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Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply

Odelia Braun

COMMENT

INTERNET PUBLICATIONS AND DEFAMATION: WHY THE SINGLE PUBLICATION RULE SHOULD NOT APPLY

Defamation is broadly defined as any communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[1] A defamation action must establish four essential elements: falsity, an unprivileged communication, fault and damages.[2]

Traditional defamation law sought to restore a defamed individual's dignity and worth by vindicating the individual's sullied reputation in a public forum and by exacting compensation from the defamer.[3] In 1966, Justice Stewart characterized the values underlying traditional defamation law as "reflecting no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty."[4]

At common law, each communication of a defamatory statement to a third person constituted a new publication, which gave rise to a cause of action.[5] In response to the multiple claims resulting from mass media publications, many states adopted a Uniform Single Publication Act or rule, either by statute or case law, limiting damages for libel or slander

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1 RESTATEMENT (SECOND) OF TORTS § 559 (1977).

2 Mark v. Seattle Times, 486, 635 P.2d 1081 (1981).

3 Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1973).

4 Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

5 RESTATEMENT (SECOND) OF TORTS § 58. *See also* Spears Free Clinic & Hospital for Poor Children v. Majer, 271 P.2d 489 (1953); Schneider v. United Airlines, Inc., 208 Cal. App. 3d 71 (1989).

based on any single "aggregate" publication to one cause of action.[6]

However, even in states that follow the Uniform Single Publication Act, reprinting or republication in another form constitutes a new cause of action.[7] In *Kanerak v. Bugliosi*, an allegedly libelous book that was republished in paperback form, although identical in form and content to the earlier hardcover edition, was intended to and did reach a new group of readers, and therefore constituted the basis for a new cause of action.[8]

The Second Restatement of Torts states that the single publication rule does not include separate aggregate publications on different occasions.[9] In these cases, if the publication reaches a new group, the repetition justifies a new cause of action.[10] The originator of defamatory matter may be liable for each "repetition" of the defamatory matter by a second party "if he could reasonably have foreseen the repetition."[11]

I. DEFAMATION ON THE INTERNET

Republication on the Internet, however, requires an entirely different approach. According to the court in *ACLU v. Reno,* "The Internet is not a physical or tangible entity, but

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[6] New Mexico (N.M. STAT. ANN. §§ 41-7-1); Arizona (ARIZ. REV. STAT. ANN. § 12-651 (1982)); California (CAL. CIV. CODE §§ 3425.3 (Deering 1984)).

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

Id.; Idaho (IDAHO CODE §§ 7-702 to 7-705 (1979)); Illinois (ILL. ANN. STAT. ch. 126, pp. 11 to 15 (Smith-Hurd 1987)); New Mexico (N.M. STAT. ANN. §§ 41-7-1 to 41-7-5 (1986)); North Dakota (N.D. CENT. CODE 14-02-10 (1987)); Pennsylvania (42 Pa. Cons. Stat. Ann. § 8341 Notes (West Supp.1994)); Florida (FLA. STAT. § 770.06 (1987)); Nebraska (NEB. REV. STAT. § 20-209 (1983)); Gregoire v. Putnam's Sons, 298 N.Y. 119, 81 N.E. 2d 45; Applewhite v. Memphis State University., 495 S.W. 2d 190 (Tenn. 1973); Holloway v. Butler, 662 S.W. 2d 688, 689 (Tex. Ct. App.1983).

[7] Kanarek v. Bugliosi, 108 Cal. App. 3d, 327, 332 (1980).

[8] *Id.*

[9] RESTATEMENT (SECOND) OF TORTS § 577A.

[10] *Id.*

[11] McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 795, 797 (1980); *See also* Mitchell v. Superior Court, 37 Cal. 3d 268, 281 (1984).

rather a giant network which interconnects innumerable smaller groups of linked computer networks."[12] In 1996, over 9.4 million computers were linked to the Internet, 60 percent of which were located in the United States.[13] This does not include personal computers using modems to access the Internet.[14] Reasonable estimates are that as many as 40 million people can and do access the Internet; that figure was expected to grow to 200 million Internet users by 1999.[15] Today, home Internet use in the United States alone is estimated at 165.2 million people. Globally, over 259 million people currently have the ability to access the Internet in their homes.[16]

This vast use of the Internet changes the scope of harm associated with defamation. Communications on the Internet are more pervasive than print. For this reason, they have tremendous power to damage a person's reputation.[17] Once a message enters cyberspace, millions of people worldwide can gain access to it. Any posted message or report can be republished by printing, or more commonly, by forwarding it instantly to a different location, leading to potentially endless replication. The power to defame others over the Internet is extraordinary.[18] As stated by the court in *ACLU v. Reno*:

> When information is made available, it is said to be 'published' on the Web.[19]...Publishing on the Web simply requires that the publisher, has a computer and access to the Internet....[20] ...Once a provider posts content on the Internet, it is available to all other Internet users worldwide...Internet technology gives a speaker a potential worldwide audience.[21]

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12 ACLU v. Reno, 929 F. Supp. 824, 830. Affmd. 521 U.S. 844 (1997).

