DEFAMATION LAW – ONLINE PUBLICATION

(FOR MATERIAL PUBLISHED AFTER 1 JANUARY 2006)

NOTE: This information sheet has been prepared in light of the enactment of "uniform" defamation laws in 2006. It is based on the New South Wales law which is a model in effect for other states and territories. The *Defamation Act 2005* (NSW) will be referred to as the "Defamation Act NSW"). However, be aware that the legislation in other states and territories is still not entirely uniform.

If the material in issue was published prior to 2006, please refer to our Information Sheet entitled "The Law of Defamation – for material published pre-2006".

Introduction

Defamation is a communication from one person to at least one other that harms the reputation of an identifiable third person, where the communicator (the publisher) has no legal defence. The law of defamation aims to balance the right of free speech with protecting a person's reputation against harm. This information sheet focuses on the application of defamation law to the online environment and online content providers.

The Arts Law information sheet: Defamation law (for material published after January 2006) discusses the Uniform Defamation Laws and the common law action in defamation and the defences that are available to an action in defamation and also the effect of an apology or an offer of amends and the consequences of the failure to accept a reasonable offer to make amends.

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The Uniform Defamation Laws and the common law action in defamation

The law of defamation is complex and the outcome of any defamation action is often unpredictable. Defamation actions are very costly**,** difficult to defend and substantial monetary damages can be awarded. In some cases plaintiffs can obtain a court order called an "injunction" preventing any further communication of the offending publication or material. An action for defamation may be brought, not only against the original publisher (the writer/speaker), but also against anyone who takes part in the publication (the 'primary publisher') or re-publication of the material (a 'subordinate publisher').

This information sheet provides an overview of the law of defamation applying to online publications based on the Uniform Defamation Laws, ways to minimise risks and what to do if you are threatened with a defamation action. It is outside the scope of this information sheet to set out the differences between the Uniform Defamation Laws and the common law rules as to defamation.

Defamation on the Internet: flame wars and online trolls

Internet message boards and social media websites are publishing platforms rife with instances of online defamation. Some participants get carried away in their discussion and descend into a 'flame war', posting personal attacks and comments that could be defamatory. The anonymity of the internet also provides an environment for 'trolls' who deliberately make outrageous statements about other people to cause disruption. As a response to the online environment potentially producing a flood of defamation claims, the courts have attempted to balance the right of a person to seek vindication of his or her reputation through legal action against the need to avoid the resources of the courts being applied to trivial claims.

A claim for defamation in relation to a publication on the internet presents problems to a person seeking to vindicate his or her reputation (the plaintiff). The publication may be anonymous so the person may have practical difficulties in discovering the identity of the person posting the defamatory material. The plaintiff also has to prove that the alleged defamatory material has been viewed by third parties. If the plaintiff cannot identify people that have viewed the material, or if only a very small number of people have read the material complained of, these can be factors which may lead the court to conclude that there is no real and substantial defamation claim. The court may then strike out the claim as an abuse of process because it is a waste of the resources given the trivial nature of the defamation claim.

Another factor the courts would consider is the level of seriousness of allegedly defamatory material relied on by the plaintiff. If the level of seriousness is low and as such the plaintiff is unlikely to have sustained any harm to their reputation, a court may strike out the defamation action. This is because such claim is trivial and plaintiff has no prospect of obtaining any damages or other valuable relief proportionate to the resources likely to be expended on the trial.

What is defamation?

For a defamation action to succeed, the person complaining of the defamation (the plaintiff) has to prove three things:

1. that the communication has been published to a third person;
2. that the communication identifies (or is about) the plaintiff; and
3. that the communication is defamatory.

These elements are described in the Arts Law information sheet: Defamation law (for material published after January 2006), so this information sheet will focus on the first element in relation to online communications.

The communication has been published to a third person

To be defamatory, the material has to be **published** (communicated by any means – written, orally, pictorially) to at least one person other than the plaintiff. The intention of the publisher does not matter – liability for defamation can arise from errors.

