Defamation Charges in a Networked Environment

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One of the most difficult Internet disputes that college and university information technology staff are called on to resolve is one user’s claim that another user has posted defamatory material on a newsgroup. Existing defamation law will have to address and accommodate Internet disputes, and information technology organizations should be prepared to play a major role both in assisting the courts in applying existing legal principles to the new technology, and in identifying areas where the technology calls for a departure from existing legal principles. The information technology role is critical because much of the legal community currently lacks an understanding of either the underlying technology or the culture of this technology community. This article considers how civil law might treat defamation claims arising from newsgroup postings. This analysis is presented as a stimulus to the information technology professional community to further inject itself into the current legal arena.

Background

Newsgroup defamation claims are not uncommon, and will become more common as the population of Internet newsgroup readers grows in numbers and becomes more heterogeneous. As many early users have lamented, the old polite, monolithic Internet is gone (and some of this nostalgia fuels the Internet II initiative). In reality the Internet population has not become less polite. Rather the problem is that users lack the ability to distinguish a defamatory statement from a flame, rhetorical hyperbole, or imaginative expression in the multicultural Internet environment.

Existing defamation law will have to address and accommodate Internet disputes. Defamation law dates from sixteenth-century England, and is part of tort law. Legal scholars generally agree that when defamation law crossed the Atlantic during the colonization period, freedom of speech and freedom of press doctrines held more sway over the resolution of defamation cases than had been true in England. As the courts continue to address Internet issues, we can anticipate changes in media law generally, and in defamation law specifically. For example, the courts recently ruled that the Internet is not the same as broadcast media, and consequently different law will apply. But many existing media law concepts—publication, the reasonable person standard, consent—will find their analogy in Internet cases. Below we will consider how civil law might treat defamation claims arising from newsgroup postings. Much of the discussion has relevance for both information technology units and student judiciary systems in colleges and universities.

Publication

In American courts today, one of the first steps in legal analysis in defamation cases is to determine whether the statement appeared in a “publication.” Defamation applies only to situations where one individual (defendant) makes a statement about a second individual (plaintiff) to a third party. In legal terms, this is called “publication” and is different from the layman’s use of the term to refer to printing or circulating a statement.

Applying this first step in the legal analysis process to newsgroup defamation cases, it seems obvious that a newsgroup “posting” would be considered as “publication” of a statement, because a third party (sometimes thousands of third parties) is the recipient of the posting. Note that it is critical to determine whether the alleged defamatory statement was actually posted to the newsgroup, rather than appearing in an e-mail message exchanged between the plaintiff and defendant. (It is not uncommon for a feud that began in a newsgroup setting to migrate to e-mail.) If the defamatory statement about the plaintiff had occurred in an e-mail message mailed only to the plaintiff, the statement would not meet the criteria for a “publication.” But if the e-mail message is sent to a third party, this would constitute a publication, much as a telephone call to a third party is considered a publication by our legal system.

The standard

The second step in the legal analysis process
is for the Court to determine whether “reasonable persons of ordinary intelligence” would evaluate the statement as defamatory. The Court must view the publication as a whole and consider the context of the defamatory statement. Note that it is the Court that evaluates the statement, not a jury of “reasonable persons of ordinary intelligence.” In newsgroup defamation cases, the Court probably will use the same standard of “reasonable persons of ordinary intelligence” rather than the standard of “readers of the particular newsgroup” or “readers of any newsgroup” or “users of the Internet” or some other specialized Internet subgroup. This difference in reference group will be a major influence on resolution of the case. Even newsgroup users will agree that there are differences between “reasonable persons of ordinary intelligence” and “newsgroup users.” These differences may fade over time, however, as newsgroup participation becomes more commonplace.

**Definition**

A defamatory statement is one that is false and “tends so to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” An embarrassing statement is not necessarily defamatory, a fact that plaintiffs find particularly distressing. Note that false attribution of criminality is defamatory as a matter of law.

Although each state has a slightly different definition of defamation, the differences in the outcome of cases is more a function of community standards than definitional differences. What is defamation in Los Angeles may not be defamation in New York. Again, the analogy to the newsgroup world is apt. What is defamation in one newsgroup community may not be defamation in another newsgroup community. What is defamation in one newsgroup at one period of time may not be defamation in that same newsgroup just one day/week/month later.

