



Wrongful Posting on the Internet

The Privacy You Save Could be Your Own

by Gary D. Nissenbaum and Laura J. Freedman

Ubi Jus Ibi Remedium. (Equity will not suffer a wrong to be without a remedy.)

Free speech on the Internet is not for the faint of heart. It is a messy, cacophony of both accurate and inaccurate information blasted about the ether at the speed of light. While on the one hand this is clearly evidence that the sweet song of democracy also can be played electronically, there are times when the note struck is off key. People can misuse their free speech rights to post inaccurate and harmful information on the Internet about someone's personal, financial or even sexual life that can cause devastating harm.

It is black letter law that a person has a First Amendment right to engage in free speech anonymously.¹ The authors believe that attorneys should be zealous advocates of that right, and hold it sacrosanct; however, when an inaccurate or exceedingly offensive posting causes harm to another, the law must provide a remedy that takes into account the rights of the victim as well.

The courts and legislative bodies have had mixed results in reaching that balance. In order to begin to sort all this out, the authors have set forth below three fact patterns to illustrate

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the current state of New Jersey law. Each of these three scenarios offers a non-exclusive list of potential remedies. As the scope of the Internet grows, the courts and legislative bodies will continue to refine the law to create a balance between the rights of the poster of an Internet communication and those of the person who is the subject of that communication.

Scenario #1

Postings That Cause Financial Harm

A client manufactures tires. Someone anonymously posts in various chat rooms and blogs a series of false statements that the tires will blow out at high speeds. The client assumes this has been orchestrated by its main competitor. It has experienced a number of cancelled orders for tires, citing the Internet rumor. The client asks if something can be done.

The Anonymous Speaker

The first order of business will be to determine the identity of the person who posted the information. In the event the poster hosts its own website, obtaining that information may include doing some online investigative research, including searching domain registries and reaching out to those parties to obtain identifying information. If instead, the person is merely posting comments on an online message board or third-party website, the investigation also may involve filing suit against the person or entity that owns the website on which the postings were made.

Notably, under the Communications Decency Act, the webmaster may have immunity from damages if the webmas-

ter is considered to be encompassed by the highly expansive definition of interactive computer service.² However, the information still may be obtained by subpoena, subject to a motion to quash, if appropriate.

In order to issue the subpoena, one might institute suit for defamation against a fictitious defendant.³ Ultimately, as set forth above, based upon the First Amendment right to anonymity, the identity of the speakers may be unobtainable.⁴ In fact, the Appellate Division has established the following guidelines for evaluating the rights of the anonymous speaker in comparison to the rights of the plaintiff:

[W]hen faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP [Internet service provider] to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses[, t]he trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclo-

sure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application....

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie

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cause of action against the fictitiously-named anonymous defendants...

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.⁵

Business Defamation and Tortious Interference

There are essentially five elements of a defamation claim: 1) the defendant made a defamatory statement of fact; 2) that fact was "of or concerning" the

plaintiff; 3) the statement was false; 4) it was made public, or "communicated to persons other than the plaintiff;" and 5) the plaintiff incurred damages as a result.⁶ A plaintiff bears the burden of proof for each of those elements "by clear and convincing evidence."⁷

The tort of defamation has been held to apply to business-related speech as well. The courts have awarded damages caused to a business's reputation as a result of a defamatory statement.⁸ However, in making such an allegation, the plaintiff must prove additional elements. Specifically, "[a] plaintiff alleging trade libel must prove publication of a matter derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him

or otherwise to interfere with plaintiff's relations with others."⁹

The court elaborated that the statement "must be made to a third person and must play a material part in inducing others not to deal with plaintiff."¹⁰ Notably, the defendant's actions also could constitute tortious interference with a business opportunity.¹¹

Scenario #2 Postings of a Sexual Nature That Cause Harm

The same client from Scenario #1 is so pleased with how his matter was handled, that he seeks advice involving his 15-year-old daughter. Apparently, at her 20-year-old boyfriend's request, she posed for a nude photo for him. He then emailed it to his friends. The photo has now made its way onto a number of social networking websites.