13 *Id.* at 871.

14 *Id.*

15 *Id.*

16 Nielsen/NetRatings Website, *July Internet Universe* (visited January 6, 2002) <http://www.nielsen-netratings.com/hot_of_the_net_i.htm.>

17 Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 864 (2000).

18 Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1154 (1996).

19 ACLU v. Reno, 929 F. Supp. 824 at 837.

20 *Id.*

21 *Id.* at 844.

II. REPUBLICATION ON THE INTERNET

Few cases have addressed the issue of republication of defamatory material on the Internet. In the case of *Firth v. State*, the plaintiff, the Director of the Division of Law Enforcement for the Department of Environmental Conservation in New York, filed a claim against the State of New York and its officers for publication of a defamatory report regarding his management of the office.[22] The plaintiff had served as director of the office for 13 years, and had been investigated because of a "whistleblower" complaint to the State Inspector General, which resulted in a defamatory report being issued by the State.[23] The plaintiff maintained that he was defamed by the report, both at the time of initial publication and thereafter through daily republication on the Internet.[24] The plaintiff argued that he suffered from a continuing injury to his reputation, and that each day that the article was available on the Internet constituted a new publication triggering a new accrual date.[25]

The court agreed that the initial publication on the Internet was a new "publication" for the purpose of defamation and agreed that a republication will occur when the defamatory article is placed in a new form, such as paperback as opposed to hardcover, or edited in a different manner.[26] Therefore, publication on the Internet was a republication of the written report.[27]

The court next considered the issue of whether each appearance of the report upon the Internet constituted a republication. The trial court determined that the single publication rule applied to newspapers [28] and books [29] should be extended to the Internet.

Further, the court analogized that, in the case of a book, the date of publication is the date it is first sold to the public.[30]

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22 Firth v. State, 2000 WL 306865 (2000).
23 *Id.* at 2.
24 *Id.*
25 *Id.* at 6.
26 Rinaldi v. Viking Penquin, 420 N.E.2d 377, 381-384 (1981).
27 *Firth*, 2000 WL 306865 at 6-7.
28 Wolfson v. Syracuse Newspapers, Inc., 18 N.E. 2d 767 (1939).
29 Gregoire v. Putnam's Sons, 119, 81 N.E. 2d 45 (1948).
30 *Firth*, 2000 WL 306865 at 6.

Therefore, on the Internet the date of publication is the date it first appears on the Internet. The court further analogized that, just as sales of the book did not constitute republication, "hits" viewed as the equivalent of book sales on the Internet also did not constitute republication.[31] The court concluded that each daily appearance of the report on the Internet did not constitute a republication triggering a new cause of action, or extend the statute of limitations.[32]

In *Van BusKirk v. N.Y. Times Co.,* a subsequent New York trial court case that followed *Firth's* reasoning, plaintiff filed a claim for defamation based on a letter written by defendant that was posted on a *New York Times* opinion page on the Internet.[33] The plaintiff claimed that the letter was republished daily, and that the statute of limitations period therefore began every day that the letter remained on the Internet. The New York trial court followed *Firth* in applying the single publication rule to the Internet.[34]

The plaintiff argued that Internet publishers should not be protected by the single publication rule because, unlike book or newspaper publishers, the Internet publisher can withdraw the material at any time.[35] The plaintiff asserted that the defendant made a "conscious decision every minute of every day not to remove the letter."[36] The court disagreed, holding that a publisher's sale of a book from stock did not constitute a republication, even though it too could have been withdrawn.[37]

In the only state Court of Appeals case to address the issue of republication on the Internet, a Tennessee Court of Appeals in *Swafford v. Memphis* held that the single publication rule should not apply to multiple reports issued from a database accessed on the Internet.[38] In *Swafford,* the plaintiff, a physician, alleged defamation based on a report stored in the National Practitioner Data Bank, which was accessed by