**Viewed as a whole**

Regarding the newsgroup specifically, the requirement that the Court view the publication as a “whole” is an interesting one. What constitutes the “whole” publication as far as newsgroups are concerned? Many newsgroup postings are extended discussions over a period of days/months/years with a changing audience as users subscribe and unsubscribe. When a user complains that a newsgroup posting is defamatory, how far back in the history of the newsgroup would the Court have to go to meet the criterion of examining the “whole” publication?

**Internal context**

The legal requirement that the allegedly defamatory statement must be evaluated in context must be discussed in terms of both internal and external contexts. In the case of the print press, the Court has held that headlines must be read in the context of the story, i.e., the internal context, although sensational headlines should be evaluated separate from the text because it is traditional for readers to glimpse a headline, or jump from headline to headline. Thus the Court examines an allegedly defamatory statement relative to the content of the entire publication and also in the context of typical reader behavior. What is typical reader behavior in the realm of newsgroups? Do readers glimpse subject lines and jump from subject line to subject line, drawn to a particular posting because of the sensationalism of the subject line? The analogy between reading sensational print headlines and reading sensational newsgroup subject lines holds. Sensational newsgroup subject lines that allegedly defame an individual would be evaluated independent of the accompanying newsgroup posting. Thus it would be irrelevant that a sensational newsgroup subject line was explained away five screens later—the damage is done.

**External context**

Courts have held that allegedly defamatory statements must also be evaluated in external context. For example, if the newsgroup posting accused the plaintiff of selling an illegal substance, using the slang term for it, then the plaintiff would plead that extrinsic facts explain the defamation. This form of defamation, i.e., a combination of explicit fact and extrinsic facts known only to frequent readers of the newsgroup, is not uncommon. Nor should it be surprising. The success of newsgroups in large measure is predicated upon the fact that individuals with very unique interests and backgrounds find a haven in the newsgroups, and if specialized language or terminology doesn’t already exist in that community, it develops during the life cycle of the newsgroup.

**Outcome**

If the Court decides that reasonable persons of ordinary intelligence would not find the statement defamatory, the case is dismissed. Conversely, if the Court decides that reasonable persons of ordinary intelligence would find the statement defamatory, the statement is deemed libelous as a matter of law. Of course it is possible that the Court will rule that reasonable persons of ordinary intelligence might attribute multiple meanings to the statement, at least one of which

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2 Restatement (Second) of Torts Sec 559, 1977.
would be defamatory. If that is the case, a jury will be asked to resolve the issue.

Defenses against defamation charges

A number of defenses will probably be available to the individual who posted the material in the newsgroup. One possible, but unlikely, defense is that the plaintiff consented to the posting. Other defenses in current defamation law—truth, fair comment, retraction—appear to have more applicability to newsgroup defamation cases.

Truth

The defendant doesn’t need to establish that the newsgroup posting was the literal truth, but only that the impact of the posting upon the person’s reputation was the equivalent. The classic example in defamation law involves accusations of stealing $10,000 when the actual amount was $8,000. Under the law, truth has been established in spite of the $2,000 difference. Obviously there will be a judgment in determining whether inaccuracies in newsgroup postings are relevant or irrelevant in the particular case. It can be very expensive to establish the truth, however.

Fair comment

American law has long recognized the right of literary and musical critics to freely criticize as long as the criticism is honest, with “honesty” being measured by the extent to which there is a match between the facts and the critic’s conclusions. The “fair comment” privilege has also been extended to cases involving criticism of public office and candidates for public office, with mixed results. As with literary and musical criticism, the privilege only applies to “honestly believed” comments.

Retraction

Some states have enacted retraction statutes that have the net effect of reducing damages in defamation cases. Existing statutes could be amended or rewritten to cover defamation cases in the newsgroups. The timing and location of retraction have been factors in print defamation cases and no doubt these factors would figure in newsgroup cases. Compare the newsgroup viewing audience of a retraction posted on Monday morning at seven and one posted on Friday night at ten. Just as the Court has ruled that defamatory material published in the Sunday paper must be retracted in the Sunday paper, the Court will probably prescribe that a defamatory statement posted during high volume Internet traffic be retracted in a similar environment.

Conclusion

In future legal cases, newsgroups postings will probably be viewed as a hybrid of print and broadcast media. As defamation law is applied to the Internet, the law will evolve, mirroring the trend observed in the seventeenth century colonization of America: The fledgling newsgroup users, like their colonial press forefathers, will vigorously and aggressively protect their freedoms of speech and press. Although traditional defenses to defamation charges will exist, the concepts of “community,” “viewed as a whole,” “external context,” and “internal context” will take on new meaning, and present new challenges for the legal system.

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