

# ONLINE DEFAMATION: A COMPARATIVE ANALYSIS AND EVALUATING THE RESPONSIBILITY OF THE INTERNET SERVICE PROVIDERS IN THE INDIAN LEGAL FRAMEWORK

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## ABSTRACT

*The Law however, developed though it may be in the United States and Europe, is not growing at the same rate as the Internet is, in India. Several questions arise regarding the content of the web pages on the Internet. Who is considered the publisher? What if the material put up on the site is defamatory or pornographic in nature? What is the liability of the ISP? Whose responsibility is it to survey these web pages? These questions, as far as India is concerned, remain unanswered, as there is no law governing it. The purpose of the study is to present a clearer picture of the law relating to the concept of online defamation. Like other nations, India does not have any specific statute or legislation in particular dealing with online defamation. However, there are few sections of Criminal Procedure Code (CrPC) as well as Information Technology Act, 2000 that come into picture whenever there arise any case on online defamation. The present research shall discuss these sections and their significance. The research shall also look into the difficulties that arise in cases involving online defamation and how courts have tried to overcome those obstacles and laid down directives and laws*

## INTRODUCTION

Defamation is the intentional infringement of another person's right to his good name. Cyber defamation is anything which could be seen, read or heard with the help of computers. It is the wrongful, intentional publication of words or behavior concerning another person, which has the effect of injuring that person's status or good name or reputation in society. When cyber defamation is concerned, number of people who may view the comment may be gigantic. It can be more effective when posted in a specific newsgroup. Section 499 of the Indian Penal Code, 1860 discusses Defamation. Not many people are aware of how easily a defamation action can arise and it is this ignorance or lack of awareness which increases the risk of defamation over the internet. However, the courts have held that there will be no publication unless the third party to whom the defamatory statements were made actually understands their meaning.

The following are among the areas of risk of exposure to online defamation:

- World Wide Web
- Discussion groups
- Intranets
- Mailing lists and bulletin boards
- E-mail

Defamation cases involving the internet generally fall into two basic categories:-

(1) Cases involving the liability of the primary publishers of the defamatory material, e.g. web site content providers, e-mail authors etc; and (2) cases involving the liability of the internet service providers or bulletin board operators.

The ease of publishing information, correct or not, to millions of listeners worldwide over the internet has caused defamation to become an increasing problem. For example, one of the newest types of web sites on the internet are "suck sites", web sites that use a domain name that includes the name or the trademark of a company and then contains the information critical of that company. Such sites go beyond just publishing negative comments about an individual or company and actively establish a specific web site with an identifiable name such as lucentsucks.com. A key question in this area is what remedies does the law provide to the victims of such actions?

## ONLINE DEFAMATION

Defamation is a statement that harms the reputation of someone else. Courts have to balance the reputation of one person with the free speech rights of the other. Statements have to be repeated to at least one third person and must have caused damage. There are two forms of defamation: libel and slander. Libel involves the publishing of a falsehood that harms someone. Slander is the same doctrine applied to the spoken word. Collectively, they are referred to as defamation. Both fall under the jurisdiction of individual states, which usually require the falsehood to be intentional.

The common law tort of defamation provides a legal remedy to those injured by gossip. Specifically, an individual is subject to liability if he or she damages another person's reputation by speaking or publishing false statements about that person to a third party. Defamatory statements have the potential to tarnish a person's morality or integrity, or even to discredit a person's financial standing in the community. A person found guilty of making a defamatory statement is assessed the monetary value of the harm caused by his or her statement. In addition, the plaintiff in a defamation action has the burden of proving the elements of the tort.