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[31] *Id.* at 6.
[32] *Id.*
[33] Van BusKirk v. N.Y. Times Co., 2000 WL 1206732 (2000).
[34] *Id.*
[35] *Van BusKirk* , 2000 WL 1206732 at 2.
[36] *Id.* at 2.
[37] *Van BusKirk*, 2000 WL 1206732 at 2.
[38] Swafford v. Memphis Individual Practice Ass'n., WL 281935 (Tenn. Ct. App. 1998),

health care agencies on several occasions. In reaching its decision, the court relied on two theories.[39]

First, the court recognized that publication of any one edition of a book or newspaper, any one radio or television broadcast, exhibition of a motion picture, or similar aggregate communication is recognized under the single publication rule as a single publication.[40] However, the court noted that the single publication rule does not apply to "aggregate publications on different occasions." The Restatement explains:

> If the same defamatory statement is published in the morning and evening editions of a newspaper, each edition is a separate single publication and there are two causes of action. The same is true of a rebroadcast of the defamation over radio or television or second run of a motion picture on the same evening. In these cases the publication reaches a new group, and the repetition justifies a new cause of action. The justification for this conclusion usually offered is that in these cases the second publication is intended to and does reach a new group.[41]

The defendants argued that the Data Bank is openly accessible to the public and, therefore "is akin to the circulation of copies of an edition of a book, newspaper, or periodical."[42] The plaintiff argued that the single publication rule is inapplicable, and that the injury does not occur until the information stored in the Data Bank is requested and retrieved by others.[43] The court agreed with the plaintiff that each access of the Internet database was an additional "aggregate" publication.[44]

Second, the court acknowledged that this was an issue of first impression, and, as of the filing of the opinion, no reported cases addressed the statute of limitations in the context of defamation on the Internet.[45] Because of analogous facts, such as retrieval of information from databanks, the court looked to

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39 *Id.* at 4.
40 *Swafford,* WL 281935 at 6 [quoting Restatement (Second) of Torts § 577A (3)].
41 RESTATEMENT (SECOND) OF TORTS § 577A cmt. D.
42 *Swafford,* WL 281935 at 5.
43 *Id.*
44 *Id.*
45 *Swafford,* WL 281935 at 6.

causes of action that arose out of allegedly defamatory credit report statements.[46]

In *Hyde v. Hibernia Nat'l Bank,* the plaintiff claimed that the defendant bank had submitted to the defendant credit-reporting agency an erroneous statement that the plaintiff had failed to pay a debt.[47] Three years later, a credit card company rejected the plaintiff's application for a credit card. The Fifth Circuit Court of Appeals held that liability arose on the date that credit was denied to the consumer, not the date that the report was submitted to the reporting agency because that was the date on which injury was inflicted.[48]

In a similar defamatory credit report case involving accessing and reporting from a database, the California Court of Appeals in *Scheneider v. United Airlines, Inc.,* held that "where republication reaches a new entity or person, repetition justifies a new cause of action."[49] The court held that even though the credit-reporting agency had previously published the report to one its customers, its dissemination to a second customer was a separate publication and new cause of action.[50]

This analogy has merit. The Internet may be likened to a vast publicly accessible database. The information is potentially always accessible. It is always available to cause new harm, if harmful information is placed on it. Information is placed on the Internet with the intention that it will be available to reach new audiences over time. Echoing the words of the Second Restatement, the Internet "is intended to and does reach a new group."[51] This is not true with the print media, which has a dramatic impact, but quickly fades away over time. The Internet is more like a television, radio, or motion picture exhibition, which gives material a renewed impact each time it is broadcast, or each time the defamatory material is accessed. This repeat impact justifies its exclusion from the single publication rule.

The Second Restatement of Torts enforces the idea that different communications are different publications. According

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46 *Id.*

47 Hyde v. Hibernia Nat'l Bank, 861 F. 2d 446, 447 (5th Cir. 1988).

48 *Id.* at 446.

49 Scheneider v. United Airlines, Inc., 208 Cal. App. 3d 71, 75 (1989).

50 *Id.* at 76.

51 RESTATEMENT (SECOND) OF TORTS § 577A cmt. D.

to the Restatement, "Each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises."[52] Thus, one printing of an edition of a book, magazine, or newspaper is one communication, one call for attention. One broadcast of a television program, radio show or motion picture exhibition is one communication. However, a repeat broadcast, exhibition, printing or edition is an additional communication, is an additional call for attention, and thus permits an additional cause of action.[53] By analogy, each time a defamatory message or report is accessed on a computer, it is a new communication, making a new opportunity for injury, and should warrant a new cause of action.

