EVERYONE'S A CRITIC: DEFAMATION AND ANONYMITY ON THE INTERNET

Internet publishing is easy and has become commonplace in our technology-focused society. Although this type of publication can be exciting and helpful for those interested in communicating an idea, the issue of anonymous speech on the Internet has created some complications in the rather established tort of defamation. This article will discuss two approaches recently taken by two different courts in response to the Internet-anonymity issue and will evaluate them based on their ability to strike a balance between protecting free speech and protecting against defamation.

Introduction

The proliferation of the Internet over the last few years has added a new dimension to the world of communication and media. Not only does the Internet provide endless sources of information for the general public, it also provides members of public the opportunity to become a source of information themselves. Web-boards, websites, listservs and chat rooms are only a few of the cyber-forums where anyone with Internet access can share their opinions and publish statements of fact.

While this publishing opportunity can be exciting and helpful for those interested in communicating an idea, the issue of anonymous speech on the Internet has created some complications in the established tort of defamation. Internet forums typically involve dialogue between anonymous or pseudo-anonymous individuals, making it difficult for would-be plaintiffs in defamation cases to know who to sue or even how to sue them. Many defendants in Internet defamation actions claim that revealing their identity for the purpose of a defamation suit is not necessary and, in fact, is a violation of their right to free speech under the First Amendment. This iBrief will discuss two approaches recently taken by two different courts in response to this issue.

The Technology

Many Internet forums are conducive to anonymous posting. "Screen names" act as pseudonyms and provide Internet users with the freedom to be recognized online without actually submitting their names with their messages. Although many people may feel this is a complete shield to identity exposure, computer logs and records can often reveal the names of Internet users.[1] Furthermore, sometimes Internet service providers such as Yahoo! have policies that

[1] Dave Wilson, *Ruling Backs Anonymity of Net Messages*, L.A. TIMES, December 11, 2001.

allow them to reveal the identities of their users when the service provider is subpoenaed, subjected to court orders or involved in a legal process.[2] The fact that these companies can and will identify Internet users when asked by a court to do so forces courts to decide whether to protect the anonymity of Internet users sued for defamation or require their identity to be revealed in order to have a more easily administered defamation lawsuit.

The Law of Defamation

The tort of defamation began in American common law as an action completely defined by state law. When a state determined a statement to be libelous, that statement was not entitled to First Amendment protection.[3]

In 1964, the Supreme Court's ruling in *New York Times v. Sullivan*[4] dramatically changed the face of defamation in the United States. Sullivan, the plaintiff, was an Alabama public official whose public duties included supervising the Montgomery Police Department.[5] During his time in office, the *New York Times* printed an advertisement that criticized the police department for what the advertisers considered harassment of the African Americans in the South and an attempt to terrorize Martin Luther King, Jr. The advertisement contained several inaccuracies, but did not identify Sullivan or his office.[6] Sullivan sued the *Times,* claiming that he had been defamed.[7] The courts in Alabama all held for Sullivan, but the United States Supreme Court reversed the decision.[8] In doing so, the Court established that state defamation rules are limited by First Amendment principles. Furthermore, the Court held that when public officials sue for defamation, they must prove a higher standard of fault than private individuals. They must prove the defendant publisher acted with actual malice, which it defined as knowledge of falsity or reckless disregard of the truth.[9]

In subsequent cases, the Supreme Court extended the actual malice standard to public figures,[10] and held that private individuals must prove actual malice only when trying to obtain

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[2] Yahoo! Privacy. http://privacy.yahoo.com/privacy/us (last visited February 8, 2002).
[3] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[4] New York Times v. Sullivan, 376 U.S. 254, 254 (1964).
[5] *Id.* at 256.
[6] *Id.* at 258.
[7] *Id.* at 256.
[8] *Id*.
[9] *Id.* at 280.
[10] *See* Curtis Pub. Co. v. Butts**,** 389 U.S. 889 (1967) and Associated Press v. Walker, 388 U.S. 130 (1967).

punitive damages in a case dealing with a matter of public concern.[11] When a private individual sues for defamation regarding a matter of private concern, no actual malice must be proven, even for punitive damages.

Although defamation in the United States has changed substantially over the years, it is now fairly well-established. For today's plaintiff to prevail in a defamation action, he must prove publication of the defamatory statement, identification of the plaintiff, falsity, defamatory content, injury and fault.[12] If the plaintiff is a public official or public figure and the subject matter is a matter of public concern, or if the plaintiff is a private individual seeking punitive damages for a statement involving a matter of public concern, he must prove actual malice to establish the fault element.[13] Otherwise, states are free to establish their own fault standards for recovery.

Anonymity on the Internet & Libel – The Debate

While defamation since the *Sullivan* case has become an increasingly more defined and established tort, the introduction of the Internet and its anonymity-based forums for discussion have created a new wrinkle in the administration of defamation actions.

