

Injurious falsehood and defamation on the internet.

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Abstract

This paper sets out to briefly summarise the current state of defamation/injurious falsehood law and its application to the internet. A series of websites are then examined and discussed in terms of likely defamation/injurious falsehood implications.

Introduction

Defamation and injurious falsehood are both concerned with the protection of reputation, either of an individual (defamation) or of a business entity (injurious falsehood). In Australia, both are based on a collection of Common Law Torts and state legislation such as the Defamation Act 1974 (NSW)¹, the Defamation Act 1938 (NT)² and the Defamation Act 1957 (TAS)³. Defamatory action on the internet (including injurious falsehood) in other jurisdictions has recently been legislated at a national level.

Brief overview of Australian defamation/injurious falsehood law.

Defamation is, at base, held to be a statement ‘of a kind likely to lead ordinary decent folk to think less of the person about whom it is

¹ See http://www.austlii.edu.au/au/legis/nsw/consol_act/da197499/

² See http://www.austlii.edu.au/au/legis/nt/consol_act/da99/

³ See <http://www.thelaw.tas.gov.au/fullview/42++1957+AT@EN+2001081600>

made'.⁴ In several jurisdictions (New South Wales, Queensland, Tasmania, and the Australian Capital Territory) it is not sufficient to defend against a charge of defamation by proving the statement to be true it must also be proved that the statement is 'in the public interest'.⁵ It should also be noted that deceased individuals are generally held incapable of being defamed⁶.

To be defamatory, a statement must clearly identify the individual, and must be one that would lead to a lowering of reputation of an individual. These twin concepts allow various defences to defamation charges including obvious comedy and exaggeration that is farcical, and 'a well known socialite' style rumour columns where the individual is never named.

Injurious falsehood provides protection for businesses against false statements, which result in loss of business. In Australia, businesses are not protected under defamation laws as they are held to not have a 'reputation' as such⁷.

Injurious falsehood provides protection against false statements regardless of medium, which are disparaging of a business's goods, services, or business practices that have been made by an individual or organisation that knows them to be false or has been reckless with

⁴ *Consolidated Trist Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 88.

⁵ LAW520 Subject Outline, Trimester 3 2002. Charles Sturt University.

⁶ Patrick Quirk in Fitzgerald et al (ed), *Going Digital 2000*. Defamation in cyberspace and the corporate cybersmear.

⁷ LAW520 Subject Outline, Trimester 3 2002. Charles Sturt University.

the truth. Comparative statements that are not specifically disparaging of the other business such as styling a product ‘best in class’ are held under Australian law to be puff not requiring proof.

On the internet, liability for defamation has proven to be a key issue. The nature of the internet has placed many separate organisations in a position of potential liability for defamatory action including the ISP’s, telecommunications carriers, hosting sites, and mirror and archive sites⁸. This has largely arisen due to the concept of publication that rests at the heart of Australian defamation law. In the lack of legislation, Australian internet service providers, carriers and hosts have been liable to prosecution as ‘publishers’ under the law.

Approaches in other jurisdictions – USA and New Zealand

The United States *Telecommunications Act 1996*⁹ provides a ‘good Samaritan defence’ for any individual or business that has transmitted defamatory material over the internet, with the exception of the original author. Unfortunately, this act lacks penalties for providers who cannot show the original author, as shown by *Zeran v America Online Inc*¹⁰ and similar cases¹¹. The US position appears to go too far, essentially abrogating all responsibility for anonymous defamation originating from and contained within the US internet.

⁸ Patrick Quirk in Fitzgerald et al (ed), *Going Digital 2000*. Defamation in cyberspace and the corporate cybersmear.

⁹ <http://www.fcc.gov/telecom.html>

¹⁰ Civil Action 96-952-A in the US District Court for the Eastern District of Virginia.

¹¹ See <http://legal.web.aol.com/decisions/dldefam/index.html>

The US constitutionally enshrined concept of free speech also creates a wider range of defences than that available with Australia.

The New Zealand *Defamation Act 1992* includes an ‘innocent defamation defence’ which covers electronic distribution and redistribution by service providers with the significant requirement that the lack of knowledge that the material was defamatory was not due to negligence. This appears to be a reasonably balanced approach to reaching a suitable balance in defamation law pertaining to the internet. Importantly, it allows for prosecution of ISP’s and hosting sites for negligence and when the nature of the material is likely to contain matter of a defamatory nature.

Interaction of other law

In addition to defamation/injurious falsehood law, several other laws relating to published statements exist which should be considered in the wider legal context. In Australia the *Trade Practices Act (1974)*¹² restricts businesses from engaging in certain practices when engaged in commerce or trade. These restrictions overlap in many aspects with injurious falsehood laws relating to claims about a product or service and need to be considered in a wide context. Specific restrictions on certain types of speech, such as the amendment to the

¹² See http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/

NSW *Anti-Discrimination Act (1977)*¹³ covering homosexual vilification also have significant effect in the wider context and do not provide the same forms of defence for distribution the defamation law typically offers.

Discussion of websites in relation to defamation on the internet.

Bulletin Boards / Discussion Forums

Bulletin boards and discussion forums exist have been a common part of the internet since its inception and pose some significant concerns when examined in light of defamation/injurious falsehood.