The chancery court in *Del Mastro v. Grimado*¹² was presented with a similar set of facts, albeit offline. There, the plaintiff had been in a long-term relationship with the defendant during which she allowed him to take a series of provocative photos of her. She alleged that the boyfriend and/or his sister then distributed the pictures through Christmas card mailings. Her claims included intentional infliction of emotional distress, mental anguish and damage to reputation.¹³ The court found in the plaintiff's favor, and granted compensatory and punitive damages.¹⁴

False Light Publicity

In the scenario, the daughter arguably also could try to make a claim that she was damaged by the boyfriend's publication of materials that place her in a "false light." The tort essentially prohibits an individual from giving "publicity to a matter concerning another that places the other before the public in a false light [where:] (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reck-

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less disregard as to the falsity of the publicized matter and the false light in which the other would be placed."¹⁵

This likely would not work for the potential plaintiff in the above scenario. Because she posed for the photo, she likely would have a difficult time arguing the falsity of the subject matter. Similar to a defamation claim, "[u]nder New Jersey law, the falsity of the alleged statement is an essential element of...a false light claim."¹⁶ However, this could be relevant in a different scenario, where a photo was digitally modified to create a false image.

Invasion of Privacy

While New Jersey does not have a statutory right of privacy, it does generally recognize a common law right.

The common law right to privacy is itself very expansive and recognized by this state...The cause of action for an invasion of the right of privacy has been defined by the Restatement of Torts as having at least four separate torts: 1) unreasonable intrusion upon the solitude of another; 2) unreasonable publicity given to one's private life; 3) appropriation of the other's name or likeness; and 4) using publicity to place the other in a false light before the public.¹⁷

In the authors' scenario, the two *separate* torts that are implicated are the intrusion upon the solitude of another and the publication of private facts. With regard to intrusion upon the solitude of another, New Jersey has adopted the restatement rule that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."¹⁸ Such an intrusion into one's privacy can bring about liability,

even absent publication.¹⁹

Again, the authors can look toward the court's holding in *Del Mastro*, to the effect that it "is satisfied that the distribution of erotic photographs of plaintiff in Christmas cards sent to her immediate family, friends and business contacts is 'highly offensive to a reasonable person,' owing mostly to the nature of the material distributed, *i.e.*, the contents of the photographs and the selected addressee," and thus would constitute a violation of the right to privacy.²⁰

Perhaps even more relevant to the instant analysis is the invasion of privacy as it relates to the publication of private facts. Here, New Jersey also follows the restatement rule, finding liability for "[o]ne who gives publicity to a matter concerning the *private* life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that (a) would be *highly* offensive to a reasonable person, and (b) is not of legitimate concern to the public."²¹

Clearly, nude pictures of the minor would be offensive, and are of no concern whatsoever to the public.

The ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned home from a visit, or gone camping in the woods, or given a party at his house for his friends. It is quite a different matter when the details of sexual relations are spread before the public eye, or there is highly personal portrayal of his intimate private characteristics or conduct.²²

Federal Sexual Exploitation Laws and the Communications Decency Act

In this fact pattern, because the victim was a minor there are other laws relating to child pornography that would be implicated and arguably provide a remedy. Probably the most well known aspect of this body of law is 18

U.S.C. Section 2257, which requires that any picture of a sexual nature only be posted if the producer of the content complies with strict recordkeeping requirements.²³ These requirements are putatively meant to ensure that the person is demonstrably over the age of 18 (though some have argued that it is a thinly veiled attempt to overly complicate the regulations with which the adult entertainment industry must comply, in order to impede its growth).

However, other sections of the statute provide a prohibition on coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction, and likewise provide a prohibition on the transportation or shipment of that visual depiction (including shipment via computer).²⁴ While this is generally considered a criminal statute enforceable only by the Department of Justice, there is a little-known section that provides for a private right of action for violations of certain aspects of it as well.²⁵

Importantly, a social networking website would presumably not be able to claim immunity by virtue of its status as an Internet service provider, or as provider or user of an interactive computer service, even as so broadly defined under the Communications Decency Act.²⁶ That statute specifically states that its immunity does not extend to criminal activities.²⁷

