

Global: Defamation and social media

Across the globe, social networking via the internet is on the rise. In 2012, on average, there were 850 million active users of Facebook each month and 175 million tweets each day. Consequently people's statements, opinions and remarks have the capacity to disseminate more widely, quickly and uncontrollably than ever before. This raises a number of difficult questions in the area of defamation where, up to recently, the law has developed on the basis of more traditional means of communication.

This article looks at how the existing laws of different jurisdictions, the UK, the USA and Italy, treat defamation claims relating to social media, and how policy makers are reacting to ensure that those laws work effectively.

The UK

In the UK, the issue of defamation has recently caught the headlines in two high profile cases. In early 2012, the High Court in *Cairns v Modi* [2012] EWCA Civ 1382 held that a New Zealand cricketer was defamed by the Chairman of the Indian Premier League in a tweet implicating him in match-fixing. More recently, it was reported that Lord McAlpine, the Conservative peer, was pursuing at least 10,000 Twitter users who had re-tweeted false accusations connecting him with the Saville child-abuse scandal.

A New Zealand cricketer was defamed by the Chairman of the Indian Premier League

A critical factor in establishing liability for defamation under UK law is determining who is a "publisher." In UK law, "publisher" is defined very widely, and includes not only those who exercise direct editorial control over published statements ("Primary Publishers"), but also anyone else who makes defamatory comments available to third parties ("Secondary Publishers"). This means that, in the context of social media, there are a number of parties who are potentially liable for the same defamatory statement.

Initial publishers, such as people who send tweets (as in the *Cairns* case) or post messages on blogs or

Facebook pages, will be Primary Publishers liable for defamatory statements they make. A twitterer with few followers, following the logic of *Dow Jones v Jameel* [2005] EWCA Civ 75, might be able to argue that a defamation claim is an abuse of process on the basis that publication was so limited that no real and substantial tort has been committed. But, a quite opposite effect can also occur, given the propensity of defamatory statements to percolate or "go viral" via the internet. In *Cairns*, it was determined by the Court of Appeal that this "percolation phenomenon" is a legitimate factor that can be taken into account by the Courts in assessing damages. This means that a tweet that has only a limited initial audience (Mr Modi's tweet had only 65 immediate publishees) can still result in significant damages. Cairn's was awarded £90,000 and the Court of Appeal upheld that award.

A tweet that has only a limited initial audience can still result in significant damages

Re-publishers will also be Primary Publishers. Therefore, for example, the unqualified re-tweet of a defamatory statement will also result in liability. It is no defence that a publisher is simply repeating a statement made by someone else. This is analogous to the situation in *Cairns* where Cricinfo, an online magazine, published an article based on Mr Modi's tweet. Cricinfo settled out of Court for £7,000 plus costs. Even attaching links to defamatory statements can be a basis for liability (see, for example, *McGrath v Dawkins* [2012] EWHC B3).

Social media websites, such as Twitter and Facebook, will be Secondary Publishers in relation to messages posted on them by their users. However, there are specific statutory defences that they may be able to rely on under section 1 Defamation Act 1996 and Regulation 19 of the E-Commerce Directive, which broadly remove liability where a Secondary Publisher does not have knowledge of the defamatory statement, or reason to suspect that it exists. However, should the website operator obtain such constructive knowledge

of the defamatory statement, for example where it is informed by a prospective claimant, it may be liable unless it then takes steps to take down the defamatory material.



The Defamation Bill may provide clarity for secondary publishers



Internet Service Providers (ISPs) may also be Secondary Publishers of messages posted on the websites that they host, although they can also rely on section 1 Defamation Act 1996 and the hosting defences under s19 of the E-Commerce Directive. However, the Court of Appeal in *Tamiz v Google Inc* [2013] EWCA Civ. 68 treated Google Inc. as a publisher at common law for the period from which it was notified of defamatory comments until those comments were removed and did not consider that Google would have an unassailable defence under Section 1 of the Defamation Act. Unfortunately, it was not necessary for the Court to consider whether Google would have had a hosting defence under the E-Commerce Directive. The current law is still therefore uncertain on liability for ISPs.