III. THE SINGLE PUBLICATION RULE SHOULD NOT BE EXTENDED TO THE INTERNET

The single publication rule applied to the print media should not extend to the Internet because the Internet is a more pervasive and permanent medium than print. Print media is evanescent. It generates a substantial impact at the time of publication, which quickly fades over time. In contrast, information stored on the Internet is potentially permanently available. Further, while it is difficult to eliminate print once it is in circulation, eliminating information on a website is practical, even easy to do.

There is a remedy for defamation on the Internet not available with defamatory print materials. This remedy can and should be utilized. The size of the audience on the Internet each day is up to a thousand times larger than any single publication of print media.[54] Information is assembled purposefully to reach wider and wider audiences so that exposure potentially increases over time. Easy access to information on the Internet promotes continuing or greater

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[52] RESTATEMENT (SECOND) OF TORTS § 577A subs (1) cmt.

[53] 740 ILCS 165/1 (West 1994). Dubinsky v. United Airlines Master Executive Council, 708 N.E.2d 44; N.M.S.A. § 41-7-1 (1996); 42 PA. CONS. STAT. ANN. § 8341(b); 41 A.L.R.4th 541 § 8. (1985).

[54] ACLU v. Reno, 929 F. Supp. at 871.

impact over time, in contrast to the diminishing impact of the print media due to its decentralization after publication.

An important difference between defamation in the print media and defamatory publication on the Internet is that, unlike print media, defamatory material is more easily removed from the Internet. Once a book, magazine or newspaper is printed and distributed, it cannot be easily removed from circulation. The damage of that printing cannot be curtailed by its elimination because it is virtually impossible to retrieve the defamatory material and destroy it. Therefore because courts cannot and do not require elimination of defamatory print material once it has been published, the courts permit only one action in liability.

The Internet differs from print media because, once a defamatory piece is published on the Internet, a practical remedy is to eliminate it from continued circulation. One need only remove it with a click off its URL location. In this way, the Internet is more like a television broadcast, a radio broadcast or a motion picture exhibition. Once the court determines that a broadcast contains defamatory material, the defamatory material cannot be broadcast again without incurring renewed liability for defamation.[55] The decision maker need only refrain from re-broadcasting to avoid the liability. By failing to remove defamatory material, an Internet publisher theoretically makes a conscious decision to leave that material on the website daily.[56] If the publisher has sustained his maximum liability when he first publishes, he has no motivation to limit the harm.

Printed matter is evanescent in its impact and existence. A week old newspaper is likely to have been thrown in the garbage, been used to wrap a fish, or committed to microfiche in the bowels of a library. Magazines have the same short life span, and books tend to fall out of public access by being secreted in the personal space of one user. An Internet document never finds its way into the garbage except by the publisher's choice. Although one copy may become isolated to a single user's personal space, the document remains theoretically available to the public for an infinite period of

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[55] 42 PA. CONS. STAT. ANN. § 8341(b); 41 A.L.R.4th 541 § 8. (1985).

[56] *Van BusKirk*, 2000 WL 1206732 at 2.

time. The differences between print media and the Internet favor not extending the single publication rule to the Internet.

Moreover, the single publication rule has never been extended to television, radio or motion pictures.[57] This is because it is understood that each subsequent broadcast has renewed impact and "is intended to and does reach a new audience."[58] An Internet communication is similar to a television or radio broadcast. It has renewed impact with each viewing. Information on the Internet is intended to and does reach a new audience every minute of every day. Thus, the Internet is more like television, radio and motion pictures, with renewed prominence and new audiences each time it is accessed for viewing on the screen.

Due to the sheer volume of users of the Internet, serious problems could arise if the Internet provided a permanent haven for defamatory material. One large book printing may constitute several hundred thousand copies. A defamatory book may not be reprinted again without incurring liability.[59] Over time, single copies are stored on disc, microfiche, or kept on shelves in libraries, inaccessible except to those who specifically seek them out requiring motivation, time and some degree of physical labor.

The number of web users each day is greater that an entire printing of a single newspaper, magazine or book. The Internet's great success is due to the fact that information is more easily accessible, available instantaneously, and requires minimal motivation and physical energy. A single document remains available on the Internet to forty million readers every minute.[60] The likelihood of viewing by new persons increases, not decreases, over time, and therefore the ability to cause continuing damage is more likely. One need only e-mail the URL to defame an individual to a new party all over again.

