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Name Calling On The Internet: The Problems Faced By Victims Of Defamatory Content In Cyberspace.

SARUDZAI CHITSA*

INTRODUCTION

The celebrated advent of the Internet has brought with it an exciting opportunity for the worldwide audience to share information in a unique way. Internet users often hook into electronic bulletin boards to post content on the Internet either for fun or to gather information about a subject the user is writing about. However, lawmakers around the world are struggling to tackle a problem which arises when an injurious false statement is made about a corporation or an individual on these electronic bulletin boards. This problem is exasperated by the fact that at the inception of the Internet, there were no laws that regulated Internet speech. [1] Countries have reacted differently to resolve the problem of defamation on the Internet.[2] The different legal

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1. See, e.g., Michael L. Rustad & Thomas H. Koeing, *Rebooting Cybertort Law,* 80 WASH. L.. REV. 335, 366-7 (providing history of Internet tort law.)

2. See, Helen Chang, *Singapore Wakes Up And Smells The Internet,* Business Week Editions, March 25, 1996, at 30 (describing that in Singapore the government has extended libel laws covering print media to make Internet service providers liable for content placed on their bulletin boards); Section 1 (1) of the United Kingdom Defamation Act of 1996 (granting immunity to defamation suits to service providers for statements originating from third parties as long as the service provider can show that he, she or it did not know that what they are publishing is defamatory); U.S.C. § 230 (a) (giving immunity to libel suits to Internet Service Providers (ISPs) for defamatory content posted online by third parties even when the ISP has been given notice of the defamatory content); Newzimbabwe.com, *Zimbabwe Makes First Facebook*

approaches used in different countries have bought with them special legal challenges to those injured by the content posted on the Internet.

In the past decade or so, internet libel has become one of the hot topics in internet law. Courts have dealt with an enormous amount of cases brought by both the suppliers and consumers of the internet services. Although the advent of the World Wide Web has come with many complex legal problems; this paper will only focus on the problems that are being faced by the victims of defamatory speech on the internet in trying to seek remedies through the courts. These problems include, *inter alia,* the reluctance of the courts in unmasking the identities of the authors of the defamatory speech where such speech is posted in blogs where the true identity of the author is not known,[3] jurisdiction, choice of law and enforcement.[4]

AN OVERVIEW OF THE PROBLEMS

There are some crucial points that are worth emphasizing from the beginning. The problems that victims of defamatory speech posted on the internet face are caused by the fact that internet speech is often anonymous and many speakers on the internet employ pseudonymous identities. The international connectivity of constantly communicating computers, their speedy transmission of huge amounts of data and the Internet's lack of respect for national borders has caused problems more diverse than lawmakers and courts in any country could have ever imagined.[5] This has made it extremely easy for "unknown" persons with an Internet connection

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Arrest, April 03 2011 (describing how the Zimbabwean government is reacting to content posted on the Internet).

[3] *See,* In re Subpoena Duces Tecum to America On Line, 542 S.E.2d 377 (Va. 2001).

[4] *See,* Dow Jones & Co. v. Gutnick, (2002) HCA 56, 77 ALJR 255 (2002).

[5] *See, generally,* International Herald Tribune, *A New Legal Chapter, In Verse,* January 31, 2006.

to bypass mainstream media and speak directly to thousands, if not millions, of people similarly situated, and making the potential injury to one's reputation almost immeasurable. It's very easy for a person in, say, China to post defamatory statements about an American citizen or corporation via a computer situated in China – where (as discussed in detail below) the law of, and defenses to, defamation in China may be very different or, in some cases, almost nonexistent.[6] Even if the identity of the author(s) is known, questions such as what country should have jurisdiction to hear the suit for damages, which country's law should be applied to that suit and, if judgment is obtained, how it can be enforced if the author of the internet defamatory speech is domiciled outside the jurisdiction of the court, have posed more difficult questions than answers.

This unique nature of the internet makes it difficult for those libeled on it to pursue their cases. Some have argued that there is nothing that changed with the advent of the internet because many states in the U.S as well as many nations have long arm statutes that subject authors of defamatory speech on the internet to their laws. In as much as this might be true, long arm statutes have not been able to eradicate all the above mentioned problems. Even if a country can apply its long arm statute and subject the defendant to its defamation laws, the plaintiff can still have problems in trying to enforce the judgment in defendant's country if it has different and wide defenses that excuse the defendant's speech.