That said, the Defamation Bill, which is currently progressing through the House of Lords, may provide some clarity in this area. The Bill includes new provisions expressly aimed at Secondary Publishers. Most significantly, section 10 of the Bill provides that there will be no action against Secondary Publishers unless it is “*not reasonably practicable*” for the claimant to bring an action against the Primary Publisher responsible. What is meant by “*not reasonably practicable*” is not further defined, either by the Bill or in its explanatory statements. While it seems likely that it will include the situation where the identity of the Primary Publisher is unclear, it is less clear that it will apply, for example, where the Primary Publisher has no financial standing.

In addition, the Bill sets out, at section 5, a new statutory defence whereby website operators, as Secondary Publishers, will not be liable for the defamatory posts of users, unless they are given a

formal notice of complaint by a claimant and they fail to respond to it in accordance with statutory regulations. While the content of these regulations has not yet been produced, they are likely to include provisions requiring website operators to identify or provide contact details of persons who posted defamatory statements, as well as obliging them to take action relating to removal of the statements themselves. This is intended to help reduce cases of cyber-bullying and people anonymously posting defamatory statements online.

The USA

In the United States, an increasing number of defamation actions are being brought as a result of statements made on Twitter, Facebook, blogs, and other social media. Journalists, celebrities, and private individuals have all been the target of such suits. One such action brought by a couple in Texas against anonymous contributors to message-board discussions on the website Topix.com produced a staggering \$13.78 million jury award. (This judgment was later thrown out by the court and costs were awarded to the defendants.) *Leshner v. Doescher*, No. 348-235791-09 (Tex. Dist. Ct. June 8, 2012).

Twibel suits abound in the US

A plaintiff alleging libel on a social network may need to satisfy heightened standards imposed by the U.S. Supreme Court to protect First Amendment interests. As in all defamation actions in the U.S., a public-figure plaintiff must prove that the defendant acted with actual malice – that is, with actual knowledge of the falsity of the statement or reckless disregard for the truth of the statement. The standards for cases with private-figure plaintiffs vary state by state, and some states provide for the presumption of damages, falsity, or even fault, in cases that do not relate to a matter of public concern and involve non-media defendants. However, most states at least require proof of the defendant’s negligence.

In one high-profile example of libel-by-tweet (or “Twibel”), Courtney Love was sued by Dawn Simorangkir, a fashion designer known as the “Boudoir Queen.” Simorangkir claimed that Love defamed her on several internet forums including Twitter, most notably in a series of tweets posted in a Twitter “rant.” *Simorangkir v. Love*, No. BC410593 (Cal. Super. Ct. Mar. 26, 2009). Love brought a motion to strike pursuant to California’s anti-SLAPP statute.



Simorangkir claimed that Love defamed her on Twitter

Courtney Love uses anti-SLAPP law

“SLAPP” (or “Strategic Lawsuit Against Public Participation”) is a term used to refer to a lawsuit brought for the purpose of suppressing speech through legal intimidation. Anti-SLAPP legislation enacted by individual states – such as the California statute that Love invoked – is one means to deflect such claims. Twenty-eight states and the District of Columbia have passed legislation to combat the chilling effect of SLAPP suits on the exercise of First Amendment rights.



States have passed laws to combat the chilling effect of SLAPP suits

In her anti-SLAPP motion, Love argued that when a celebrity is the focus of significant public interest her life is a matter of public concern. Love maintained that she made the statements because of her belief in the rights of consumers to warn other consumers about bad business practices. The judge denied Love’s motion, holding that the statements did not involve matters of public interest and that Simorangkir was not a public figure. Love ultimately paid \$430,000 to settle the case – only to be sued for Twibel again by attorneys representing her in a case involving the estate of Kurt Cobain, Love’s late husband.

In contrast with Love’s failed anti-SLAPP challenge, the well-known gossip blog Gawker successfully invoked the California statute in August 2012. The CEO of a technology start-up company sued Gawker for defamation based on a blog post questioning the validity of the CEO’s claims relating to his success in business and his company’s products. The California Court of Appeal affirmed the trial court’s grant of Gawker’s motion to strike based on the anti-SLAPP statute, concluding that the blog post was

constitutionally protected opinion. *Redmond v. Gawker Media, LLC*, No. A132785, 40 Media L. Rep. 2145 (Cal. Ct. App. Aug. 10, 2012).



