutes to clarify the rules for online defamation. See, e.g., *It's In The Cards, Inc v. Fuschetto*, 535 N.W.2d 11 (Wisconsin State Court of Appeals 1995), where the court stated, "[a]pplying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway."

occurs if the remark is merely available to persons connected to a network, but not seen or read. A plaintiff could face the hurdle of having to prove that some third party connected to a network has actually read the defamation in question. The nature of publication online also poses questions about the application of laws defining the time period within which a lawsuit can be brought.³

-- Parties to a defamation suit – the plaintiff

In a traditional defamation case, whether a statement is defamatory depends in part on the nature of the party defamed and the nature of the party sued, in particular the degree of editorial control exercised by the defendant. In other words, both the nature of the person claiming to be defamed and the status of the publisher of the statement will make a difference.

American jurisprudence, for example, has developed the “public figure” doctrine. Under this principle, developed as a matter of American constitutional law to protect free speech in the area of politics and public affairs, it is harder for a prominent person or government official to win a case of defamation. In order to recover in a defamation suit, a public figure must prove not only that a statement was false, but that it was made with “actual malice” – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁴ The U.S. Supreme Court has defined public figures as those who “voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”⁵ The Supreme Court reasoned that prominent individuals have other remedies for reputational damage besides resort to the courts -- such as the ability to command media attention and respond to the false statements. Private individuals, in contrast, have fewer opportunities to correct the public record when they are defamed.

The same doctrine applies to the Internet, but the question arises: Who is a public figure on the Internet? Some analysts have contended that *every* user of the Internet should be considered a “public figure,” because they have the opportunity to respond to any statement

³ The date of publication start the clock ticking on the “statute of limitations,” setting the deadline by which a plaintiff must demand a retraction or file suit. At common law, a statement is “published” each time it is distributed, with the exception of publications subject to the Uniform Single Publication Act (USPA), which has been adopted in most states in the United States. The USPA provides that all issues of a mass-media publication be treated as one; the statute begins to run when the first copy of an issue is distributed. It remains to be seen whether this rule will work with online publications. It may be that each day that comments remain “published” on an electronic bulletin board creates a separate and distinct cause of action with a new statute of limitations.

⁴ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁵ *Gertz v. Welch*, 418 U.S. 323, 344-345 (1974).

made about them.⁶ In our view, this proposition goes too far. A better approach would be to assess the context in which a statement was made, under what is known as the "limited purpose" public figure test. A plaintiff who has been participating in an online discussion might be characterized as a "limited purpose" public figure who must meet the actual malice standard. A limited purpose public figure is defined as a person who (1) voluntarily takes part in a discussion about a public controversy, and (2) has access to the media or effective channels of communication to make an opinion available to the public. For example, a participant in a chat room has an opportunity to respond in that chat room, while a person concerned with a statement made on a web site may not be able to respond on the same web site. Elements of the public-figure doctrine developed offline are also significant for on-line defamation cases: (1) whether the plaintiff has access to the media; (2) whether there was a public controversy; and (3) to what degree the plaintiff injected himself into this controversy.

-- **The defendant – the liability of service providers**

Under many legal systems, an author is responsible for her own words, of course, but media and communications companies are treated differently depending on whether they are categorized as common carriers, publishers, or distributors. Common carriers have absolute immunity, publishers are liable for what they choose to publish, and distributors (such as retail bookstores) are not subject to liability unless they have specific knowledge that they are transmitting defamatory material.⁷ Under English libel law, for example, news vendors, booksellers and distributors are able to take advantage of an "innocent dissemination" defense if they were not negligent in the act of distributing the defamation.

Courts have applied these categories to the Internet, although they sometimes had difficulty deciding where various online service providers fit into the existing scheme.⁸ In early

⁶ Bruce W. Sanford and Michael J. Lorenger, *Teaching An Old Dog New Tricks: The First Amendment In An Online World*, 28 Conn. L. Rev. 1137 (1996) at 1157. For a full discussion of the theory that access to media and right of reply may diminish the distinction between public and private figures, see Mike Godwin, *Cyber Rights: Defending Free Speech in the Digital Age* (Times Books 1998), Chapter 4, "Libel on the Net."