THE CONFLICT OF LAWS NIGHTMARE

[6] *See, generally,* Elizabeth Spahn, *As Soft As Tofu: Consumer Product Defamation On The Chinese Internet,* 39 VAND. J. TRANSNAT'L. L. 865, 879 (2006) (describing that unlike American libel law where the defendant can use the defense of truth, in China comments posted on the internet about a natural person can be found to be defamatory even if what the defendant wrote about the plaintiff is true).

Those libeled on the Internet are placed in a very unique position in that any country that had access to the defamatory content posted on the Internet will be a potential forum because as long as the jurisdictional requirements of a country are met, the plaintiff can bring suit there.[7] Of course, in doing so, the plaintiff will look at the jurisdiction which is most favorable to the plaintiff's libel suit. It might be advisable for an Australian plaintiff who was defamed by, say, an article in *The Wall Street Journal* to sue the defendant newspaper in Australia (as was the case in Dow Jones and Co v. Gutnick [8] where the plaintiff sued *The Wall Street Journal* in Victoria, Australia, for statements that it had published online that implied that he was a money launderer) than to bring the suit in New Jersey (United States of America) because the plaintiff has slim chances of winning the suit and/or being rewarded meaningful damages because, unlike in Australia, freedom of speech in the United States enjoys broader constitutional protection and United States courts are keen to protect the First Amendment right of speakers.[9]

But, even if jurisdiction is established and the court in a foreign country has concluded that it can use its long arm to subject the defendant to its jurisdiction, the court hearing the suit must decide the question of choice of law. Most common law countries still require the "double actionability requirement"; that is, for an action for defamation to proceed, there must be a successful cause of action in both the forum where the plaintiff has chosen to bring the suit and the place where the defamatory statements originated. This problem is invidious where the

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[7] *See,* Jessica R. Friedman, *A Lawyer's Ramble Down The Information Superhighway: Defamation,* 64 Fordham L. Rev. 794 at 803 (describing that defendants are potentially liable for suit in every jurisdiction that had access to the defamatory content posted on the Internet).

[8] (2002) HCA 56, 77 ALJR 255.

[9] *See, generally,* John Doe No. 1 v. Cahill, 884 A.D2d 451 (2005).

parties come from two different legal systems which have totally different defamation laws. As an example, if the Australian High Court had chosen to follow this route, the plaintiff in Dow Jones and Co. v. Gutnick [10], might not have succeeded in suing *The Wall Street Journal* because in the United States, the plaintiff, as a public figure, would have been required to prove that the defendant published the statements with actual malice, that is, the defendant knew that the statements were false.

In Dow Jones and Co. v. Gutnick, [11] the Australian High Court, faced with this question of whether to apply Australian defamation law, as submitted by the plaintiff, or to apply libel law of New Jersey as vigorously argued by *The Wall Street Journal,* decided not to follow the "double actionability" rule in favor of a "proper law" approach. The *Wall Street Journal*'s argument was premised on the fact that the Australian defamation law recognizes that there can be jurisdiction either in the court where defendant is domiciled or in the place where the defamatory statements were published. The question which immediately struck any lawyer is; what constitutes a "place where the defamatory statements are published"? The Australian High Court held that it can either be a place where the defamatory statements were made or where the defamatory statements were made public and have an impact on the reputation of the plaintiff. The Australian High Court agreed with the plaintiff that it was proper for a court in Victoria, Australia, to hear the case because the Mr. Gutnick's reputation was injured not only in New Jersey, but also in Victoria, Australia, where he lived and had businesses. The court concluded that it was proper for the plaintiff to bring the suit in Australia because Australian law allowed him to sue in Australia since his reputation was also injured in Australia.

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[10] *See, supra.*

[11] *See, supra.*

Considering the different cultures from different countries and methods that countries use to solve the problem of Internet libel, the "double actionability" requirement places a huge burden on the victims whose reputations have been harmed by content posted on the Internet. Internationally, courts should follow the "proper law" approach used by the Australian High Court and allow the plaintiff to bring suit as long as the plaintiff's reputation was injured in that country and the plaintiff meets the jurisdictional requirements of that country.