An entity that publishes or distributes a defamatory statement made by another person is also liable. An entity, such as a newspaper, that repeats or otherwise republishes a defamatory statement is subject to publisher liability because the injured party is harmed every time the statement is repeated. However, an entity, such as a bookstore, that only distributes or transmits a defamatory statement, is subject to distributor liability only if the entity knew or should have known that the statement was defamatory. A distributor "should know" that a statement is defamatory if "a person of reasonable prudence and intelligence or of the superior intelligence of the distributor would ascertain the nature of the statement

One could claim immunity from the liability if one successfully proves that the statements were published as facts, not opinions or ideas. For example, writing, "I think that someone is accepting bribes." is not libel because it is published as an idea of the publisher. On the other hand, if the publisher writes, "this person is accepting bribes." and the statement is proved to be false, then the publisher can be considered guilty of libel.

However, the "I think" or "I believe" clause is not always a valid exemption from libel law, if the implication is that the author is indeed attempting to convey factual information.

The issue of whether an allegedly defamatory statement is one of opinion or fact is one of the more difficult and common questions in a defamation suit. Courts have held that merely prefacing an otherwise defamatory statement with the words "I believe..." is not enough to eliminate the implication that the statement was intended to communicate facts.

The plaintiff must prove that some form of damage occurred from the published statement. The damage may have been tangible losses, such as the loss of a job, financial loss, or the damage may have been intangible such as the loss of reputation and respect in a community.

No claim of defamation would arise if it's a fair, true and impartial account of:

1. A judicial proceeding, unless the court has forbidden the publication
2. An official proceeding, to administer the law.
3. An executive or legislative proceeding
4. The proceedings of a public meeting with a public purpose
5. Reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.

Public figures such as politicians have less protection under libel law than average individuals. They cannot take action unless they can prove that the statement published about them is of malicious intent and not simply of misinformation. The reasoning behind this is that in theory a public figure can restore his or her reputation more quickly and easily expressly because he or she is already in the public eye and commands the attention of that public.

With the explosive growth of the Internet as a medium used to share information quickly and inexpensively between people, we are faced with the problem of a large decentralized global forum with very little regulation. What happens when a law is broken, and one must place accountability? How does one enforce legislation that may conflict with other codes from other communities to which the Internet extends?

Many questions arise from the issues revolving around the Internet and libel laws. What court precedents have there been in regards to cyber libel? What issues did they address? And how those cases laid down the grounds for future legislation? As of late, there have been a few major cases that have strongly affected the courts' decisions in case law. However, due to the

constant changing nature of technology and the needs that come about from differing use of that newly developed technology, amending case laws is nearly inevitable. Yet, we must drive the formation of the new laws, which are to regulate or not to regulate the Internet, to take into consideration the possible affects and the needs of the future developments in cyberspace.

## **DEFAMATION & INTERNET: LIABILITY OF THE INTERNET SERVICE PROVIDERS**

Internet defamation law is complicated by the tricky question of liability of system operators. In defamation law for print and broadcast media, liability is sometimes considered to extend beyond the defamer himself, for instance, the writer of a libelous newspaper column, to the publisher of the material. The idea of holding publishers responsible for libelous material in traditional media has been thoroughly tested and defined in court; there are clear precedents for determining who is liable for defamatory statements in these media. On the Internet, however, such issues are considerably more nebulous.

A sysop, or system operator, is defined as a person or organization who in some way manages the publication/distribution of material online. The most common example is the operator of a bulletin board where users are permitted to post messages which can then be read by other users. Such bulletin boards may be exclusive to a limited group of subscribers, or they may be accessible to anyone on the Internet. The exact role of the sysop can range from merely providing technical support for the posting and reading of messages to carefully reading and editing all published submissions. It is this disparity in the functions of individual sysops that leads to questions about the extent of a sysop's liability in individual cases.

One view of a sysop is as a common carrier, much the way telephone companies are legally viewed. Just as telephone companies attempt no control over what information is communicated across their wires, and are not held legally liable for the content of such communication, this view of a sysop indicates that the sysop provides a forum for any message the user wishes to communicate and is therefore not liable for the content of such a message. For such a definition to apply, the sysop would have to take no editorial or censorial control whatsoever over any postings; only then can he be considered a common carrier. An example of this might be the host of a live-chat room who in no way limits access to this chat room or monitors the conversations which take place therein.