⁷ "A common carrier--an entity that has no editorial control over the information it carries--such as a telephone company, may not be held liable for information that it merely transmits from one party to another as a passive conduit. A publisher, such as a newspaper or other entity that retains editorial control over the information it sends out, is held accountable if the traditional burdens discussed above are met and at least negligence is shown in its actions. A distributor, on the other hand, is often compared to a public library, and as such may only be held liable on a plaintiff's prima facie case and the showing that the distributor had actual knowledge of the defamatory content or should have reasonably known of the defamatory nature of the work." (84 A.L.R.5th 169).

⁸ Bruce W. Sanford & Michael J. Lorenger, *Teaching An Old Dog New Tricks: The First Amendment In An Online World*, 28 Conn. L. Rev. 1137 (1996).

US cases involving allegedly libelous statements posted on the Internet, the courts looked at the circumstances and context in which the disputed statements were published. In one case, the court classified the defendant, which maintained a series of bulletin boards where subscribers posted messages, as a publisher because it had made attempts to monitor the content of its bulletin boards. It had posted guidelines for appropriate content, used software to screen offensive language, and maintained “board leaders” to enforce the guidelines.⁹ However, where the online service provider did not, and could not reasonably have been expected to, review content before passing it to subscribers, acting only as a passive conduit, the court found it to be a distributor, and not subject to liability.¹⁰

Legislation addressing online defamation

Some nations have adopted legislation cutting short this process of working out through judicial decision how defamation rules apply online. In particular, a number of nations have adopted legislation defining specific rules for the liability (or immunity) of Internet service providers (ISPs).

-- United States

In 1996, the US Congress adopted a rule virtually foreclosing the possibility of cyber-libel suits against ISPs.¹¹ As added in 1996, Section 230(c)(1) of the Communications Act offers broad immunity to ISPs, providing:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Section 230 offers ISPs nearly complete immunity from liability for information that originates with third parties, even if the ISP has notice of the offensive content and fails to act. The statute relieves ISPs of the burden of monitoring content they host – monitoring that would be extremely difficult from a practical standpoint. It places the focus of liability on the author of content, bringing in the ISP as a defendant only if, for example, the ISP was involved in editing or selecting the expression to be posted.¹² In effect, the statute treats ISPs as neither publishers

⁹ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794, 1995 WL 323710 (N.Y. Sup. Ct. 1995) (ruling that an on-line service could be held liable for statements made by an anonymous poster to a bulletin board it operated, even if the service was not specifically aware of the statements.) This decision has been criticized by many commentators, however, because Prodigy as a policy matter at the time of the alleged defamation did not prescreen online messages submitted by subscribers.

¹⁰ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 19 Media L. Rep. (BNA) 1525 (S.D.N.Y. 1991).

¹¹ Barry Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 Rich. J.L. & Tech. 9 (1999).

¹² *Id.*

nor distributors, but gives them the immunity enjoyed under the common law by common carriers.¹³

-- **European Union**

The European Union has adopted a more detailed approach, one closer to the traditional distinction among common carriers, distributors and publishers. The EU Directive on e-commerce¹⁴ provides as follows:

Section 4: Liability of intermediary service providers

Article 12

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

...

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on the condition that:

- (a) the provider does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information.

...

¹³ *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997). Section 230 may give greater protection to online speech than offline speech. For example, under section 230, as interpreted in the *Zeran* case, the publisher of a print newspaper could face liability for printing a defamatory letter to the editor, while the publisher of an electronic newspaper would be immune from liability for carrying unedited the same text.

¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce").

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

-- **United Kingdom**

In the UK, "material passing over the Internet [is] subject to the same laws as material begin distributed by other means." (House of Lords, 1996.) The UK Defamation Act of 1996¹⁵ made it clear that ISPs were covered by the qualified immunity traditionally enjoyed by printers and distributors. With this revision, Parliament made it clear how the rules and standards of liability that existed at common law applied to the Internet.

Section 1 of the Defamation Act, titled "Responsibility for Publication," codifies the defense known in England as "innocent dissemination" and extends it to the Internet, conferring upon ISPs the protected status enjoyed by bookstores, libraries, and other agents involved in the business merely of distribution of communicable material. The innocent dissemination defense provides, "In defamation proceedings a person has a defence if he shows that- (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement." Section 1 of the 1996 Act goes on to provide:

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved-

(a) in printing, producing, distributing or selling printed material containing the statement;

[...]