It is critical to note that even in countries where such legitimate forum shopping is allowed by national laws, the question that a victim of defamatory statement may be confronted with is; can a plaintiff sue for damage caused by defamatory statements on the internet in every jurisdiction where such statements were published? If so, should the plaintiff be allowed to sue only in countries where he or it (in the case of legal persons) has reputation? If such reputation is recognized almost internationally, for example where the plaintiff is an internationally recognized celebrity or a multi-national company, should he or it be allowed to sue in each and every jurisdiction since the internet is transnational? Or should suits be limited to countries which share the same language used in the internet post? More precisely, where a defaming online post originated in Chile and written in Spanish, should a company with international reputation which has been defamed by the publication be allowed to sue only in Spanish speaking countries? Although this question has not been answered by many countries, it seems most nations will allow the celebrity or the internationally recognized company to seek damages in respect of injury that the celebrity or the company has suffered in that jurisdiction.

The European Union (EU) approach to this problem might shade light on the solution to this dilemma. In the EU, where a person, whether natural or legal, has been injured by material that has been distributed in one or more members of the European Community, the plaintiff can

sue in the country where the defamatory content was published or in each member state the defamatory material was distributed.[12] Although the EU approach does not address a situation where the defamatory material has been distributed internationally, it serves as a model solution in solving the dilemma of which countries should accept the plaintiff's suit. If the EU approach is to be followed, then what the court should consider is not the language used in the defamatory content, but whether the plaintiff's reputation was injured in that jurisdiction.

ENFORCEMENT

Assuming that the plaintiff in an internet libel case wins against a defendant who lives abroad, he may face challenges in enforcing the judgment because the judgment must be recognized by the courts in defendant's country for it to be enforceable there. The trend in the past has seen many countries reluctant to enforce foreign judgments, either because they do not have mechanisms that allow them to recognize foreign decrees or such judgments will be against their own legal principles. It will be difficult for a plaintiff who wins a judgment against an internet libel defendant who lives in the United States to enforce it in the United States because of an over-riding constitutional preference for the First Amendment right of freedom of expression. The American courts will not enforce a judgment which, on the face of it, will suppress the defendant's First Amendment right.

Considering the worldly nature of the Internet and the fact that no single country is immune to the problem of anonymous bloggers who post defamatory content on the Internet, a

[12] *See,* Shevill v. Presse Alliance [1995] 2 AC 218 (holding that a London based newspaper which was published in Sweden could be sued for defamation under Swedish law or in any other European Union state where the plaintiff has suffered harm to his reputation).

uniform, international methodology in dealing with Internet defamation cases seem to be the most favorable solution to the problem of reluctance by countries to enforce foreign judgments.

UNMASKING THE "UNKNOWN" BLOGGERS' IDENTITY

One of the greatest challenges faced by the victims of internet defamatory statements is that internet speech is usually anonymous. In the United States of America for example, 47 U.S.C. § 230 (a) gives immunity to providers of interactive computer services. The statute was enacted by Congress in 1996 "to promote the development of the Internet and to provide immunity to Internet Service Providers (ISPs)"[13] It was enacted in response to Stratton Oakmont Inc v. Prodigy Services ,[14] which held the defendant liable for defamatory comments that were posted on a discussion board it hosted. The Stratton Oakmont court held that facts of this case were different from those in Cubby v. CompuServe, [15](holding that the defendant did not edit statements that appeared on its website and therefore it was merely a distributor, and not a publisher, of the defaming statements that were on its discussion board) because the defendant had explicitly marketed itself as "a family oriented computer network" that screened the material that appeared on its discussion board and therefore it was as good as the author of the defamatory material himself.

It is now settled law in the United States that a victim of defamation on the Internet cannot sue an interactive service provider even after the ISP has been given notice of the offending content. The United Kingdom's 1996 Defamation Act section 1

[13] *See,* 47 U.S.C. § 230 (b) (1) (incorporating the Congress's policy in enacting the Communications Decency Act).

[14] *1995 WL 323710 (N.Y. Sup. Ct. 1995)*

[15] 776 F. Supp. 135 (S.D.N.Y. 1991)

(1) provides for immunity to ISPs as well for content posted on line by a third party, but only if the ISP can show that it; " (a) …was not the author, editor or publisher of the statement complained of, (b) …took reasonable care in relation to its publication, and (c)…did not know, and had no reason to believe, that what [it] did caused or contributed to the publication of a defamatory statement."[16] A reading of section 1 (1) of UK Defamation Act imply that the Act does not provide total immunity in that if an ISP knows, or has reason to know, that what it caused to be published is defamatory it will not be immune to suit.