Accordingly, in the scenario, there would be a number of potential claims. First, the website itself, and/or the person or entity owning the website, would likely be the subject of a claim for the failure to maintain the requisite recordkeeping under the statute.²⁸ Next, any of the individuals who participated in forwarding the photo, including the boyfriend, could be liable for the transportation of the depiction of child pornography.²⁸ Further, the boyfriend also could be liable under this statute if it is determined that he coerced her to pose for the photo.²⁹

Scenario #3

Death by Internet Posting

A 13-year-old girl was communicating on the MySpace website with someone she thought was a boy who was interested in her. Eventually, his communications became hostile and he rejected her, suggesting that she kill herself. She was so distraught that she committed suicide. It later was revealed that there was no boyfriend, and the poster was instead a female neighbor, or others using her computer, who had perpetrated a hoax on the girl.

This is an unfortunately true scenario involving the circumstances of the suicide of 13-year-old Megan Meier in Missouri. When this happened a few months ago, the local prosecutor came to the conclusion that there was no law that would support a criminal case against the neighbor.

In her testimony before a panel seeking to draft a law to provide a remedy for this harm in the future, Megan's mother testified, "I can start MySpace on every single one of you, and spread rumors about every single one of you, and what's going to happen to me? Nothing. People need to realize that this is 100 percent *not* OK; that you're going to go to jail."³¹

Criminal Fraud and Harassment

While the Missouri authorities concluded there was no legal means to redress this wrong, as of this writing the U.S. Justice Department empanelled a grand jury to determine if an indictment should issue for criminal fraud. Interestingly, they are alleging that the fraud would be deemed to have been perpetrated upon MySpace. That is because its terms and conditions of use include a provision stating the user agrees it will not violate the proscription against using MySpace for the purpose of "attempting to impersonate another Member or person."³²

Moreover, while the Missouri harassment statute is fairly restrictive, had the

conduct occurred in New Jersey the state's harassment statute would likely have prohibited the wrongful conduct. N.J.S.A. 2C:33-4 states that it applies to "a communication or communications anonymously."³³ The Missouri statute only applied to written or telephone communications.³⁴

It also is possible that, had the conduct taken place in New Jersey, the crime of forgery would have applied. Under N.J.S.A. 2C:21-1, "a person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor...Makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act or of a fictitious person,..."³⁵ Moreover, the statute also prohibits the possession of a forgery device, which includes computers.³⁶

Conclusion

There clearly is no general prohibition against posting anonymous opinions and other information on the Internet, nor do the authors believe there should be. However, there are scenarios in which the exercise of free speech crosses the line into the realm of tortious misconduct. For such misconduct, there should be redress. The authors believe the law must provide such a remedy, while appropriately balancing the civil rights of the person posting the communication. ❧

Endnotes

1. See generally, *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 342 (1995) ("Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

2. 47 U.S.C. § 230(c) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); see also generally, *Donato v. Moldow*, 374 N.J. Super. 475, 487 (App. Div. 2005) ("There is no dispute that large, commercial ISPs fit the "interactive computer service" definition...Website operators are also included.") (citations omitted).
3. N.J. Court Rules.4:26-4 (2008).
4. See *McIntyre*, 514 U.S. at 342.
5. *Dendrite Int'l, Inc. v. John Doe, No. 3 and John Does Nos. 1, 2 and 4, et. al.*, 342 N.J. Super. 134, 141-42 (App. Div. 2001).
6. See *Zheng v. Quest Diagnostics, Inc.*, 2007 WL 2745771, *3 (3d Cir. 2007) (citing *Feggans v. Billington*, 291 N.J. Super. 382 (App. Div. 1996)).
7. *Id.* (citing *Hornberger v. American Broadcasting Cos., Inc.*, 351 N.J. Super. 577 (App. Div. 2002)).
8. Notably, the statute of limitations differs for business defamation as compared to traditional defamation. "Whereas a defamation claim is subject to a one-year statute of limitations, a claim for business libel is subject to the general six-year statute of limitations applicable to malicious interference claims."
9. *Patel v. Soriano*, 369 N.J. Super. 192, 246-47 (App. Div. 2004) (citing *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 331 N.J. Super. 303, 313-14 (App. Div. 2000) and *Prosser & Keeton on Torts* § 128 at 970-71).
10. *Id.* (citing *Prosser & Keeton on Torts* § 128 at 967).
11. *Id.* (citing *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 524, (App. Div.), *certif. denied*, 170 N.J. 211 (2001)).
12. A defendant can be liable for business interference with a prospective economic advantage upon a show-