Three examples of such discussion forums are:

- FlyerTalk.com
- ErrorPlan.com
- My.csu.edu.au/forums

Each of these three sites allow members to post comments on existing topics or to create new ones. Additionally FlyerTalk.com and ErrorPlan.com allow non-members to view the posts in the forums.

FlyerTalk.com – a moderated forum

FlyerTalk.com contains a number of separate forums relating to travel, with the most popular being related to frequent flyer and loyalty programs. FlyerTalk.com is a moderated forum – staff and volunteers ‘police’ the forums removing undesired posts

¹³ See http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204/

and blocking further discussion of unrelated discussions. Additionally there is an automatic filter designed to block certain words from being posted to the forum.

The likely legal situation resulting from an allegedly defamatory statement on FlyerTalk.com under the three jurisdictions discussed (USA, New Zealand, and NSW) if the FlyerTalk.com server were located in that jurisdiction would therefore be:

USA – Under the *Telecommunications Act 1996* (USA) FlyerTalk.com might claim defence under the good Samaritan clause however liability may still exist if the defamatory post had been edited by a moderator. ISP's and other third party providers would be protected from prosecution by this act in all cases such as this.

New Zealand – Under the *Defamation Act 1992* (New Zealand), it is likely that FlyerTalk.com would be considered an 'innocent distributor' and not be held liable. The existence of moderation in this jurisdiction actually being positive as it would demonstrate that the site was not negligent in not knowing the material was defamatory. ISP's and other third party providers would be protected from prosecution by this act in all cases such as this.

NSW – The situation in Australia is less clear and it is likely that a defamatory statement on such a site may well lead to a successful defamation case against the site as well as the author

of the post (if able to be identified and in the same jurisdiction).
ISP's and other third party providers may also be prosecuted in
this case although it is difficult to envisage a court ruling
against a third party electronic distributor in this type of case.

ErrorPlan.com – an unmoderated forum

ErrorPlan.com is an unmoderated forum set up to allow
unhappy customers to post comments about Air Canada and its
AeroPlan frequent flyer program. The lack of moderation and
the stated purpose of the site somewhat alter the likely legal
situation regarding defamation in these jurisdictions.

USA – As for FlyerTalk.com above, ErrorPlan.com, ISP's and
third party service providers would be protected from
prosecution under the 'good Samaritan' clause of the
Telecommunications Act 1996 (USA).

New Zealand – The lack of moderation may be considered
negligent under the *Defamation Act 1992* (New Zealand)
leaving a site like ErrorPlan.com open to prosecution. The ISP
that hosted such a site may also be liable as a case could be
made that such a site was likely to contain defamatory material.

NSW – The legal situation is likely to be the same as for sites
such as FlyerTalk.com for both the site, the hosting ISP and
other third party providers.

CSU students forums – a members only forum

Charles Sturt University provides moderated forum discussion groups for all students in a particular subject and session. Postings to these forums can only be read by members, all of whose identities are identifiable by the University. Unfortunately, these differences do not provide legal protection beyond that of the moderated forum discussed above, although the ability to identify the author of the post would allow for contractual agreements between students and the University to indemnify the institution against loss resulting from materials posted to the forum. The limited distribution group would also limit possible damages when compared to the publicly viewable types of boards.

Review Sites

Many successful retailers and information providers on the internet provide a customer review functionality where individuals may post comments on the product and read reviews left by other people.

Examples of these include:

- Amazon.com
- Yourmovies.com.au

Both sites allow essentially un-edited review and sometimes quite negative reviews to be posted. The likely legal situation in the three jurisdictions for an allegedly defamatory statement would be:

USA – The lack of editorial control for customer written reviews would allow defence under the ‘good Samaritan’ clause. Obviously, reviews produced by staff of the organisation as ‘official reviews’ would not be covered.

New Zealand – Except in extreme cases it is likely that the sites and third party providers would be held to be ‘innocent distributors’ and not be held liable for defamatory customer reviews.

NSW – While the sites in question might be liable under the law for potentially defamatory reviews they may be able to argue that the statement constitutes fair comment for the public good.

Rumour Sites

The essentially anonymous nature of the internet has led to the web version of the rumour newspaper column. A multitude of sites provide gossip and rumours covering the full range of interests. An extreme example of this is FuckedCompany.com a rumour site providing bad news about corporations. Users provide rumours to the maintainer of the site who then posts some of these to the website. Companies are clearly identified by name and it is almost unimaginable that the site does not contain defamatory material. The site has adopted a curious fiction that it is a ‘game’ with rumours being scored and provided points. The legal position of this site in each jurisdiction is likely to be:

USA – The site would be liable as an author for prosecution. It is unlikely that the ‘game’ fiction would provide any form of defence as real company names are used with clear likely detrimental effect. The ‘good Samaritan’ clause of the *Telecommunications Act 1996* (USA) would continue to provide defence to the hosting ISP and all other third party providers.

New Zealand – The site would be liable to prosecution as author. The hosting ISP would also be liable for prosecution as the site is of the sort which would reasonably be expected to be likely to contain defamatory material.

NSW – Lacking any specific defences, the site, host ISP and third party providers would all be liable for prosecution for a defamatory statement.

Conclusion

While legal coverage varies between jurisdictions it appears that the only way to avoid being successfully prosecuted for defamation/injurious falsehood as a result of statements made online is to ensure all materials are confirmed, accurate, and defensible as being ‘in the public interest’ before being released on the internet.