Legally Speaking

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Libel and Slander on the Internet

The Internet adds a new dimension to the power of words, challenging our freedom of speech as we know it.

Following the Reno decision regarding the Communications Decency Act, euphoria swept the electronic village as Internet users celebrated a victory for free speech on the Internet. Although the CDA had not been as thoroughly defeated as is commonly believed [6], the court's decision in Reno made it clear that legislation to regulate speech on the Internet would be carefully scrutinized. This decision, along with the burgeoning number of Web sites and user groups devoted to advancing a spectrum of personal and political ideologies, convey the impression that few limits exist as to what can be published on the Internet.

But as with traditional publishing, there are actually significant limits to what can be published on the Internet, and anyone held responsible for defamatory Web content could face significant financial liability. Providers and operators of Internet services, as well as employers—whose risk of being held partially responsible for defamatory activities increases as employee Internet access increases—must have a clear policy that limits exposure to defamation suits.

What is Defamation?
Broadly speaking, defamation takes one of two forms: libel, which is a damaging statement in printed or written form (including publications, signs, and motion pictures); and slander, a damaging statement that is spoken.

Not all forms of damaging language are defamatory; statements that are damaging but true are not defamatory. Exceptions also exist for statements made about public figures, such as actors and politicians. For public figures to bring a defamation suit, they must generally show the defendant's statements were made maliciously or with reckless disregard for the truth, and were intended to cause harm to the plaintiff [4, 5].

Winning a libel case involves proving an untruthful printed statement was damaging to the plaintiff's reputation [4]. Winning a slander case involves proving an oral statement damaged the plaintiff's reputation. The oral statement must also have created harm, or untruthfully claimed the plaintiff engaged in unprofessional activities, criminal misconduct, sexual misconduct, or had a disease that would cause people to fear association with the plaintiff (such as syphilis or the plague) [5].

Libel or Slander?
The Internet creates an interesting twist to the challenge of interpreting the law of defamation; the question currently vexing the legal community is whether electronic communication is libel or slander.
Since defamation law is primarily state law, 50 court systems are confronting the problem with 50 different legal perspectives.

Because slander is more difficult to prove, defendants in Internet defamation actions prefer to be held to the slander standard, while plaintiffs prefer to bring a libel suit. This begs the question: Is electronic communication more like print or speech?

Although many users instinctively feel the Internet is a form of publication (witness the evolution of e-zines, e-journals, and protocols for scholarly citation of Internet references), the courts continue to wrestle with whether something on a Web page or BBS is spoken or published. And since defamation law is primarily state law, 50 court systems are confronting the problem with 50 different legal perspectives.

Interestingly, the same issue arose when television and radio became popular. Since people spoke on radio and television, the courts initially sought to apply slander standards to broadcast defamation. The courts eventually recognized the breadth of exposure and resulting damage from broadcast defamation was akin to published defamation, and began to apply libel standards to broadcast defamation[3].

While the broadcasting standard may eventually apply to Internet defamation, in the short term there will still be dispute as to whether potential plaintiffs can pursue legal actions under libel or slander standards. The final resolution to this debate may eventually require legislative intervention.

Who is Vulnerable to Defamation Action?

When the telegraph and telephone were introduced, courts were asked to determine if communications firms were liable for defamatory statements carried through their systems. Eventually, a series of court decisions and federal guidelines classified these firms as infrastructures not responsible for the actions of users[3]. Similarly, ISPs as access providers are not generally liable for the content they passively carry. Protection of the access function of ISPs was first addressed in Cubby Inc. vs. Compuserve Inc. Here the court found that Compuserve was not liable for messages posted on an unmoderated BBS. In exonerating Compuserve, the court likened the company's role to that of a news vendor selling a magazine with defamatory content. The Telecommunications Act of 1996 statutorily codified this decision, and was tested in Blumenthal vs. Drudge. In Drudge, the plaintiff sought damages from both America Online and Matt Drudge, who operated a gossip/news Web site on America Online. Citing the Act, the court found that America Online was protected from a defamation action because it only provided Drudge's access to the Internet, and had no relevant control over the content of his site.

But ISPs are not always exempt from liability. In Stratton Oakmont vs. Prodigy, Prodigy Services—which is an ISP as well as content provider—was found liable for defamatory statements made on a BBS it hosted. In this case, Prodigy Services exercised some monitoring and editorial control function over the BBS, and as such was treated by the courts as a publisher of libelous content. Although this decision predates the Telecommunications Act of 1996, it was determined to be consistent with Cubby, and continues to provide an important delineation of the distinction between the ISPs and content providers. The court in Drudge underscored this distinction by noting when an ISP provides its own content, it is no longer protected by the Act.

Others who communicate via the Internet have little protection from defamation lawsuits; posting any kind of defamatory statement, either to a BBS or a Web site exposes one to some form of defamation action. An Oregon state trooper is suing a couple who created a Web site accusing him of sexual misconduct [1]. (The Web site has had over 70,000 hits.) Also, an executive of Applied Cellular has sued an individual who made anonymous defamatory statements; in this case, the court has ordered Yahoo! Inc. to divulge the name of the anonymous poster [2]. These

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1 At press time, the U.S. Supreme Court let stand a ruling that frees ISPs from liability for email content.
two cases underscore just how aggressively defamation actions are being pursued, as well as how great a change this kind of action will portend for the Internet.

Avoiding Defamation
A good policy to protect against defamation should consist of:

- A clear definition of libel. By providing users with a clear definition of libel, the policy helps users understand the kinds of statements that constitute libel, as well as the penalties for making libelous statements.
- A clear prohibition of defamatory statements. Internet site operators and content producers in particular need to make it clear that they do not condone defamatory language. Although this may seem to contradict the historical culture of the Internet, courts are increasingly intolerant of defamatory, and frequently anonymous, postings [2]. Organizations that provide Internet (or even email) access to employees should also prohibit the transmission of defamatory statements.

ISPs should also carefully consider potential exposure to defamation actions when they offer any kind of content service. Such services attract customers, but may also expose the otherwise exempt ISP operator to defamation lawsuits if not carefully monitored. This exposure can probably be avoided if the ISP uses third-party vendors to supply content services.

When the Internet operated outside the mainstream media, it developed a unique culture in which participants went beyond traditional content boundaries. But as it is enveloped by the mainstream media, information that might once have gone unnoticed is now potentially seen by millions. As Internet access and popularity increase, so too does the possibility that defamatory statements will be taken seriously, and those making them will be pursued through the courts.

References
2. Croft, J. Lawsuit alleges cyberlibel: A Fulton court will struggle with the question of how free speech applies to the Internet. The Atlantic Journal and Constitution (Apr. 5, 1999), 1B.

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