In relation to material displayed online or delivered by electronic communications (such as email) a **publication** needs to consist of two elements, for example the act of sending an email and someone else receiving it. It is only when a defamatory publication is comprehended by the reader that harm to reputation will occur.[1]

If you think you have been defamed by someone posting anonymously on the internet, there are rules contained in the Uniform Civil Procedure Rules of each state and territory, which allow access to information to identify the Internet Provider (IP) address of the person responsible.

Whether it is in a comment in a discussion forum or through a YouTube video, by forwarding an email or retweeting on Twitter, publishing or republishing defamatory material can result in liability for defamation.

Everyone involved in the publication is potentially liable and each, all, or some can be sued. Writers, publishers, editors, artists and gallery owners must all be aware of the potential dangers because it is no defence to argue that you are only repeating rumours or a comment made by somebody else – you can be liable for a republication.

Defamation law recognises that liability can arise as a result of:

- a positive act where a person who controls the publishing forum (such as a blog) publishes defamatory material; or
- the failure to prevent or remove defamatory information published by someone else. For example, you innocently disseminated defamatory material and later receive a complaint but fail to take sufficient steps to remove the defamatory material or prevent its display.

The communication identifies the plaintiff

The plaintiff has to prove that the plaintiff was the person identified by the communication. This is most straightforward when the plaintiff is named, but other information may be sufficient. Even the use of a false name may not save you if the plaintiff can be identified by other means.

[1] *Dow Jones v Gutnick* [2002] HCA 56.

See the Arts Law information sheet: Defamation law (for material published after January 2006).

The communication defames them

The test of whether a communication is defamatory is: "Does the communication lower/harm the plaintiff's reputation, hold the plaintiff up to ridicule, or lead others to shun and avoid the plaintiff?" This is judged from the viewpoint of "ordinary reasonable people in the community in general" and in light of contemporary standards.

See the Arts Law information sheet: Defamation law (for material published after January 2006).

Defences

The first step when someone threatens you with defamation is to establish whether they actually have a case. The plaintiff must be able to prove all three elements discussed above – that the material has been communicated to a third person (other than the plaintiff), that the plaintiff is identified in the communication and that the communication defames the plaintiff. The next step is to consider whether you have a defence under the law of defamation.

Defences include:

1. Honest opinion (defence of fair comment at common law)
2. Justification/Truth
3. Qualified privilege
4. Innocent dissemination
5. Triviality
6. Other defences
7. This information

This information sheet will focus on the application of the defence of innocent dissemination and triviality in the online environment. For a discussion on the defences to a defamation action, see the Arts Law information sheet: Defamation law (for material published after January 2006).

Defence of innocent dissemination

Who can rely on the innocent dissemination defence?

Generally, publishers are strictly liable for disseminating defamatory material because their assumption of responsibilities in preparing and communicating the material to the public. However the defence of innocent dissemination is available to subordinate publishers (those who disseminate content created by someone else) if the meet the requirements of that defence. If you publish something that is written or created by someone else and if you can demonstrate that:

- You neither knew, nor ought reasonably to have known that the matter was defamatory; and
- This ignorance was not due to your own negligence,[2]

Then you can rely on the innocent dissemination defence and will not be held liable for the publication of the defamatory material. That is, you did not know and would not, with the exercise of reasonable care in the circumstances, have known that the material contained defamatory content.

The can be differences between the standard of care expected of online publishers. The operator of a discussion forum that has an express purpose to conduct a critical campaign would be expected to exercise particular care in respect of potentially defamatory comments posted at the site;[3] whereas a lower standard of care would be applied to a discussion forum dedicated to a more neutral topic.[4] However once notice is given the operators of a discussion forum need to have taken reasonable steps to limit further dissemination of the material alleged to be defamatory – or risk being liable for damages in a defamation action.