The opposite role from a common carrier is what is called a publisher; in the case of print media, this is the company that actually prints the newspapers containing defamatory material. A publisher is held legally liable for the information it prints because it exercises full editorial control over that information; it is therefore assumed to be in a position to monitor its content for defamatory material. Many sysops are deemed to fit this role much more closely than that of distributor or common carrier, as past court decisions on sysop

liability have shown. In *Stratton vs. Prodigy* a judge noted that Prodigy did exercise control over its content and could therefore be held responsible for that content. This definition of Prodigy as a publisher was later changed, but some sysops are still considered publishers under the law. A more definitive example would be a newsgroup moderator who reads and edits all material before any is posted; this moderator then clearly takes an active role in the dissemination of defamatory information.

A third category, between common carrier and publisher, is the category of distributor. Again, an analogy to print media is useful; the distributor in this case would be the newsstand which may sell a newspaper containing defamatory content. The newsstand is not assumed to be aware of the content of all the publications it sells and is therefore not held responsible for that content. However, in some situations, the newsstand may in fact be aware of defamatory content; in this instance, it can then be held liable for continuing to distribute this content. In general, a distributor is seen as taking only a passive role in possible defamation and is therefore not liable; only when some deliberate transgression such as failing to remove material it knows to be defamatory can be proven is the distributor liable. This category, sitting in the middle ground between two extremes, is the most difficult to define and deal with, but it seems to be the appropriate designation for many system operators, who will in general not attempt to monitor content but may take action to remove objectionable content if it is brought to their attention. In *Cubby vs. CompuServe*, CompuServe was deemed a distributor and therefore not held liable for defamatory material of which it could not be expected to have knowledge. However, the categorization also implies that if CompuServe had been made aware of this material, it would have been obligated to remove it.

Finally, the case of *Zeran vs. America Online*, in which a user was victim of a malicious hoax. The courts ruled in favor of America Online, upholding that interactive computer service providers may not be held liable for posting defamatory statements posted by 3rd parties via the ISP. Effectively, this decision reversed the findings of *Stratton Oakmont, Inc. vs. Prodigy*.

## PROBLEMS OF APPLYING TRADITIONAL DEFINATIONS

Although these definitions can be and have been applied to system operators in Internet defamation cases, some problems do arise with such categorization. For instance, when Prodigy was deemed in court to be a publisher, many were concerned that penalizing a service for attempting to maintain control of its bulletin boards could discourage any attempts at control whatsoever. Not only could this conceivably make it easier for defamers to spread on-line, it also makes it more difficult for a service to forbid flaming or, like Prodigy, provide a family-friendly forum for communication, or even to focus that forum on discussion of a specific topic, as many bulletin boards do. Further, laws that hold system operators liable for their content can, by making the system operator's position a hazardous one, discourage people and organizations from taking on this role, therefore reducing the usefulness of the

Internet as a forum for communication among all users. There are some who will argue that this ultimately results in an unnecessary restriction on free communication, and that system operators should therefore not be held liable for defamation or other violations on their services under any circumstances. Others, of course, argue that defamation is a serious enough problem, especially on a forum like the Internet where false information is so easily spread, that all possible efforts should be made to discourage it, and this extends to making sysops responsible for the material they make available. The issue is new enough that neither courts nor legislation have yet rendered definitive verdicts on these questions; only time will tell how they are ultimately answered.

## POSITION IN SOME OTHER COUNTRIES

### *The United States Position:*

Currently libelous messages placed on the Internet are treated the same as libelous messages published in any other medium. However, because the author can easily keep his or her identity a secret, there is frequently a problem in finding a responsible party. Recent cases indicate that owners and operators of online service providers may be liable for what is placed on their servers. Whether or not the Internet service provider is responsible depends on whether the courts consider the Internet service provider to be a publisher or a distributor. Distributors and publishers are treated differently under traditional libel law.