The potential damages resulting from the vast scope of information and accessibility of the Internet is currently the subject of litigation in other related areas of law. Previously

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[57] Illinois (ILL. ANN. STAT. ch. 126, paras. 11 to 15 (Smith-Hurd 1987)); New Mexico (N.M. STAT. ANN. §§ 41-7-1 to 41-7-5 (1986)); and North Dakota (N.D. CENT. CODE 14-02-10 (1987)); Pennsylvania (42 PA. CONS. STAT. ANN. § 8341 Notes (West Supp.1994)).

[58] RESTATEMENT (SECOND) OF TORTS § 577A cmt. D.

[59] Dodd v. Harper & Bros., 3 App Div 2d 548 (1957).

[60] ACLU v. Reno, 929 F. Supp. at 871.

unimaginable access to information requires new laws to meet the new realities of the Internet. For example, in *Sony Corp. v. Universal Studio Inc.*, the United States Supreme Court permitted videotape copying of copyrighted television programs and movies for home use. The Court concluded that the Sony VCR was capable of significant non-infringing use and that Sony lacked the constructive knowledge that their customers would use their equipment to make unauthorized copies of copyrighted material.[61] The Court refused to hold Sony liable for contributory copyright infringement for assisting the copying of copyrighted television programs and motion pictures.[62]

However, the courts have treated downloading copyrighted material from the Internet differently. In *A & M Records v. Napster,* the district court concluded, and the 9th Circuit Court affirmed, that the plaintiffs were likely to succeed in demonstrating that the defendant, Napster, an Internet-based service that provided a platform for downloading mp3 music files, was liable for contributory infringement of copyrighted songs on the Internet, even though the defendant's system was similarly capable of significant non-infringing uses.[63] The court concluded that the defendant's Internet site had the capability to block access to the system by users that supplied infringing material to other users, and that they failed to remove infringing material from the system, thereby providing the "site and facilities" for direct infringement.

The difference in holdings was based on a number of factors all unique to the Internet. First, the court addressed the fact that Napster's users transmitted the copyrighted music from one home to the next in an unending series of downloads. In contrast, Sony home VCR users typically make a single copy of a television program, which remains in their own home for their own personal use.[64] The court stated, "The majority of VCR purchasers...did not distribute taped television broadcasts, but merely enjoyed them at home."[65] The video copy became decentralized material available only to the

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[61] Sony Corp. v. Universal City Studio Inc., 464 U.S. 417, 439 (1984).
[62] *Id.*
[63] A&M Records, Inc. v. Napster, Inc. 239 F. 3d 1004 (2001).
[64] A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 913.
[65] *Id.*

household, while the mp3 file was centralized and capable of being passed on indefinitely.[66] "Conversely, it is obvious that once a user lists a copy of music he already owns on the Napster system in order to access the music from another location, the song becomes 'available to millions of other individuals,' not just the original CD owner."[67]

The court further pointed to the ability of Napster to remove copyrighted material once it was made aware of its existence. This was consistent with the court's ruling in *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.* that held a computer system operator who learns of specific infringing material available on his system and fails to purge such material from the system would be liable for contributory infringement.[68]

The court's distinction between the limited scope of home video taping and the vast impact of Internet-based downloading of music is instructive and suggests that Internet publications should be treated differently than traditional paper publications because of the magnitude and pervasiveness of Internet-located materials. The court's further focus on the ability to remove improper materials for the Internet is also instructive, for what cannot be remedied in a traditional paper publication is easily remedied on the Internet.

Defamation does not contribute to meaningful public discourse. The volume, scope, and permanence of defamatory information on the Internet cannot be ignored, nor can the fact that potential remedies are available on the Internet that are not available for defamation in print media. Once a public report is no longer published in print, it goes from creating news one day to being forevermore removed from circulation by banishment to the bowels of a state legislative library. Today that public report, true or not, continues to be republished daily on the Internet, potentially damaging an individual's reputation for the rest of his or her life. If extended to the Internet, the Single Publication Act would contribute to making the Internet a safe depository for defamatory material.

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[66] *Id.*

[67] *Id.*

[68] Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1374 [N.D. Cal. 1995].

Therefore, the Single Publication Act should not be extended to the Internet.

*Odelia Braun**

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* J.D. Candidate, 2002, Golden Gate University School of Law, San Francisco, California. To Eric, Adina, Elissa, Zack, and Sophie who support me unfailingly.