Who is a 'publisher' of online content?

The 'publisher' of online content includes the author of material, the editors and the legal entity responsible for the publication. The courts have accepted that these people have the primary liability under defamation law as their role in the publication process is such that they know or can be expected to take responsibility for reviewing the content of the material being published,[5] and are therefore able to control that content, and if necessary prevent the publication of defamatory material.[6] The criteria for identifying a primary publisher are:

- that the person knows or can easily acquire knowledge of the content of the material being published - although not necessarily having knowledge that the material is defamatory (**the knowledge criterion**); and

- that the person has a realistic ability to control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content (**the control criterion**).[7]

A primary publisher is therefore someone involved in the process of publication that they know or can be expected easily to find out the content of the material being published and who are able to control that content, if necessary preventing the publication of the material.

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[2] *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47 (4 July 2013) [90]. (Court of Final Appeal of Hong Kong).

[3] e.g. *Kaplan v Go Daddy Group* [2005] NSWSC 636 (operation of "www.hunterholdensucks.com"); *Wishart v Murray* [2013] NZHC 540 (Facebook page called "Boycott the Macsyna King Book").

[4] *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47 (4 July 2013) [92].

[5] *Dr Yeung, Sau Shing Albert v Google* [2014] HKCFI 1404; (5 August 2014) [76]. (Court of First Instance of Hong Kong).

[6] *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47 [75].

[7] *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47 [76]. See also *Bunt v Tilley* [2006] EWHC 407 (QB) [21-22].

There are differences between online content and service providers, such as search engines, ISPs, hosting services, content platforms and online content providers,[8] with each type of service provider having a different potential liability for online content that is defamatory. If any of these entities have a compelling basis to say they are 'mere conduits' or 'passive facilitators' of the content, the consequence is that they can then argue they are not 'publishers' of the content.

It is important to understand that the Australian courts have still to establish clear rules as the circumstances in which an application service provider (search engine) and the other online entities described above, can rely upon the defence of innocent publication. Google has been involved in litigation in Australian relation to defamatory imputations that were argued to flow from how the search engine presents the results of a web search. However Australian judges who have considered the application of the innocent publication defence to search engines, have come to different conclusions.[9] It is outside the scope of this information sheet to attempt to reconcile these cases.

Who is a 'subordinate publisher'?

As discussed above, the defence of innocent dissemination is only available where you are not the author or you do not have editorial control over the material. The Australian cases that consider the innocent publication defence establish that if you have innocently published defamatory material you must take reasonable steps to remove the defamatory material as soon as you are aware of it, otherwise you will be deemed to have published the material.[10] The Uniform Defamation Laws has extended what is understood to be a 'subordinate distributor' to include:

> *a provider of services consisting of:*
>
> > *(i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded, or*
> >
> > *(ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form, or*
>
> *an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control.* [11]

The type of providers of services that are included in this statement in the Uniform Defamation Laws could include application service providers, host providers, internet access providers and content platforms.

[8] For example, see the ALRC Report 118, Australian Law Reform Commission (2012) *Classification - Content Regulation and Convergent Media* Section 5, paragraph [5.62].

[9] *Bleyer v Google* [2014] NSWSC 897 (12 August 2014); c.f. *Trkulja v Google (No 5)* [2012] VSC 533 (12 November 2012).

[10] *Thompson v Australian Capital TV Ltd* [1996] HCA 38 (High Court of Australia).

[11] s. 32 (3) (f) & (g) *Defamation Act 2005* (NSW).