- ing by the plaintiff that (a) the plaintiff was "in 'pursuit' of business; (b) the interference was intentional and with "malice;" (c) the interference caused a loss of prospective gain; (d) the interference caused damage to the plaintiff; and (e) that the claim is directed against defendants who are not a party to that relationship. See *Printing Mart-Morristown v. Sharp Electronics Corp, et. al.*, 116 N.J. 739, 751-52 (1989).
13. *Del Mastro v. Grimado*, 2005 WL 2002355 (N.J. Super. Ch. 2005) (unpublished opinion).
 14. *Id.*
 15. *Id.*
 16. *Zheng v. Quest Diagnostics, Inc.*, 2006 WL 19933423, *2 (D. N.J. 2006) (not approved for publication), (citing *Romaine v. Kallinger*, 109 N.J. 282, 294 (1988) (citing Restatement (Second) of Torts § 652E)).
 17. *Id.* at *3.
 18. *Del Mastro*, 2005 WL 2002355 at *4.
 19. *N.O.C., Inc. v. Schaefer*, 197 N.J. Super. 249, 254 (Law Div., 1984) (citing Restatement (Second) Torts § 652B (1977)).
 20. *Bisbee v. John C. Conover Agency, Inc.*, 186 N.J. Super. 335, 339-40, (App. Div. 1982) ("The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined...The thrust of this aspect of the tort is, in other words, that a person's private, personal affairs should not be pried into.").
 21. *Del Mastro*, 2005 WL 2002355 at *4. ("Sexual proclivities and personal relationships are not best examined in a judicial context. Individuals, though, must have access to the judicial process when his or her rights to privacy and individual integrity are violated. A level of civility and respect for the rights of others are properly vindicated within the judicial process. That which occurred here is simply beyond unacceptable. The gravamen of the violation alleged does not concern whether or not the taking of certain photographs was consensually conducted; rather, that which need necessarily be addressed is the depraved distribution of photographs to plaintiff's "universe" in an effort to humiliate, embarrass and tortiously violate an individual for hurtful, spiteful purposes. A termination of a relationship, a failure to repay a loan or the interest that might pertain, or even feelings that one has been personally wronged, can never justify the personal degradation of an individual and her right to be free from the unconscionable and outrageous activities of another. That which occurred here simply cannot be countenanced in a civilized society. The distribution of the photographs, consensually taken, to plaintiff's "universe," by Philip is an outrageous act warranting both compensatory and punitive damages.") *Del Mastro*, 2005 WL 2002355 at *6-8.
 22. *Dzwonar v. McDevitt*, 348 N.J. Super. 164, *177-78, (App. Div. 2002) (citing Restatement (Second) of Torts § 652D (1977) (emphasis added)).
 23. *Bisbee*, 186 N.J. Super. 335 at 341.
 24. 18 U.S.C. § 2257.
 25. See generally, 18 U.S.C. §§ 2251; 2252 and 2252A.
 26. 18 U.S.C. § 2255. Any person who, while a minor, was a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000 in value.
 27. 47 U.S.C. § 230.
 28. 47 U.S.C. § 230(e)(1) ("Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.").
 29. 18 U.S.C. § 2257.
 30. 18 U.S.C. § 2252A.
 31. 18 U.S.C. § 2251.
 32. Cathcart, Rebecca, MySpace Is Said to Draw Subpoena in Hoax Case, *N.Y. Times*, Jan. 10, 2008.
 33. MySpace.com Terms of Use Agreement, Terms and Conditions, located at www.myspace.com/index.cfm?fuseaction=misc.terms.
 34. N.J.S.A. § 2C:33-4 ("Except as provided in subsection e., a person commits a petty disorderly persons offense if, with purpose to harass another, he: a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;...").
 35. V.A.M.S. § 565.090.
 36. N.J.S.A. § 2C:21-1.
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