Case law suggests that CDA immunity would protect a re-tweeter



In the U.S., Section 230 of the Communications Decency Act (CDA) immunizes Internet Service Providers (ISPs) from defamation claims based on the speech of website-users, provided that the ISPs do not contribute to or encourage the creation of the defamatory content. See, e.g., 47 U.S.C. § 230(c)(1); *Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012). Because Section 230 provides that no “user” is to be “treated as the publisher or speaker of any information provided by another information content provider,” CDA immunity may also extend to website users who republish defamatory content via, for example, re-tweets on Twitter or Facebook “likes.” See 47 U.S.C. § 230(c)(1). Although “user” is not defined in the statute, case law suggests that CDA immunity would protect a re-tweeter – assuming the original tweet is not edited or supplemented. In *Shiamili v. Real Estate Group of N.Y., Inc.*, for example, a defendant-website administrator who copied an allegedly defamatory comment and reposted it as an unedited “stand-alone post” was held to be immune under the CDA. 952 N.E.2d 1011 (N.Y. 2011). Other courts have similarly held that content forwarded in an e-mail or copied and pasted into a discussion board constitutes information from another content provider under the CDA, thus immunizing the defendant. See, e.g., *Mitan v. A. Neumann & Associates, LLC*, No. 08-cv-6154, 2010 WL 4782771 (D.N.J. Nov. 17, 2010); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

Relatedly, courts have held that publishing hyperlinks to allegedly defamatory content and inserting Facebook and Twitter “share” buttons does not constitute republication of the underlying content that renews the statute of limitations for libel claims. See, e.g., *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d

Cir. 2012); *Haefner v. N.Y. Media, LLC*, 82 A.D.3d 481 (N.Y. App. Div. 2011); *Martin v. Daily News*, 2012 WL 1313994 (N.Y. Sup. Ct. Feb. 10, 2012).

Finally, under the SPEECH Act, which was signed into law by President Obama in 2010, foreign defamation judgments failing First Amendment scrutiny or failing to comport with due process requirements under the U.S. Constitution are unenforceable in U.S. courts. 28 U.S.C. § 4102. This statute is particularly significant in light of the expansive reach of social media, which has the potential to expose U.S. libel defendants to jurisdiction worldwide.

Italy

In Italy, the issue of defamation through social networks is a “hot” topic and there have been many cases recently regarding defamatory comments posted through Facebook, YouTube, Blogs, Twitter, etc. Such cases have concerned first of all the type of liability of the person posting the comment as well as the potential additional liability of the ISP.

Under Italian Law (Article 595 of the Criminal Code), defamation occurs when someone makes publicly

available statements offending the reputation of a third party, which may be an individual or a legal entity (e.g. a company). The elements of the offence are: (i) the injury to someone’s reputation, (ii) the communication to a plurality of people (two persons is sufficient).

Given the specific nature of the Internet, defamation can occur by email (provided that there is more than one addressee), websites and certainly social networks. The Court of Cassation has clarified (Decision No. 25875 of June 21, 2006) that a defamatory statement posted on a website is potentially made available to anyone who can access the Internet and therefore is subject to defamation regulations.

Furthermore, the Italian Criminal Code provides that the crime of defamation is more serious (and the relevant sanction is higher) in the event it occurs through the “press” or “other means of publicity.”

In this respect, there is very recent case law (Court of Livorno, decision No. 38912 of 2 October 2012), which recognized that posting offensive comments on a Facebook personal profile not only represents a defamatory conduct, but is also aggravated by



the circumstance that it occurred through a mean (i.e. the social network) that allows a broad diffusion of the offence, thus applying to Facebook profiles the “other means of publicity” principle described above.

With regard to the criteria to determine jurisdiction in case of online defamation, the Italian Court of Cassation also clarified that in case of defamation through the Internet, the court of the residence of the damaged party has jurisdiction over the case for civil related cases regarding the reimbursement of damages (see Decision 21661 of 13 October 2009) while the court of the accused party’s place of residence has jurisdiction for criminal related cases (see Decision No. 964 of 2011), irrespective of the place where the servers are located or where the information has been made available for the first time (as such criteria, usually applied on the off-line world, are not relevant for online defamation).