Primary publishers and subordinate publishers: publication or re-publication of the material created by someone else

In considering digital communication media, the courts in various countries have considered the relevance of older cases relating to publishing information on physical notice boards or as graffiti on walls. These older cases determined that for a person to be held responsible for defamatory content created by someone else there must be knowing involvement in the process of publication of the relevant words. It is not enough that a person merely plays a passive role in the process, such as providing the notice board on which the defamation information was placed. However once notice is given as to the existence of the defamatory material, the provider of the notice board has a duty to promptly remove the material and if they fail to do so, they become liable for the continued publication of the defamatory material.[12] There is continuing debate as to whether these older cases have a direct application to online content providers, which remains unresolved. Online content providers can be argued to be primary publishers, because they control the process of publishing on the online forum, and they may also encourage and facilitate postings to the internet discussion forum that they make available to the public or to subscribers.

While online content providers can be argued to be publishers (because they meet the control criterion) they may not satisfy the knowledge criterion. The defence of innocent dissemination will be available if they can establish that they were not aware of the defamatory content and that in the context of the operation of their online discussion forum, that they did not have the ability or opportunity to prevent the dissemination of the defamatory material.[13] Cases in New Zealand that have considered the innocent publication defence under the Defamation Act (NZ) in relation to social media sites, such as Facebook, have held that the status of publisher depends upon editorial control rather than actual knowledge of the existence of defamatory material. For example, the administrator of a Facebook account would be accepted as the publisher of defamatory material posted by other people and the administrator would not be regarded as a processor or distributor that can rely upon the innocent dissemination defence, where the administrator controls the membership and content of the social media account, can send messages, appoint other admin members and edit account information and settings.[14]

The Supreme Court of Canada has considered whether creating a hyperlink to a web page that contains defamatory material results in the 'publication' of the content as a result of the link. The majority of the court decided that only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be 'published' by the hyperlinker. A hyperlink was viewed as 'content-neutral' in that the link required some act before a person gains access to the content and that "*inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked*" .[15]

[12] e.g. *Bunt v Tilley* [2006] EWHC 407 (QB) (10 March 2006) [21-23]; referring to *Emmens v Pottle* (1885) 16 QBD 354,357.

[13] *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47 [89].

[14] *Karam v Parker* [2014] NZHC 737 (9 April 2014), see also *Wishart v Murray* [2013] NZHC 540 (19 March 2013).

[15] *Crookes v Newton* [2011] SCC 47, [2011] 3 SCR 269 (Supreme Court of Canada) [27].

It is important to understand that Australian courts have still to determine whether creating a hyperlink to defamatory material is the publication of that material or to determine whether online content provide are primary or subordinate publishers and the circumstances they can rely upon the defence of innocent publication.

Does the operator of an interactive discussion forum have a duty to monitor what is posted?

If you are the administrator or monitor of a blog, discussion forum or social media community where you control the membership and access to posting content – there are overseas decisions that, if followed by Australian courts, categorise you as a primary publisher – that status will prevent you from relying upon the innocent dissemination defence. However the publication of the material may fall within one or more of the other defences that exist at common law or under the Defamation Act.

Australian courts have been reluctant to impose a positive duty to monitor an open access internet discussion forum.[16] If you are a subordinate publisher of material created by someone else the range of possible defences available to you incudes the defence of innocent dissemination. However in order to rely on the defence of innocent dissemination you will need to prove that you acted promptly to remove the defamatory material. The question as to what is a reasonable time within which to respond to claims of defamatory material will vary depending on the circumstances of each publication.

Broadcasting Services Act 1992: 'internet service provider' (ISP) & 'internet content host' (ICH)

The Broadcasting Services Act 1992 (BSA) regulates 'internet service providers' (ISPs) and 'internet content hosts' (ICHs). However the BSA is primarily directed to establishing a complaints-driven scheme for enforcing removal or blocking access to on-line prohibited or potential prohibited content, as classified by the OFLC and notified by the (ACMA). The BSA does not provide rules for determining whether content is defamatory; although the BSA does provide a limited immunity to entities that qualify as an ISP and ICH.

