

The Business Cost of Online Defamation

Margaret E. Vroman, Karin Stulz, Claudia Hart, and Kenneth Mullins

Abstract—The Internet has radically changed the way businesses and individuals communicate. Most people view this as a positive achievement and applaud the egalitarian ability of all to post online and locate information of interest. Along with these benefits, however, is the increasing damage done by those who post untrue business reviews, personal attacks and altered photos and videos. Interestingly, the average person will claim to support “freedom of speech” on the Internet – until they are the victim of a false accusation or hate speech. This paper examines when speech ceases to be “free” and crosses the line to defamation. It will discuss some of the laws that govern online defamation, provide situational examples and specify the costs incurred by victims of defamation. Finally, it will conclude with recommendations on how to proactively deal with potential defamation situations.

Index Terms—Defamation, internet service provider, right to be forgotten, section 230 of the CDA.

I. INTRODUCTION

When does free speech cross the line and become defamation? The answer to this question depends on the laws of the country or state in which the defamation occurs. Even this can be difficult to determine since online defamation occurs in “cyberspace” which has no geographical, and therefore no jurisdictional, terrain. Traditional legal rules allow a party to file suit where the plaintiff resides, where the defendant resides or where the subject matter of the lawsuit arose. Obviously, if the defamatory action took place online there is no physical location to establish jurisdiction. Another problem with online defamation is the difficulty in determining who made the defamatory statement. As a result, most defamation cases are filed in the jurisdiction in which the plaintiff resides. This is the jurisdiction whose laws will be applied in evaluating whether the defendant committed a compensable act of defamation.

II. WHAT IS DEFAMATION?

Online defamation is a tort (a wrongful act resulting in civil liability) which consists of the act of defaming, insulting, or causing harm to another through false statements made online. It includes product reviews, social media postings, comments made on a website or chat room, blog posts,

podcasts, and more. If an online statement is false, causes damage, and is made to a third party, it’s probably defamation [1], [2].

Defamation law in general characterizes defamation as “the issuance of a false statement about another person, which causes that person to suffer harm” [3]. The harm is typically to one’s reputation and it may have economic consequences. Libel is the written form of defamation and slander is spoken. Libel is applicable to online defamation because the Internet contains content that is in a fixed form just as printed media or videos. Under common law the specific elements necessary to prove defamation are:

- An intent to cause harm to the plaintiff by making a knowingly false statement about them,
- The publication/communication of the statement to a third party, and
- Demonstrable damage to the plaintiff [3]

To be successful in a defamation suit, a plaintiff must prove all of the necessary elements for a defamation claim including the damages they have suffered [3].

At common law, and in most defamation statutes, a person who repeats someone else’s defamatory statement is just as responsible for it as the original speaker so long as it can be shown that they knew, or had reason to know, the statement was defamatory [2].

In the United States, the law recognizes the following defenses to defamation claims: 1) the statement is true, 2) the statement is the opinion of the maker, 3) the statement is satire, 4) no reasonable person would believe it to be true [2].

Online defamation is arguably more harmful than traditional defamation because the consequences can be exponentially worse. This is because the Internet makes its content available to almost everyone all over the world and it makes it easy to pass it along to others at any time. The Internet’s ability to shield the identity of the maker of the defamatory statement creates even more problems because if the maker of the statement cannot be identified there may be no one to hold liable.

III. CAN YOU HOLD AN INTERNET SERVICE PROVIDER LIABLE FOR DEFAMATION?

At common law not only could the party who made the defamatory statement be found liable and owe the plaintiff compensation but so could the party who repeated this false information to others. Typically, this third party was a newspaper that printed a salacious false story or rumor. Often, this “publisher” was sued for defamation because it had more money than the individual who made the original defamatory statement. Thus, when defamatory statements began

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appearing online, victims began suing the hosting network or Internet Service Provider (ISP) claiming that they were the “publishers” of these statements [1]-[3].

In response to what they felt could be a cascade of legal liability, ISPs lobbied Congress for legislation that would protect them from defamation lawsuits since they claimed the Internet was just too big for them to patrol for defamatory content.

In an effort to alleviate their concerns, the US Congress passed the Communications Decency Act (CDA) which specifically exempts website hosts and ISPs from most defamation claims [1], [4].

The Communications Decency Act, which was passed in 1996, contains a section that addresses service provider concerns associated with the rising problem of online defamation. Specifically, section 230 of the CDA abrogated common law rulings concerning the liability of the “publisher” of defamatory content. In traditional media such as a newspaper, journal or television station, a defamatory statement it published, which was read by a third party, could cause it to be found legally responsible for defamation. These publishers could typically eliminate their liability, however, if they timely retracted the story when provided with evidence that it was false. Section 230 of the CDA changed this rule to provide Internet Service Providers (ISPs) with immunity from liability for “interactive computer services” and their users [4]. To determine if an online provider of content was an “interactive computer service” under CDA section 230, courts use a three-part test:

- The defendant must be a “provider or user” of an “interactive computer service.”
- The legal claim made by the plaintiff must accuse the defendant of being “the publisher or speaker” of the defamatory information.
- The information must be “provided by another information content provider,” i.e., the defendant must not be the “information content provider” of the defamatory statement [5].

