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Social media and online issues: Defamation and Privacy

Inside

Introduction

Online publishing via social media is now instant, free and easily accessible. Anyone can publish content without much in the way of control or the input of an in-house legal team to veto high risk content. Such freedom and accessibility raises issues for online publishers who face the possibility of claims of defamation and breach of privacy.

Overview

By way of context and to highlight the potential of online publication, in 2012 34.4% of the world's 7 billion plus population was online in some respect. In the United Kingdom 53% of the population have a Facebook account which equates to 33 million Facebook accounts in the UK alone. In comparison, there are only 5.5 million print readers of The Times in the UK. It seems that increasingly more of us want to share our thoughts and voice our opinions demonstrated by the 1 billion tweets posted each week on Twitter.

In theory the legal risks that affect online publishers are similar to the risks facing offline publishers, for example issues around privacy, breach of confidence, defamation and harassment. However, in practice the risks for online publishers are actually relatively modest and claims against online publishers appear rarer and the awards against them lower than for their counterparts in print publishing.

In 2010 there were only 7 libel actions [brought in the UK] rising to just 14 in 2011 before decreasing again by 15% in 2012. There are a number of reasons for these low numbers. One factor is the increased scrutiny of journalists as a result of highly publicised events such as the phone hacking scandal and the resulting Leveson Inquiry. Wider use of the "Reynolds" defence (providing qualified privilege to the media as long as they have acted responsibly), and increased privacy actions by celebrities, have played their part in keeping libel actions to a minimum. The approach of the courts must also be mentioned because the UK courts appear to have adopted a policy of working towards a US-style immunity for online publications.

Consequences of a Claim against an Online Publisher

Regulation

In addition to facing legal action as a result of a defamation or breach of privacy claim, publishers and service providers may also face disciplinary action from regulatory bodies such as the Press Complaints Commission ("PCC") (which regulates publishers), Ofcom (which regulates UK broadcasters) or the Authority for Television on Demand ("ATVOD"). The PCC only has regulatory power over those organisations which are party to the Commission and its policies. The PCC has been criticised for its unsuitable positioning for monitoring complaints made against the press. Publishers contribute to the PCC's running costs and so the result is an effectively self-regulating industry. While the PCC can be credited with mediating complaints well, the action taken against publishers who are adherent to the Commission is mild. The PCC's ineffectiveness was an area that Lord Leveson addressed as a major concern in the Leveson Report. He suggested that whatever body replaces the PCC, it needs to be more robust and independent.

Criminal repercussions

While it is widely known that there are possible civil repercussions for publishing defamatory statements, it is lesser publicised that certain activities carry criminal charges. It is a criminal offence to publish "grossly offensive" communication and in 2012, 653 people faced criminal charges in connection with comments made on Twitter and Facebook. The Crown Prosecution Service's Guidelines on prosecuting cases involving communications sent via social media aims to offer some guidance as to when an offence occurs. The Guidelines call for robust prosecution in a number of situations, namely :

- communications which constitute credible threats of violence to a person or damage to a property
- communications which specifically target an individual and may constitute harassment or stalking
- communications which amount to a breach of a court order

There is a fourth category of communications which may be prosecuted, constituting those communications which may be considered grossly offensive, indecent, obscene or false. However, this category of communications will be subject to a high threshold and in many cases prosecution is unlikely to be in the public interest.

User Generated Content

There are a number of considerations that online publishers and online service providers must take

into account to avoid any regulatory or legal action, civil or otherwise. Currently, there is no obligation to monitor or moderate user generated content under EU or UK law, (although publishers and service providers still need to comply with injunctions). The reason for this is that the additional cost of enforcing the moderating of user generated content is hard to justify as against the risk of not doing so. However, if an online publisher or service provider chooses to moderate website content then they assume liability and they must carry out their role as moderator responsibly. If they do not moderate sufficiently then they risk becoming a possible joint tortfeasor in any actions raised.

Defences

When an action is raised against a publisher or service provider for the publishing of defamatory material, there are a number of defences available to them. The Defamation Act 2013, (which received Royal Assent on the 25th of April 2013), provides new defences for online publishers. These include the defence of responsible publication on matters of public interest, truth and honest opinion.

The Defamation Act 2013 also provides further protection for service providers who host user generated content. Section 5 of the Act provides a defence provided they have enacted a procedure to enable the complainant to resolve disputes directly with the author of the material concerned. This defence additional to the existing protection available under the Electronic Commerce (EC Directive) Regulations 2002/2013 which allow for protection under the following: the 'Mere Conduit' principle, the 'Caching Defence' and the 'Hosting Defence'. These Regulations apply to virtually every commercial website, including those that monetise themselves through the display of adverts.

Under the Mere Conduit principle in Regulation 17, immunity is provided for Internet Service Providers ("ISPs") where the service provider:

- did not initiate the transmission
- did not select the receiver of the transmission
- did not select or modify the information.

The Caching Defence in Regulation 18 is aimed at protecting websites that cache copies of sites. The service provider will not be liable where the caching is "automatic, intermediate and temporary for the sole purpose of providing a more efficient service." To avoid liability the ISP must act "expeditiously" upon gaining "actual knowledge" of the defamatory material, to ensure that the information is removed from its cache or otherwise disabled. In 2005 'Yahoo!' called for clarification as to what constituted "actual knowledge" and requested a clearer takedown notice procedure. Regulation 19 provides immunity to ISPs for "Hosting" a website containing defamatory material if:

- it does not have "actual knowledge of unlawful activity or information"
- it acts expeditiously upon obtaining such knowledge to remove or disable access to the information
- the recipient of the service was not under the authority/control of the service provider

This Hosting exemption is more limited than the others as only "constructive" knowledge rather than "actual" knowledge is required by the host. There is unfortunately very little guidance as to what will constitute constructive knowledge.