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

As with other distributors, this defense is not available if the ISP has knowledge of the defamatory expression or failed to exercise "reasonable care" in disseminating the material. In

¹⁵ <http://www.hmso.gov.uk/acts/acts1996/1996031.htm>

determining whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to- (a) the extent of his responsibility for the content of the statement or the decision to publish it, (b) the nature or circumstances of the publication, and (c) the previous conduct or character of the author, editor or publisher. The difficulty of monitoring all traffic flowing over an ISP is likely to weigh heavily in favor of an ISP's ability to rely on the innocent distributor defense.

There has been concern that the UK rule in practice has resulted in non-governmental censorship of controversial views or statements, because ISPs are quick to remove material posted by their customers as soon as the ISP receives a complaint from a third party alleging defamation. In order for the ISP to escape liability, it must take down content after being notified that it is defamatory because at that point the ISP no longer can argue that it lacks knowledge of the defamatory content. Rather than dispute the claim of defamation, the ISP removes the content, and subscribers usually have no right to insist that it be restored.¹⁶

-- Germany

In 1997, as part of a major law on information and communications services, Germany adopted the Federal Act on the Utilization of Teleservices, which includes the following:

§ 5: Responsibility

- (1) Providers shall be responsible in accordance with general laws for their own content, which they make available for use.
- (2) Providers shall not be responsible for any third-party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content.
- (3) Providers shall not be responsible for any third-party content to which they only provide access. The automatic and temporary storage of third-party content due to user request shall be considered as providing access.
- (4) The obligations in accordance with general laws to block the use of illegal content shall remain unaffected if the provider obtains knowledge of such content while complying with telecommunications secrecy under § 85 of the Telecommunications Act (Telekommunikationsgesetz) and if blocking is technically feasible and can reasonably be expected.¹⁷

¹⁶ Godfrey v. Demon Internet Ltd. (26 March 26, 1999), No. 1998-G-No 30 (Q.B.) (ISP found liable for defamatory material published on its Usenet servers, after the defendant ISP was notified of the offending material) <http://www.bailii.org/cgi-bailii disp.pl/ew/cases/EWHC/1999/175.html?query=%7e+godfrey+v+demon+internet+Ltd>

¹⁷ Federal Act Establishing the General Conditions for Information and Communication Services - Information and Communication Services Act - (Informations- und Kommunikationsdienste-Gesetz - IuKDG) August 1 1997, Article 1, Act on the Utilization of Teleservices, (Teleservices Act - Teledienstegesetz TDG), available at <http://www.iid.de/rahmen/iukdgeb.html>

It is important to note the general principle that providers are responsible for their own content "in accordance with general laws," confirming the proposition that libel actions arising from Internet expression should be treated the same as print publications. This statute doesn't *change* procedures or standards for adjudicating a defamation case on the Web, it only clarifies who what pre-existing category Web services fall within

Jurisdiction

Despite the new technological variables involved in adjudicating cases involving the Internet, the human actor, the hardware, and the financial assets used to operate each part of the Internet are all located in some traditional jurisdiction.¹⁸ Judicial power may be exercised wherever a human defendant may be found and wherever some assets are located.

Moreover, in the offline world, there are situations in which a defendant not physically present in the geographic place may be subject to the jurisdiction of the courts in that place. Under traditional defamation cases arising before the Internet existed, a publisher could be held liable in a jurisdiction where it had no offices based on intentional causation of effect.¹⁹ For example, in the US Supreme Court case of *Calder v. Jones*, the Court held that it was proper for the courts of California to exercise jurisdiction in a defamation case over a Florida newspaper editor and reporter for an article written and edited in Florida because the article was intended to cause harm to the plaintiff in California, where she lived.²⁰ This justification for jurisdiction has been adopted for some intentional tort cases²¹ on the Internet, and it is likely to apply to defamation claims, as well.²² This concept is also relevant in Europe, as personal jurisdiction

¹⁸ Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 Vill. L. Rev. 1, 13 (1996) .

¹⁹ Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet - American Bar Association Global Cyberspace Jurisdiction Project at 32
²⁰ 465 U.S. 783 (1984).

