

Victims of Online Abuse

What Can You Do?

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The Problem

- The internet allows determined individuals to engage in a widely published campaign against those they resent.
- A victim of internet publications faces wider damage and greater challenges in defending themselves than with traditional forms of publication



Recognition by the Courts

- *“The Internet represents a communications revolution ... the Internet is also potentially a medium of virtually limitless international defamation”*



– Barrick Gold Corp. v. Lopehandia, 2004 CanLII 12938

Some Scenarios

- A posting claiming a doctor sexually touched a patient is, after thousands in fees, traced to a bitter ex-spouse
- A campaign of harassment from an anonymous web server or internet café cannot be traced at all
- An internet harasser does not hide his identity; instead he simply posts in so many places and so aggressively, that complaining is like “whack-a-mole”

Tools for Victims

1. Defamation law
2. Privacy law
3. Internet Terms of Use rules

All of these require some basic information gathering – the starting point is being able to trace what was published, where and by whom

Gathering Information

- For websites, a “whois” search, e.g. <http://www.whois.net/> may tell you who runs and hosts the website or IP address
- For postings (e.g. Google Groups, Facebook) the key information is the IP address and exact time of posting. These are sometimes shown or available in response to complaints

Court Orders for Identities

- If necessary, a court order can assist
- Website hosts can be ordered to divulge the client name
- the internet service provider (e.g. Telus) can be ordered to provide customer ID matching IP and time of posting



1. Defamation Law

- 3 Elements: negative statement, identity and publication
- Court asks: “does the publication directly or indirectly identify the plaintiff, and say or imply something negative about the plaintiff to a reasonable reader”
- Onus on plaintiff to prove who and how many actually read it
- Presumptions of falsehood & damages

Limits on Defamation Actions

- If the culprit is outside BC, enforcement requires extra steps. USA will not enforce Canadian libel judgments
- Law gives wide latitude to opinions, even extreme and outrageous; usually successful actions involve a false and negative statement of fact.
- Mere name calling, e.g. “jerk” is not actionable
- Complaints through proper channels are often protected by qualified privilege
- Public bodies cannot sue for defamation. Individual employees can.

Who is Liable for Defamation?

- **Liability is not limited to the author. It can include anyone else involved in the publication. Whether web hosts are liable is unclear, but they are likely liable only after receiving actual notice of the libel**
- **A legal notice to the internet host and (if known) the author can sometimes result in removal of the defamatory item without the need for legal action**

Who is Liable for Defamation?

- **A defamation suit, or threat of one, is not limited to the author. It can include anyone else involved in the publication. The question of whether web hosts or internet service providers are liable remains unclear, but they are likely liable only after receiving actual notice of the libel**

When Is It Worth Suing?

- In several cases, significant damages have been awarded for serious internet defamation. Damages and falsehood is presumed, making a defamation action a powerful tool
- However, suing is expensive and time consuming, and with internet publications, proving a large audience of actual readers can be challenging

Can I Get an Injunction?

- Defamation injunctions are only rarely granted, and only where there is no defence to an action or the defence is bound to fail; this is due to the principle of not interfering with free speech
- If the defence says they intend to pursue a defence such as truth or privilege, the court will generally decline an injunction
- Privacy breaches, on the other hand, has a better chance of injunction



Breach of Privacy

»If a publication is true but an invasion of privacy, the action may lie in a breach of privacy action rather than defamation

- A person who unduly breaches another person's reasonable expectation of privacy can be sued under the *Privacy Act*
- Thus far, damages have been modest - \$30K is a large award
- This is expected to change upward in Canada as it has in the UK.

What is a Breach of Privacy

- A person in a public place talking to a group of people will likely be held to have no reasonable expectation of privacy
- A photo or information obtained from a publicly accessible website such as a government directory or LinkedIn page, would not be held to carry a reasonable expectation of privacy
- It is not a crime to record a phone call without disclosure, but it may be a breach of privacy to publish it if private statements were made

Privacy of Emails?

- Are civil servant emails private? If they don't trigger an exclusion under FOI, they are not private as they can be made public through FOI
- Is there a difference between internal and external emails? The same analysis applies. If there's no FOI exclusion, there is no expectation of privacy.

Privacy of Conversations with Public?

- Civil servants are generally carrying out a public service, and should not expect there to be an expectation of privacy
- If privacy is important, such as a tendering situation, then negotiate a confidentiality agreement first

Defences to a Privacy Action

- Consent (e.g. providing information voluntarily)
- Public Interest (e.g. a court may accept that the on job conduct of someone carrying out government business qualifies)
- Legal Authority (e.g. an official who must communicate information as part of their duties)
- Claim of Right (an honest and reasonable belief in facts which would make the breach legal)

Examples of Successful Actions

- Photo of a person outside their public role – e.g. with baby such as JK Rowling
- Revealing private facts (e.g. medical or emotional past issues, divorce etc)
- Information obtained through a privacy-breaching activity, e.g. trespassing and looking at mail or through trash

Terms of Use Complaints

- Where a culprit won't respond to legal threats, the internet service provider may be more reasonable
 - Where internet publications are abusive but not necessarily legally actionable, the internet service provider may still consider it a breach of their terms of use



Typical Terms of Use

- Internet providers almost always have a Terms of Use or Terms of Service policy available on their website, often under “legal”
- They generally prohibit “defamation”, “abusive”, “copyright infringement” and any illegal activity
- A letter of complaint under the Terms of Use policy will often, not always, result in removal of the item
- Some providers respond only to court orders (e.g. Google) while others take TOU complaints seriously

Summary

- All remedies require initial information gathering with whois or other searches or court order
- Defamation suits and threats can be against not only author but internet host if notified in advance
- Defamation usually requires false statement of fact and provable audience
- Privacy requires breach of a reasonable expectation of privacy
- Terms of Service complaints can be made for all the above and more, such as abuse and can be successful depending on web company

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Thank you!

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