Secondary Publishers and the Defence of Innocent Dissemination

A publisher is considered to be anyone who has participated in the publication of a defamatory statement. This encompasses both primary publication and secondary publication where the publisher has no active editorial control but makes the defamatory comments available to third parties. Secondary publishers could include ISPs such as Google Inc. The case of Christopher Anthony Mcgrath v Professor Richard Dawkins 2012 raised the issue of hyperlinks and whether the posting of such links could render someone a secondary publisher of the material contained in the link. The judge stated that this was dependent upon the facts of the case but that it was a possibility.

In certain circumstances, a secondary publisher will be protected by the defence of Innocent Dissemination (as provided for under Section 1 of the Defamation Act 1996). This provides a defence if one can show that:

- they are not the author, editor or publisher of the defamatory statement ('publisher' meaning commercial publisher)
- they took reasonable care in relation to the material's publication
- they did not know and had no reason to believe that their conduct caused or contributed to the publication of the defamatory material

This could include processing, copying, distributing or selling any electronic medium which records the statement. Additionally, where a person is the operator or provider of a system making the service available electronically or if they are an operator or provider who has access to a communications system which makes the statement available, then the defence could be available to them provided that they have no effective control of the editorial content. Despite these exceptions an individual can still be liable as a secondary publisher under section 1 of the Defamation Act 1996 if they do not exercise "reasonable care."

Containing the online spread of a defamatory statement

A case that demonstrates the difficulties involved in controlling a defamatory statement made online is the recent case of Lord McAlpine. BBC Newsnight aired a programme that prompted a guessing game as to which MP was the subject of sexual abuse claims. Lord McAlpine was falsely accused. Abuse started circulating online with Twitter users assuming that they could say anything that they liked and that they were protected by safety in numbers. As a result Lord McAlpine pursued a high profile action against Sally Bercow, the wife of the Speaker of the House of Commons who posted a tweet which attracted wide spread attention implying Lord McAlpine was guilty of child abuse Lord McAlpine of West Green v Bercow [2013] EWHC 1342 (QB) . Judgement was found in Lord McAlpine's favour, the tweet was held to be defamatory and an allegation of

guilt. Comment was made that even if the tweet was not defamatory on its natural and ordinary meaning, it bore an innuendo meaning to the same effect.

Privacy

The expansion of online publishing is unhelpful for individuals who want to protect their privacy rights. The case of Ryan Joseph Giggs v (1) News Group Newspapers Ltd; (2) Imogen Thomas (2013) exemplifies the weakening position of an individual's privacy as a result of the internet. An MP used his parliamentary privilege to breach an injunction granted to Ryan Giggs, as a result of the cyber campaign conducted by the mainstream media. The campaign led to thousands of people releasing Giggs' name and information about his private life on Twitter, blogs and elsewhere online. The case highlights the internet's power to strip an individual of their privacy. This point had been exemplified in the earlier case of Mosley v News Group Newspapers (2008). Mosley had been refused an injunction by Eady J because the material that Mosley wanted to keep private was already in the public domain.

Even where the law seeks to protect an individual's privacy, the internet's power has often limited the effectiveness of legal remedies. An example of this is the granting of an injunction to The Duchess of Cambridge to prevent the French magazine 'Closer' from re-publishing or selling topless photos of her. The usefulness of the injunction was limited because of how quickly the story had spread online and the apparent failure of the Palace to act quickly enough. Even today the photos are still accessible. The suggestion that immediate action is necessary to protect privacy in the internet age, finds support in the case regarding Tulisa Contostavlos and a video that was posted online in the US of her "fellating" her then boyfriend. An injunction was obtained immediately as soon as the footage appeared on UK websites. The result was that in excess of 60 sites worldwide took down the footage and the footage has now all but disappeared from the internet.

Minimising risk

There are a number of considerations that publishers and IPSs should take into account to minimise the risk of legal or regulatory action against them. Consideration must be given to the risks and content of the material prior to publishing. Prevention and thorough risk assessment is key because once material has been published it is very hard to remove completely. As the case of Lord McAlpine suggests action may still be commenced on the basis of a deleted comment published on sites such as Twitter.

To minimise risks, service providers should put in place policies dictating who can publish on their sites and what they can publish. Additionally, as previously mentioned, service providers should not take on the role of moderator unless they can do this thoroughly. To that end, placing disclaimers on websites and taking out insurance are useful to further protect themselves, should they be the subject of any claims relating to content on their websites.

As noted previously, speed is advantageous when responding to a claim of defamation or breach of privacy. If published material is accused of being defamatory or of constituting a breach of privacy then the publisher or service provider should act quickly. This decreases the chances of being sued, can help to reduce the damages if they are sued and increases the chances of being able to rely upon a defence. These points are summarised in the case of Tamiz v Google (2013). This case demonstrates that internet intermediaries can be held liable as a publisher at common law for third party material on their platform or website, once they have been notified of its existence.

Key areas of complexity of uncertainty

Despite developments in the case law there are a number of remaining issues to address including when exactly is the website operator on "notice"? Additionally there is a lack of clarity as to what must be contained in a "notice" and how long does a website operator have to respond to a complaint regarding defamatory material before it loses its defences under Section 1 of the Defamation Act 1996 and Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002/2013 ? As the case law continues to develop in this area, hopefully clarification on some of these points will be provided.

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