Under Italian law, in case of defamation performed through the press, in addition to the liability of the author of the article, there is an additional liability by the “editor” of the newspaper for lack of supervisory control.

Courts have held blog owners jointly liable

Some scholars and court decisions have applied the same principle to the Internet and held web sites and/or web platforms’ providers/owners liable as “editors” for the defamatory contents published on web sites/platforms they manage/own. In particular, owners of blogs have been considered in some court decisions similar to press editors and as such jointly liable for the defamatory content hosted on the blog (see Court of Aosta, decision of 25 May 2006). This interpretation has been overturned by more recent case law which has clarified that the additional liability of the editor only applies to the press, including online newspapers and magazines (see the decisions of the Court of Cassation, Third Criminal Department, of 10 March 2009 No. 10535/2009 and of the Court of Cassation,

Fifth Criminal Department, of 16 July 2010 No. 1907). Consequently, if the content of a defamatory article is published on an online newspaper the editor of such newspaper (along with the author) shall be liable for defamation “through the press”. In this respect, it should be noted that online newspapers are clearly identified as such as they shall be listed in a special register and clearly state their “nature” of newspapers in the online version.

Social media not an editor

With specific reference to social media, Italian courts have excluded the “editorial liability” of the ISP and in general tend to exclude any form of liability due to the mere presence of defamatory content in application of the exemption of liability provided for by the E-commerce Directive (i.e. Directive 2000/31/EC) and its national implementation (i.e. Legislative Decree No. 70/2003). However, according to some court decisions, ISPs can be held liable for the mere fact that the defamatory content has not been removed upon request of the offended party (see Court of Mantua, decision of 24 November 2009). In this respect, there is no clear interpretation by the Italian courts of the provisions set forth in the law implementing the E-Commerce Directive: indeed, according to a strict interpretation of the law (followed by some courts – see Court of Rieti, decision of 27 July 2011) a previous judicial or administrative order is necessary prior to the removal, as the ISP has no possibility to verify the lawfulness of the content to be removed. Other courts have interpreted more broadly the provision and stated that the mere knowledge of the presence of unlawful content (for instance indicated in a cease and desist or warning letter) is enough to oblige the ISP to remove the material reported (see Court of Milan, decision of 20 January 2011 No. 7680; Court of Milan, decision of 19 May 2011 n. 10893; Court of Rome, decision of 13 September 2011).

Some platforms are not considered passive hosting providers

In addition to the above, some courts have also held that websites and social media do not benefit from the liability exemption of the E-Commerce Directive and

1 In March 2012 the order of seizure of such website has been overturned by the Court of appeal.

thus can be held liable when they do not fall under the definition of “passive hosting providers” but rather play a more active role with regard to the information transmitted (for instance, they index or organize in categories the content or provide additional features such as the “related videos/content” function). This interpretation so far has mainly concerned video sharing portals, including YouTube (see court of Rome, decision of 16 December 2009), while there are no precedents so far regarding Twitter or Facebook.

Criminal seizure used to block access

Finally, a new “trend” in the Italian legal system is the seizure (e.g. shut down) of websites hosting unlawful content. The seizure is enforced with an order (granted by criminal courts) addressed to access providers asking them to prevent all users with an Italian IP address from accessing a certain domain or URL: it is therefore a form of geo-blocking. In some cases, the order has affected the entire website, in other only a specific URL. While there are many precedents regarding seizures for copyright infringement and counterfeit activities (see, for example, Court of Cassation, Third Criminal Department, decision of 23 December 2009 No.1055), there is a recent case regarding defamation in which the Court of Belluno, on 26 February 2012, by declaring the defamatory nature of a couple of posts of a website, ordered to access providers to prevent to Italian users the access to the entire website. Such seizure was broadly criticized, in particular for the disproportion of the measure of shutting down an entire website against the offensive nature of only a few pages of it.¹

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Access providers are ordered to block access to the entire website

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Indeed, there is a risk that if other Italian courts follow the same principle applied by the Court of Belluno (i.e. shut down of the entire website due to the presence of single defamatory posts) they might make unavailable if not the entire social media website, at least a Facebook profile or a YouTube channel due to single defamatory comments.



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