IV. THE CDA IN ACTION

An early example of the consequence of Section 230 of the CDA involved the online service AOL, Matt Drudge of the Drudge Report and an assistant to President Bill Clinton named Sidney Blumenthal. Matt Drudge was an Internet blogger who often posted rumors and stories about public figures in Washington, D.C. After Drudge posted false statements about Blumenthal on his blog, claiming he was involved in marital disputes and abuse, Blumenthal sued Drudge and AOL claiming defamation and an award of damages in excess of \$30 million. Blumenthal claimed libel and serious damage to his reputation. Although Drudge removed the story from his website the court did not dismiss the case [6].

The issue to be decided in this case was whether AOL should be granted immunity from suit under Section 230 of the CDA. To determine this, the court had to decide if Drudge was an AOL employee because if he was then AOL

would be considered a publisher and held liable but if he was not an employee, then AOL would not be considered a publisher of the defamatory statement and would not be subject to liability [6].

The court ultimately ruled that AOL was not a publisher but merely a conduit of the information. This interpretation of the statute set the precedent which has made it extremely difficult for individuals and businesses to successfully sue ISPs such as interactive websites and social media sites that host, and refuse to remove, defamatory content [6].

V. EUROPE’S RIGHT TO BE FORGOTTEN

Although not really a defamation law, the European Union (EU) has a different approach to dealing with online information that harms one’s reputation, even when that information may be true and therefore does not meet the legal definition of defamation.

A specific section of the EU’s General Data Protection Regulation (GDPR) gives individuals the right to ask search engine providers to delete their personal data [7].

In 2014, the EU Court of Justice made international news by ruling that Article 17(2) of the GDPR included an individual’s “right to be forgotten”. A simplistic version of this ruling is that any EU citizen can seek to have information that portrays them in a negative light removed from Internet search engines so long as they follow specified procedures and meet certain criteria. (See Recitals 65 and 66 in Article 17 of the GDPR) [8]. The right to be forgotten is not an absolute right, however, and is only applicable when:

- The personal data is no longer necessary for the purpose an organization originally collected or processed it [8].
- An organization is relying on an individual’s consent as the lawful basis for processing the data and that individual withdraws their consent [8].
- An organization is relying on legitimate interests as its justification for processing an individual’s data, the individual objects to this processing, and there is no overriding legitimate interest for the organization to continue with the processing [8].
- An organization is processing personal data for direct marketing purposes and the individual objects to this processing [8].
- An organization processed an individual’s personal data unlawfully [8].
- An organization must erase personal data in order to comply with a legal ruling or obligation [8].

Even if the above criteria is applicable, an organization’s right to process someone’s data might override their right to be forgotten in the following circumstances:

- The data is being used to exercise the right of freedom of expression and information [8].
- The data is being used to comply with a legal ruling or obligation [8].
- The data is being used to perform a task that is being carried out in the public interest or when exercising an organization’s official authority [8].

- The data being processed is necessary for public health purposes and serves in the public interest [8].
- The data being processed is necessary to perform preventative or occupational medicine. This only applies when the data is being processed by a health professional who is subject to a legal obligation of professional secrecy [8].
- The data represents important information that serves the public interest, scientific research, historical research, or statistical purposes and where erasure of the data would likely to impair or halt progress towards the achievement that was the goal of the processing [8].
- The data is being used for the establishment of a legal defense or in the exercise of other legal claims [8].

Under Article 17, any American search engine company, such as Google, which operates in Europe must abide by this rule and the EU Court of Justice's interpretation of it [8].

VI. HOW ONLINE DEFAMATION DAMAGES BUSINESSES

Increasingly, businesses are dependent on online reviews by customers for advertising and reputation. A negative review is not necessarily a defamatory one but if the review intentionally makes false claims against a business with the intent to harm it, the maker is subject to liability for defamation.

The impact and importance of online reviews is extremely important since a recent Harvard study shows that a one-star increase on Yelp leads to a 5 to 9 percent increase in a business's revenue [9].

The authors of the Harvard study also conclude that the impact of consumer reviews depends on the existing reputation of a company or product. Consumer reviews are effective overall, but ineffective when a product has a firmly established reputation (such as a chain restaurant) [9].

Finally, the study concludes that "consumer reviews present a new way of learning in the Internet age, and are fast becoming a substitute for traditional forms of reputation" [9]. Thus, taking steps to protect an online reputation is increasingly important.

A failure to appropriately address defamatory reviews may result in lost clients or customers, a reduction in new clients or customers, decreased revenue, harassment on social media or by the press and the even the demise of a business [2].