In Australia this immunity is set out in schedule 5 of the *Broadcasting Services Act 1992* (Cth), which exempts ISPs and ICHs from liability under any rule of the common law, equity or statute in any state or territory, where they were 'not aware of the nature of the internet content' or the effect of the law would require them 'to monitor, make inquiries about, and keep records of, internet content hosted by the host' or 'carried by the provider'. Unlike the Uniform Defamation Law this protection operates irrespective of negligence and is intended to protect 'mere' distributers who carry or host content in much the same way as innocent disseminators.

An ICH is defined in the Act to mean a person who hosts or proposes to host 'internet content' in Australia. The BSA does not specify what is meant by 'to host', as the consequence there is uncertainty as to whether the ICH (as defined in the BSA) is limited to the commercial internet services that are described earlier as 'host providers' or whether it also extends to 'online content providers' (also described earlier). The ordinary meaning of 'hosting' refers to providing

[16] Turner, Ryan J, "Internet Defamation Law and Publication by Omission: A Multi-jurisdictional Analysis" [2014] UNSWLawJl 2; (2014) 37(1) University of New South Wales Law Journal 34.

space on a server and the technical capability for that material to be disseminated over the internet. It can be argued that any website to which material has been uploaded or any social media platform is an ICH that has the immunity against defamation actions.[17]

The effect of this section is to widen the scope of an innocent dissemination defence in the online context to provide immunity to online publishers who do not create or vet the content that they disseminate and are unaware of the content they host. When an ICH is made aware of the defamatory material however, this immunity will end. So that ICHs must be prepared to remove content or block access when notified of the defamatory material.

Defence of triviality

Under the Uniform Defamation Laws it is a defence to the publication of defamatory material if you can prove that in the circumstances, the plaintiff was unlikely to sustain any harm (s. 33, Defamation Act NSW). This means that you need to show that the matters complained about do not seriously affect the plaintiff's reputation or standing in the community.

The triviality of the defamatory material is also linked to the power courts have to control the cases it hears. Courts can dismiss, sometimes permanently, cases where the claim is way out of proportion to the interest at stake and would otherwise be a waste of the court's time and resources (an "abuse of process"). A challenge to a defamation action as being an abuse of process can be made early in conduct of the proceedings and the defence of triviality in the Uniform Defamation Laws can also be argued at the trial of the claim. While the number of viewers of the defamatory material may be relevant to an application to dismiss the proceedings or to the defence of triviality, there is no minimum number of 'followers' a user may have before liability for defamation can arise. An English court has said that "*the assessment of whether a real and substantial tort has been committed is not a "numbers game"; even publication to a single individual can be highly damaging and make a substantial and costly libel action proportionate*".[18]

A defence of triviality may be successful where the matter complained about is:

a. When you publish an article on your blog comparing photographs of a well-known artist with an animal. It is brought to your attention that this is defamatory; upon notice you remove the article. Three people visit the page before it is taken down.

b. A statement, intended as a joke is published in an e-newsletter circulated among a small group of members. All of the email recipients have background knowledge to know the statement was not serious.

c. You retweet a defamatory post to your thirty Twitter followers; at the time you did not appreciate why it could be considered defamatory. You delete the tweet and follow up with an apology.

d. In the comments section on the Facebook page of your photography competition, users suggest that the winning entry contravened the competition rules by using banned

[17] See *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 [90].

[18] *Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB) (27 January 2015) [33].

software. Your organisation removes the comments within twenty four hours of a complaint.

The defence of triviality of the material is discussed in the Arts Law information sheet: Defamation law (for material published after January 2006).

Risk management

There will be differences between the potential risks on an online publisher depending. For example, an online forum would have a heightened risk that defamatory material will be posted if the forum exists for purpose to conduct a critical campaign or he contributors to the forum known for engaging in flame wars and posting opinionated comments.