- Distributors such as newsstands, bookstores and libraries are usually not liable for anything that they sell.
- Publishers, such as newspapers and publishing houses are held responsible for materials that they print.

On the Internet, if the service provider is found to be a distributor, the Internet service provider will not be considered liable for materials that appear on its servers. If, however, the Internet service provider is considered to be a publisher, then it will be held responsible for everything that appears on its servers.

### *Great Britain's Position:*

Material published on the web falls under the same libel laws as material published in any other medium. The British libel law differs from American libel laws in approach. British libel laws are considered **pro-plaintiff**, meaning that the defendant must prove that she or he did not commit libel. This is the opposite of American libel law, which places the burden of proof upon the plaintiff to show that the alleged libelous statement contained malice and caused damage.

The Defamation Act of 1996 holds Internet service providers responsible for what they publish under British libel laws, albeit in only a very limited scope. This act does not hold Internet service providers responsible if they are not primarily responsible for material in question.

The Defamation Act is looked upon by British lawmakers as a way of limiting potential libel lawsuits. The act will make libel cases cheaper and more quickly resolvable:

- The act will allow judges to suggest money damages and offer Internet Service providers the option of apologizing to the plaintiff and paying him or her money damages.
- Defendants will also be able to offer amends under the defense of innocent dissemination.
- Defendants will be able to reduce their damages if they can prove that the plaintiff has a general bad reputation.

#### ***Singapore's Position:***

Singapore has extremely strict libel laws compared to the American system. Singapore leaders have firmly stated that libel on the Internet will not be tolerated and abusers will be severely punished. On March 6, 1996, Internet service providers became responsible for anything that they print. Further, all Internet service providers must register with the Singapore Broadcasting Authority. The Singapore government has developed a national phone line system through which individuals can access the Internet. The phone lines can be monitored and abusers can then be found.

This law can be ineffective for two reasons:

1. **The accessibility of foreign phone lines-** Individuals can easily dial into a foreign phone system to access the Internet and bypass the monitoring system in Singapore.
2. **The existence of cybercafés-** Cyber cafes is popular locations where young people gather. The young people socialize and also surf the Internet. The computer user pays a fee for the Internet time and, to the frustration of the Singapore government, can thereby send anonymous messages.

The Singapore government is also advancing an educational program on Internet etiquette and hopes to teach students how to use the Internet responsibly.

#### ***Canada's Position:***

In Canada, there have not been any landmark cases that would determine the policy with which the Canadian government will treat Cyber libel. The existing libel codes hold that the

defendant using a defense of innocent dissemination will succeed if the defendant demonstrates:

- a. The defendant does not know of the libel contained in the work authored or published by him or her.
- b. There was no reason for the defendant to suppose that the work he or she authored or published would be libelous.
- c. It was not negligence on the defendant's part that he or she did not know that the work contained libelous material.

### ***India's Position:***

The Indian Penal Code, 1860 defines defamation as "statement or words which are published and calculated to expose any person to ridicule, contempt or hatred or which aim to injure the said person in his vocation, business, trade, profession or office, or which aim to cause him to be shunned or avoided in public and in society."

The important word here is 'published' which implies that, for a statement to be considered defamatory, it should be communicated to someone other than the person to whom it is addressed.

Though the Information Technology Act, 2000 does not specifically define defamation as an offence, it is clear that the definition of "publishing" is wide enough to include statements made on the Internet. The medium of publication is immaterial in cases involving defamation because, just as in the real world, everyone online has the right to reputation.

Online defamation is, in fact, the most dangerous because of the relatively low cost of setting up a site, the ability to disguise identities and ease with which uncensored information can reach with a limitless audience.

You can have a defamatory statement spread via a site, text message, email or discussion board, and get sued for it, too. Worse, you are guilty even if you have simply -- or even wrongly -- forwarded a defamatory email, since every subsequent "publication" is a fresh offence. Similarly, owners, administrators and coordinators of any such site will also become a party to the suit.