VII. SOCIAL MEDIA AS THE PURVEYOR OF DEFAMATION

Social media is enjoyed by most people as a positive outlet for personal interactions. But because of its ease of use and the ability for bad actors to post anonymously, as well as the financial incentives of platforms to refrain from censoring users, they are a breeding ground for defamatory statements.

Sites that are especially prone to defamatory content are:

- letters to the editor of local newspapers [2]
- public comments on media (i.e., newspaper or magazine web sites) [2]
- blogs and comments to blog postings [2]

- social media platforms such as Facebook, LinkedIn, and Twitter chat rooms or listservs [2].

An interesting case that illustrates the difference between defamatory statements and opinion is *Vogel v Felice* [10]. Plaintiff Vogel was a candidate for public office in California and the defendant, Felice, ran a blog in which he listed Vogel as one of the top ten "dumbasses". The website also indicated that Vogel was guilty of criminal conduct for fraud and non-payment of child support. The appellate court ruled that calling someone a "dumbass" was not defamatory because it was not a factual statement that could be proven true or false. The court also rejected plaintiff's argument that the defendant committed defamation by linking his name to the website "satan.com". The court said that merely linking the plaintiff's name to the word "Satan" conveys nothing more than the author's opinion that there is something devilish or evil about the plaintiff [1], [10].

Vogel and other cases make it clear that statements made on an Internet bulletin board or chat room are highly likely to be opinions or hyperbole, but courts have also said they will look at the remark in context to see if it is likely to be taken as true, even if a controversial, opinion. For example, "it's my opinion that Wiley is the hacker who broke into the Defense Department database" [1].

VIII. SUGGESTIONS FOR DEALING WITH ONLINE DEFAMATION

If you wrote that Sam Jones hit his wife a week ago on your blog, is this a defamatory statement? If the statement is true, it is not defamatory. (Remember, truth is an absolute defense to defamation). It is defamatory if you know it is not true and you made the statement with the desire to injure Sam's reputation [2].

Let's change the example a little and say that you wrote, "I think that Sam Jones hit his wife a week ago." Is this defamatory? Statements of opinion are not statements of fact, and are theoretically protected from libel suits. But the court will examine if such a statement really is a statement of opinion. Sometimes statements that appear to be opinion may be considered statements of fact by the courts, depending on the circumstances. In a case like this, the court will view it from the perspective of whether the average person will view the statement as a statement of fact. It will consider how the maker of the statement knows Sam Jones and his wife, and why they believe that Jones hit his wife [2].

So, merely phrasing something in a way that makes it look like an opinion — "I think" or "I believe" — does not mean it will automatically be protected from a defamation claim [2].

Let's use a social media example and say you wrote on someone else's Facebook page that Jane Doe was fired from her job because she made a mistake and, as a result, her company lost an important client. If this is a knowingly false statement, it is defamatory. But what if it is true that Jane made the mistake, but the company did not lose the client? What if the company fired her merely to appease the client? In that situation the statement was partially false but perhaps, overall, it was not defamatory. This can make it difficult to

determine whether it was defamatory [2].

To avoid such situations, a party should make sure that anything they write on someone’s Facebook page, or comment on someone’s blog, is factually correct before they post it. Once a statement is posted, it is often impossible to retract and the consequences can be costly [2].

The bottom line is: if you aren’t sure of the facts, don’t post it. Is it truly necessary to write on someone else’s Facebook

page, or yours for that matter, why someone else was fired, lost their job or was disciplined? Unless you’re the one who made the decision, you don’t know all the facts. These examples make it clear that when submitting posts or comments online a party should exercise the utmost caution and avoid making any statements that could be construed as defamatory [2].

TABLE I: A COMPARISON OF US & EU LEGAL PROCESS

Jurisdiction	Laws Applied	Laws Apply To	Remedies Available
United States	Common law & statutory law	Traditional defamation and online defamation	Removal of defamatory statement & economic damages
European Union	GDPR Article 17(2) & statutory law	Outdated, inaccurate information & defamation (traditional and online)	Removal of offending information & economic damages

IX. CONCLUSION

The frequency of online defamation in today’s world is a growing concern that requires updated and possibly new laws. Private companies can institute their own policies for handling potentially defamatory content but until there is a national, let alone international, consensus on how to handle the posting and removal of alleged defamation, businesses and individuals need to exercise extreme caution in what they post online, and in how they respond to the posts of others. Since these remedies are often outside of the average business’s control, the more pragmatic option may be to avail oneself of a media liability insurance policy which will cover the cost of online defamation claims [10].

CONFLICT OF INTEREST

The authors declare no conflict of interest.

AUTHOR CONTRIBUTIONS

Margaret E. Vroman researched the legal issues involved in this paper and wrote the first draft of the article. Karin Stulz reviewed the article, corrected errors and formatted the document. Claudia Hart reviewed the article for errors and proper citation. Kenneth Mullins reviewed the article for consistency, accuracy and verification of the economic damages discussed. All authors reviewed and approved the final version.

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