Setting up risk management strategies

1 If you operate an open-access discussion forum or social media account:

- Implement terms of use (TOU) that establish 'community standards' and follow-up to enforce those standards;
- Implement a policy so that comments on the forum are reviewed from time-to-time and consider deleting comments that breach the 'community standards';
- Provide an email address or some other communication process to allow the reporting of 'defamation risk' comments;
- Implement a strategy to review and consider deleting comments that are potentially defamatory;
- Promptly response to a complaint so that you can establish you have taken reasonable steps, in a timely manner, to limit further dissemination of the material alleged to be defamatory; and
- You should also implement pre-publication strategies in relation to the content you post to the website so that you can rely on one or more of the defences discussed in the Arts Law information sheet: Defamation law (for material published after January 2006).

The implementation of these risk management strategies and processes is intended to strengthen your ability to establish you are a subordinate publisher of material that is posted to the discussion forum or social media account so that you are able to rely on the defence of innocent dissemination.

2 If you operate a close membership discussion forum or social media account where you, as the administrator, control the membership and access to posting:

- You should be aware that there are decisions of courts that, if followed by Australia courts, would categorise you as a primary publisher – that status will prevent you relying upon the innocent dissemination defence;
- As you are at risk of being viewed as primary publisher, because of their assumption of the responsibilities of preparing the material and publishing or communicating the material to the public, therefore you need to implement pre-publication strategies in relation to all content of the website, the discussion forum or social media account so that you can rely upon one or more of the other defences discussed in the Arts Law information sheet: Defamation law (for material published after January 2006).

3 Consider whether you need to seek legal advice about implementing strategies and processes to manage the risk that material published on your discussion forum or social media account turns out to be defamatory.

Before you publish

1. Consider the communication as a whole including any headlines, the introductory paragraph, photo captions or illustrations. Consider the context. Ask yourself – which groups or individuals have been identified? What imputations arise? Are they defamatory? Try to put yourself in the position of potential plaintiffs;
2. See if editing or clarification can remove any unintended defamatory imputations;
3. Check who is identified in the communication. Narrowing the scope of the article, or removing details that can lead to identification can avoid potential problems;
4. Consider the benefits of publishing against the risk of being sued for defamation;
5. Consider what defences might be relevant. If it is meant to be comment, ensure that it is clearly identified as such (for example by adding "In my opinion…" and that the facts on which it is based are stated or obvious); and
6. If you want to argue that the defamatory imputations are true, how can they be proved? What has been done to verify their accuracy? Remember proof has to be to the stringent standards demanded by a court. Sources need to have direct knowledge – not passing information from another source (what if they wish to remain confidential?)

If you're threatened with an action for defamation

1. Check whether they have a case by determining whether all the elements for defamation are there: defamatory meaning, identification, and publication. Remember that just because a communication is insulting, annoying, false or damaging to someone's business doesn't meant that it is necessarily defamatory.
2. Consider what, if any, defences are applicable to you;
3. Decide if you wish to apologise, correct, clarify, or retract. The new uniform defamation laws provide mechanisms and timing requirements for making an offer to make amends. An offer will not constitute an admission of fault or liability but may be taken into account in mitigation of damages if the plaintiff is successful in court; and
4. Seek legal advice before responding. It is important to get legal advice promptly.

Further changes to defamation law in Australia

If you are printing out this information sheet for future reference please note that the Commonwealth Government have indicated that there should continue to be further reform to Australian defamation law and the introduction of Uniform Defamation Laws legislation in the states and territories is merely a platform for further reform. Please check the Arts Law website for new updates to this information sheet as legislative changes occur, or contact Arts Law for further information if you are unsure.

Further information

The News Manual, Defamation in Australia

Brian Martin, Defamation law and free speech

Electronic Frontiers Australia, Defamation Laws & the Internet

Environmental Defender's Office Western Australia: Defamation and safe speech

Queensland Public Interest Law Clearing House Incorporated (QPILCH), Defamation fact sheet

Steven Price, How to avoid defamation

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013) in EPUB format, MOBI format & eBook - PDF format; which provides a commentary on legal issues relevant to visual artists including insurance and liability (Ch 16).

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