²¹ See *Panavision Int'l, L.P. v. Toepfen* 938 F. Supp. 616 (C.D. Cal. 1996), aff'd, 141 F.3d 1316 (9th Cir. 1998).(cybersquatting).

²² E.g., *Roberts-Gordon, LLC v. Superior Radiant Products, Ltd.*, 85 F.2d 202 (W.D.N.Y. 2000) (harm suffered at plaintiff's principal place of business); *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790 (E.D. Tenn. 2000) (where plaintiff was a business competitor of the defendants with a global presence, defamation not related to plaintiff's residence was insufficient to subject defendant to jurisdiction in the state where the plaintiff resided); *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648 (N.D. Tex. 2000) (a passive web site, absent sales into or advertisements in the forum, insufficient to sustain jurisdiction in the plaintiff's home state in a suit for patent infringement). Not only, of course, must the harm be felt in the forum; the defendant must know of that likelihood when it acts. *Core-Vent Corp. v. Noble Indust. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993); *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154 (2000).

analysis in Europe is similar to the American minimum contacts principle, and does not limit jurisdiction to the physical presence of the defendant in the forum state.

Despite the obvious differences between print publications and electronic media, they share some crucial similarities, allowing for the application of traditional jurisdictional analyses. Both forms of media come in contact with a multiplicity of jurisdictions, and the difference is merely a matter of range of penetration; print publications reach a finite number of jurisdictions, while the Internet has an effectively limitless range. A crucial question is the same in both cases: did the defendant intend that its statements would be read in the jurisdiction where it has no physical assets?

This was illustrated in a recent case arising in Australia. A well-known individual in Victoria, Australia alleged defamation against a well-known defendant in the USA (Dow Jones & Co, publisher of Barron's Magazine and the Wall Street Journal), over publication of material on a website. The defendant argued that the place of publication was New Jersey, since that was where the website was based, and that the Victoria, Australia, court did not have jurisdiction. The judge ruled that publication occurred in Victoria and that the court had jurisdiction to hear the case.²³ The judge stated:

"Weighing up and balancing all of these factors, I reach a clear conclusion that the State of Victoria is both the appropriate forum and convenient forum for the disposition of the litigation commenced by the plaintiff. Many of the defendant's claimed difficulties are more imagined than real, but, at the end of the day, the most significant of the features favouring a Victorian jurisdiction is that the proceeding has been commenced by a Victorian resident conducting his business and social affairs in this State in respect of a defamatory publication published in this State, suing only upon publication in this State and disclaiming any form of damages in any other place."

This seems, however, to be no different from the rule that would have been applied if the statement had been published in a newspaper composed and printed in the US but sold in Australia.

Various efforts are underway to harmonize jurisdictional rules for the Internet, including a convention being drafted by the Hague Conference on Private International Law.

Conclusion

Cyber libel is merely an extension of normal defamation principles. The predominant approach of legal systems around the world is to maintain much of the substantive law of defamation that existed before the rise and influence of the Internet. However, the very nature of

²³ Gutnick v Dow Jones & Co Inc [2001] VSC 305 (28 August 2001)
<http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html>

e-mail and the Internet means that publication of a defamatory statement can be disseminated worldwide at the touch of a button.

There is uniform agreement that the author of a statement is responsible for it. A key question, however, is the treatment of ISPs and Web-hosting services that provide access to a defamatory statement or host it on their servers. What category do they fit into? Many legal systems now agree that ISPs should not be liable for the content when they are merely a passive conduit. Furthermore, if ISPs can be made liable for content they host, that will have a chilling effect on free expression. In addition, if ISPs are liable for content they do not remove after being notified that it is objectionable to someone, the incentive is for the ISPs to take down the material, and that seems to turn ISPs into censors in a way that is inconsistent with the user controlled vision of the Internet, especially if subscribers have no rights to restore content even when they can show that it is not likely to be defamatory.

Further resources:

Internet defamation case digest – cases from around the world compiled by the US law firm of Perkins Coie, LLP

http://www.perkinscoie.com/casedigest/icd_results.cfm?keyword1=defamation&topic=Defamation

Defamation on the Internet, by David F. Sutherland, 1999 – focuses on Canadian law, with comparisons to US law <http://www.adidem.org/articles/DS5.html>

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