What about the Internet Service Providers (ISPs) that host these pages? Can they also be held liable? Section 501 of the IPC states that "whoever prints any matter, knowing or having good reason to believe that such matter is defamatory, would be liable to imprisonment of two years, or fine, or both." This has been the bane of many publishers, who have been held liable for defamatory matter printed in their newspapers.

The IT Act, however, clarifies that though the ISPs would ordinarily be liable for the abuse of services provided by them, they may be excused if it is "proved that the offence or contravention was committed without their knowledge or that they had exercised all due diligence to prevent it." This is in keeping with global trends which hold that while ISPs should be encouraged to develop some kind of supervisory mechanism, due regard must also be given to the physical difficulties of censoring each and every statement on the Internet.

There arises difficulties of jurisdiction and lack of legal awareness amongst Net users in the country. Most defamatory sites and mailing lists are cunningly uploaded from other countries, outside the jurisdiction of our courts, making punishment by Indian authorities a pipe dream.

## **CONSEQUENCES OF DIFFERENT LEGAL APPROACHES TO CYBER LIBEL**

Because the Internet is a global medium and every nation treats libel differently, the plaintiff now has the option of selecting the most favorable forum in which to sue. Since the Internet is accessible from virtually anywhere on the globe, the plaintiff has many forums to choose from. This causes potentially serious problems for Internet service providers. Specifically, the Internet service provider might publish some material in a place where they would not be held liable in a defamation complaint, but be sued in a place where they will be responsible for anything that they put on the Internet.

## **CONCLUSION**

Communication is an art, that has developed immensely over the past few centuries and an art that will continue to reinvent itself to unimaginable technological advance. Starting with the advent of the printing press in the nineteenth century, to the era of the Internet that we are living in today, communication has become astoundingly simple and continues to become simpler by the day.

The Law however, developed though it may be in the United States and Europe, is not growing at the same rate as the Internet is, in India. There are court cases in progress right now that will decide if access providers such as Prodigy, America Online and Compuserve are responsible for defamatory remarks broadcast over their services, but there is no legal ambiguity about whether individual users can be sued for making defamatory or libelous statements. Individual users are responsible for making sure the information they distribute is not libelous or defamatory.

The Internet has made world wide, instantaneous communication easy. The average user now has the power to be heard by hundreds or even thousands of other users, but in terms of libel and defamation, the Net is not a new world of freedom. The reality is that libel and defamation laws are enforceable in the virtual world just like they are in the real world.

In the absence of any legislation governing ISPs, and no case having arisen in the courts regarding the same, the path to follow is anybody's guess. Although legislations passed in the United States and Europe along with relevant case law maybe of some value, cultural differences may hinder courts in India from taking to the decisions of foreign courts in India.

**Sec 499, Defamation:-**

Whoever, by words either by words spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any other person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

**Explanation 1:-** It may amount to defamation to impute anything, to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

**Explanation 2:-** It may amount to defamation to make an imputation concerning a company or an association or collections of persons as such.

**Explanation 3:-** An imputation in the form of an alternative or expressed ironically, may amount to defamation.

**Explanation 4:-** No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the morals or intellectual character of that person, or lowers the character of that person in respect of his caste or his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

## REFERENCES

- [1] Susan Singleton, Simon Halberstam, *Business, The Internet And the Law*, 1999, Tolley Publishers, U.K.
- [2] Sharon. K. Black, *Law In The Internet Age*, 2002, Morgan Kaufmann Publishers, USA
- [3] Ratanlal and Dhirajlal, *The Law of Torts*, 24<sup>th</sup> ed., 2007, Wadhwa and company, Nagpur
- [4] Ryan W. King, *ONLINE DEFAMATION: BRINGING THE COMMUNICATIONS DECENCY ACT OF 1996 IN LINE WITH SOUND PUBLIC POLICY*, available at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0024.html>
- [5] Peter B. Maggs, John, T. Soma, James A. Sprowl, *Internet and Computer Law*, 2001, West Group, USA
- [6] Martin Samson, *Online Defamation/Libel/Communications Decency Act - Internet Library of Law and Court Decisions*, Also available at [http://www.internetlibrary.com/topics/online\\_defamation.cfm](http://www.internetlibrary.com/topics/online_defamation.cfm)