47 U.S.C § 230 protects ISPs in a way foreign to other countries.[17] In Zeran v. America On Line Inc,[18]the American court have held that the rationale in the Communications Decency Act is to preserve the freedom of expression on the internet and not to overburden the ISPs by requiring them to investigate each and every claim to determine if the content is not defamatory. American courts are afraid that if the ISPs can be sued after being given notice of the defamatory content, the ISPs will simply remove the content complained of even if it is not defamatory than to bear the costs of litigation or investigation.[19]

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[16] *See,* Section 1 (1) of U.K's Defamation Act of 1996

[17] *See,* Zeran v. America On Line Inc, 129 F.3d 327 (4th Cir. 1997) (holding that allowing an ISP to be liable for defamatory content if it has notice would defeat the purpose of the Communications Decency Act (47 U.S.C § 230)

[18] 129 F.3d 327.

[19] *See,* Zeran, 129 F.3d, at 333 (noting that if notice could be used to trigger litigation, the ISPs would respond by removing the speech on the Internet, even if the speech is not defamatory).

However, not every country shares the American view. Some jurisdictions have argued that the American position serves the only interests of the ISPs than those who are defamed by the comments posted on their bulletin boards. In China, ISPs are required by the Ministry of Public Security to look for defamatory content posted on their electronic bulletin boards. Once given notice, the ISP is required to remove the content. If the ISP does not remove the defamatory speech from the Internet, it will be liable notwithstanding the fact that it did not post or edit the content. In China, an ISP will be subject to liability if it merely quotes the defamatory statements of another.[20] Countries such as China and Singapore can be said to be at the extreme opposite side to that of the American law. Both positions seem to be problematic. There must be a balance between the interests of the ISPs and those who are injured by the content that is posted in the electronic bulletin boards which are hosted by these ISPs. French privacy law has been viewed by some lawyers as an appropriate way to strike a balance between one individual's right to speak freely on the Internet and another person's right to personal dignity.

This does not mean that victims of internet libel or defamation do not have any recourse. They may elect to sue the third-party user who generated the defamatory statements. The plaintiff can issue the internet service provider with a subpoena requesting the service provider to release the identity of the author of a defamatory comment. What normally happens is that before the provider of an interactive service releases the identity, they contact the author of the defamatory comments to inform him

[20] *See,* Maxstation v. Wang Hong, Life Times & PC World, Case No. 1438 (Beijing No. 1 Interm. People's Court., 2000) (where two Internet magazines who directly quoted Wang Hong's speech that a corporation's product was "as soft as tofu" were held liable for defamation).

about the subpoena so that he can oppose the release of his identity by the service provider. As has been the trend, the authors of defamatory comments legally fight for their identities not to be unmasked.

This has proved to be one of the greatest challenges faced by the victims of defamatory statements posted on the internet because, as noted at the beginning of this paper, on the one hand internet speech is mostly anonymous and on the other hand courts are reluctant to unmask the identities of the authors of the defamatory postings. In the United States of America, courts have reiterated that internet speakers have a right to speak anonymously.[21] Although United States Courts have to balance the defendant's right to speak anonymously on the internet and the plaintiff's right to protect his reputation, they are unwilling to unmask the identities of the speakers especially where the plaintiff is a public figure. The justification for this reluctance is based on the fact that plaintiffs may lose the libel suit against the defendant and still pursue them extra-judicially by seeking revenge or retribution. In John Doe No. 1 v. Cahill,[22] the court explained the reasons why it was unwilling to unmask the identity of the defendant and said, "This 'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of the defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked." [23] In In re Subpoena Duces Tecum to America On Line[24], the Virginia trial court held that the court should order a non-party internet service provider to release the identity

[21] *See*, John Doe No. 1 v Patrick and Julia Cahill, 884 A.2d 451 (Del. 2005).

[22] 884 A.2d 451 (Del. 2005).

[23] *Id* at 461

[24] 2000 WL 1210372, 542 S.E.2d 377 (Va. 2001)

of the author of the defamatory statement(s) only " (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of actionable conduct and (3) the subpoenaed identity information is centrally needed to advance that claim."[25]

The above stricter standard of approach that the United States courts have adopted is evident of the courts' reluctance in allowing the identity of the authors of defamatory statements to be unmasked.

CONCLUSION

Since libel on the Internet has been an international problem for a quite some time, the international community should seriously consider a uniform, international methodology in handling libel suits. The problems currently being experienced by those libeled on the Internet will be eradicated. An international approach will bring to an end the dilemma of forum shopping and the United Kingdom will no longer be a "libel tourist destination". A uniform methodology is the most realistic solution to the problem of reluctance by countries to enforce foreign judgments.

[25] *Id* at 8