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Internet defamation and the online intermediary



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ABSTRACT

Keywords:

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The Internet's "tremendous power" to harm reputation is well-known. "A reputation can be destroyed in the click of a mouse, an anonymous email or an ill-timed Tweet."¹ Indeed, Internet postings can be widely disseminated via audio or video files, social and professional networking platforms, email messages, blog posts, electronic mailing lists, newsgroups or discussion fora, bulletin boards, web sites, framed or linked web pages, or search results produced by search engines. Such transmission or communication involves intermediaries such as service providers, web hosts and operators of email lists, forums or bulletin boards. By providing access to Internet content created by others, can intermediaries become liable for user/third party content? Intermediary liability is perhaps the thorniest of issues in Internet defamation and will be the focus of this paper. It will compare the position in other common law jurisdictions and conclude with a re-examination of how the publication rule should apply to intermediary liability in Singapore, in the context of new communications technology and the need for a proper balance between reputational interests and Internet expression.

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1. Introduction

To sue Internet intermediaries for defamation, common law as well as Singapore law requires the words complained of to be defamatory, refer to the plaintiff and be published or communicated to at least one person other than the plaintiff. Internet service providers, web hosts, search engines, web platforms and other intermediaries play a facilitative role in providing access to user-generated content. They are not the authors or originators, yet run the risk of being sued as secondary publishers of allegedly defamatory information because they have deeper pockets, are located in plaintiff-friendly fora or because the postings are made anonymously or by users using pseudonyms thus making redress against the originators difficult.

Publication comprises two components: (1) the communication of the defamatory information to a third party in a comprehensible form and (2) the receipt of the information by a third party in a way that is understood. Publication is not complete until a third party receives and understands the defamatory information. Thus, in the context of internet hyperlinks, a simple reference without anyone actually viewing and understanding the content is not publication of that information. The bilateral nature of publication was re-iterated in *Zhu Yong Zhen v AIA Singapore Private Limited*² where the Court held that it was not sufficient for defamatory material on the Internet to be technically accessible. The blog in question must be visited by a third party.

To prove publication, the plaintiff must adduce evidence on a balance of probabilities that the information was received

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¹ *Crookes v Newton* [2011] 3 SCR 269 [38].

² [2013] 2 SLR 490 (High Court). See also *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860 (High Court). <http://dx.doi.org/10.1016/j.clsr.2014.11.009>

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and understood by a third party. This can be established by direct evidence or by asking the court to draw an inference from facts that show that the words were brought to the knowledge of some third party. Direct evidence of publication can be adduced by means of witness testimony, a printout of the blog or web analytics data or by demonstrating that third party web sites were hosting links to the blog. Alternatively, facts may be adduced from which the Court can infer publication, such as by establishing the prominence given to the blog by Internet search engines when relevant search terms are entered or in the case of generally accessible web pages and bulletin boards with many subscribers.³ There is no presumption of publication and each case must be decided on its own facts. In the present case, AIA failed to establish that the plaintiff's blog had been accessed by third parties during the twenty-five days it was open to public access before it was taken down. The blog's utter lack of success was noted. It did not have a web counter to log the number of hits to the site and although hyperlinked to comments pages, each link showed that no entry had been made. Since AIA had not established publication, it failed in its counter-claim against the plaintiff.

2. Network service provider immunity

Section 26 of the Singapore Electronic Transactions Act Cap 88⁴ provides that a network service provider who merely provides access to third party material in the form of electronic records will not be liable under civil or criminal law for making, publishing, disseminating or distributing such material. Providing access to third party material means "providing the necessary technical means by which such material may be accessed and includes the automatic and temporary storage of the third party material for the purpose of providing access". A third party is defined as "a person over whom the service provider has no effective control". "Network service provider" is not defined in section 26. Any Internet intermediary will be protected if it can prove that it is a network service provider (NSP) that merely provides access without exercising control over the third party content. NSPs are businesses that sell bandwidth or Internet access. They consist of providers such as Internet service providers, data carriers or telecommunications companies.⁵ If "network"⁶ refers to telecommunications or broadcasting networks, then NSPs will include Internet service providers⁷ but

³ M Collins, *the Law of Defamation and the Internet* (Oxford University Press, 2005).

⁴ The Act is to implement the United Nations Convention on the Use of Electronic Communications in International Contracts adopted by the General Assembly of the United Nations on 23rd November 2005.

⁵ http://en.wikipedia.org/wiki/Internet_Service_Provider accessed 25 June 2014.

⁶ According to the Singapore Advisory Council on the Impact of New Media on Society, Consultation Paper, 29 August 2008.

⁷ http://en.wikipedia.org/wiki/Internet_Service_Provider accessed 25 June 2014. ISP is defined as an organisation that provides services for accessing, using, or participating in the Internet. Internet services typically provided by Internet service providers include Internet access, Internet transit, domain name registration, web hosting.

apparently not web content hosts or search engine providers which provide information location tools without operating or providing access to networks. Similarly, a hyperlinker will not be an NSP under the Act.

Does an NSP lose its statutory immunity once it receives notification of the defamatory content to which it is providing access? It is submitted that the apparent aim of the Act is to protect NSPs who are innocent disseminators and not those who are aware or on notice that they are contributing to a defamatory publication. Consistent with common law developments elsewhere such as in England, New Zealand, Australia and Canada, NSPs can be fixed with liability once they are notified of the defamatory content (notification-based liability).

The Electronic Transactions Act should therefore be amended to adopt some of the recommendations of the Singapore Advisory Council on the Impact of New Media on Society. Limited immunity should be provided for online content intermediaries who act in good faith and who have a tenuous connection with the stored data, taking no part in the selection and design of materials. For intermediaries who host their own content and actively control all data, there should be no immunity. As an incentive to intermediaries exercising moderation over content or some degree of editorial control, they should be protected if they remove the defamatory content. Any immunity provided should be subject to the obligation to take-down defamatory matter on receiving a creditable and authenticated request. In addition, a put-back regime should be introduced based on a counter-notification to protect the interests of the originators and to prevent abuse of the take-down regime as a means of censoring speech. Finally, the Act needs to be updated in view of developments elsewhere and the increased sophistication of online communication.

The English Defamation Act 2013⁸ provides operators of websites with a complete defence in respect of third party postings on their websites if they respond to a notice of complaint and comply with the notice and take-down procedure prescribed by the regulations.⁹ The defence is not defeated by reason only of the fact that the operator moderates statements posted by others. The Act also introduces the single publication rule¹⁰ which states that if someone publishes substantially the same statement on more than one occasion, time starts running from the date of first publication. Under the single publication rule, claims must be brought within the new limitation period of one year of first publication. Previously, each republication restarted the limitation period.

In the United States, section 230(c) of the Communications Decency Act 1996 gives Internet service providers absolute immunity from third party liability even if they are fully aware of the defamatory content and decline to take-down such

⁸ Which came into force on 1 January 2014.

⁹ The Defamation (Operators of Websites) Regulations 2013 w.e. f 1.1.2014.

¹⁰ Single publication rule is applied by American Courts in dealing with cases of internet defamation. The limitation period runs from the date of first publication. The Courts in Ontario, British Columbia and Australia have rejected the single publication rule as inconsistent with the common law rule that "every republication of a libel is new libel".

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