[7] An instance of libelous remarks over a public on-line forum triggered a company to sue a network service provider. On a widely read financial matters forum called "Money Talk," a Prodigy user had posted about Daniel Porush, the president of Stratton Oakmont, an investment securities firm, and his employees. Porush, the poster claimed, was "soon to proven criminal," and further, Stratton Oakmont, Inc., was a "cult of brokers who either lie for a living or get fired." After reading this posting on Prodigy, Porush filed suit against the network service claiming Prodigy liable for this poster's libelous claims. Prodigy, on its legal behalf, claimed the status of a distributor (as in the case of *Cubby vs. CompuServe*). However, Stratton Oakmont argued that due to Prodigy's editorial control over content, Prodigy should be more correctly classified as a publisher. In essence, this is because Prodigy made clear to all users that it retained the right to edit, remove, and filter messages in its system in order to ensure a "family" atmosphere on-line. Because of these claims, the court classified Prodigy as a publisher and awarded damages to Stratton Oakmont.

[8] In this very first major published case on Internet libel, the plaintiff, *Cubby, Inc.* claimed damages due to one of CompuServe's hundreds of independent, self operated forums. The journalistic forum called, "Rumorville" had an electronic gossip magazine called "Skuttlebut" on which was posted a defamatory comment about Cubby, Inc. Because CompuServe does not review the contents of publications prior to postings, the court found that CompuServe held a position analogous to a distributor -- for example, an electronic bookstore or library, thereby relieving CompuServe from the liability that a publisher would face. This finding is based on the court case *Smith v. California*, in which the United States Supreme Court held that a distributor must have demonstrable knowledge of the erroneous (and defamatory) content of a publication prior to dissemination in order to be held liable for releasing that content. Prior landmark cases involving plaintiffs pressing libel charges against a carrier, including *N.Y. Times v. Sullivan* and *Western Union Telegraph v. Lesesne*, have found that carriers, or distributors of published works, do not hold responsibility for libel unless they had reasonable knowledge beforehand of the libelous material they had distributed.

[9] The plaintiff, Kenneth Zeran, had his address and phone number posted in connection with advertisements for souvenirs (T-shirts, mugs, etc.) glorifying the Oklahoma City Bombing. An unknown AOL (America Online) user had obtain Zeran's personal information and posted these ads throughout AOL. Zeran received many disturbing threats due to this hoax, and was continually harassed via telephone and post. He sued AOL claiming negligence on AOL's behalf in allowing such notices to be posted, despite the complaints and postings he had registered with AOL upon first learning of the impersonation. Using the CDA (Communications Decency Act of 1996) as its defense, AOL claimed immunity through the protection that the CDA provides Internet providers.

[10] Martin Samson, *Online Defamation/Libel/Communications Decency Act - Internet Library of Law and Court Decisions*, Also available at [http://www.internetlibrary.com/topics/online\\_defamation.cfm](http://www.internetlibrary.com/topics/online_defamation.cfm)

[11] Susan Singleton, Simon Halberstam, Business, *The Internet And the Law*, 1999, Tolley Publishers, U.K.

[12] Internet and defamation, also available at <http://www-cse.stanford.edu/class/cs201/Projects/defamation-and-the-internet/sections/worldwide/canada.html>

[13] Pritha Jha, *Online Defamation*, also available at <http://www.legalserviceindia.com/articles/defonline.htm>

[14] Anubha Charan , Price of Defame, available at <http://www.rediff.com/search/2001/nov/01fame.htm>

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