Few plaintiffs want to sue an anonymous defendant for libel. From a practical standpoint, discovery becomes a nightmare. Speakers are able to defame an individual or company and hide behind the anonymity of a "screen name" unless a judge orders their identities revealed. The resulting cost to the plaintiff can be far above what it would be in a case where the speaker was identified. Sometimes, if the speaker's identity were revealed, plaintiffs would not judge the lawsuit worthy of their time or of their money. For instance, a judge who is defamed by an individual whom she sentenced to a prison might not feel the need to obtain a libel judgment against him to clear her name. The fact that the speaker is likely to have a grudge against her speaks for itself. And finally, the fault element becomes infinitely harder to prove, if not impossible, when the speaker's identity is unknown.

On the other side of the debate, speakers cloaked in aliases claim that anonymous speech has traditionally been protected by the First Amendment, and that revealing the identities of the Internet speakers for the purpose of libel suits would not only chill speech in the United States, but also subject the speakers to harassment by political or economic superiors before a successful claim of libel has even been proven.

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[11] *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973).
[12] Marc A. Franklin, David A. Anderson & Fred H. Cate, Mass Media Law 294-421 (2000).
[13] *See id*.

The Case Law

In the last few years, Internet libel suits involving anonymous statements have begun cropping up in courtrooms across the country. The two notable cases discussed below exhibit different approaches to solving the problems presented by anonymous libel on the Internet. One seems to provide a satisfying solution while the other creates practical problems that undermine the tort of defamation all together.

Melvin v. Doe

In November 2000, the Court of Common Pleas of Allegheny County, PA, held that if the plaintiff could prove the identity of defendant was "(1) material, relevant, and necessary, (2) cannot be obtained by alternative means, and (3) is crucial to plaintiff's case," the First Amendment would not protect the anonymity of the defendant.[14] In *Melvin v. Doe*, an unknown person published statements on a website that accused a local judge of political activity that was inappropriate for a judge in her position.[15] The plaintiff sued the unknown speaker for defamation and tried to obtain his identity during discovery.[16] The defendant petitioned the court for a protective order that would prevent this discovery.[17] However, the order was denied.[18] The court reasoned that a state's interest in discouraging defamatory statements about public officials by traditional media extended to statements made on the Internet. It held that because of this interest, there was no absolute immunity for Internet speakers with regard to the defamation tort.[19] The court then applied the three-part test discussed above to the request for the speaker's identity.[20] Without much discussion about the test's application to the specific facts of the case, the court held that the plaintiff's interest outweighed the defendant's, and the protective order should be denied.[21]

The Ampex case

While the *Melvin* case was decided in 2000, more recently, a judge in California took a different approach to the Internet anonymity question. The Contra Costa County Superior Court ruled that plaintiffs in libel actions must prove that the allegedly libelous statement is in fact

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[14] Melvin v. Doe, 49 Pa. D. & C. 4th 449, 477 (2000).
[15] *Id.* at 450-451.
[16] *Id.* at 451.
[17] *Id.* at 451.
[18] *Id.* at 481.
[19] *Id.* at 469.
[20] *Id.* at 477.
[21] *Id.*

libelous before the identity of the speaker will be revealed.[22] In this case, the plaintiff, Ampex, asked the judge to reveal the identity of an Internet speaker who posted anonymous messages about the company and its executives. Ampex claimed the messages were defamatory and said it needed the identity of the speaker so the lawsuit could proceed.[23] The judge rejected this request and gave Ampex a week to prove the statements were libelous before the plaintiff could obtain the speaker's identity.[24]

Analysis

While the *Melvin* balancing-test approach to anonymous speech on the Internet and libel actions might create extra work for a libel plaintiff before he can successfully proceed with a defamation action, it is certainly preferable to the more recent Ampex approach. Proving libel *before* receiving the identity of the defendant is practically problematic, if not impossible. Although the plaintiff could potentially prove publication, identification of himself within the statement, defamatory content, falsity and injury, proving a fault standard without the identity of the plaintiff is a daunting task. Actual malice is a subjective determination of the publisher's *state of mind* with regard to the falsity of his statement at the time of publication, and the Supreme Court has held that a plaintiff has a right to inquire into that state of mind.[25] It is not difficult to see that without knowing who the defendant actually is in a libel suit how problematic or impossible it would be to prove the defendant's state of mind at the time of the publication. Even negligence would be difficult to prove under the same circumstances. The *Ampex* approach seems almost a ridiculous answer to a very important question. Perhaps the court could require proof simply that the message held defamatory content, caused injury, identified the plaintiff and was false, but requiring proof that the complete tort of defamation occurred is asking too much.

Conclusion

The tort of defamation has become a well-established area of law over the last few decades. With the advent and success of the Internet, a piece of this established tort has become more complicated. Ultimately, when dealing with the identity of anonymous Internet speakers in defamation actions, the approach in *Melvin v. Doe* is a better solution than the one advanced in *Ampex*. Perhaps in *Melvin*, the court had an easier call to make with regard to identity because the plaintiff had already proven other elements of the defamation tort, falsity, defamatory content

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[22] Dave Wilson, *Ruling Backs Anonymity of Net Messages*, L.A. Times, December 11, 2001.
[23] *Id.*
[24] *Id.*
[25] *See* Herbert v. Lando, 441 U.S. 153 (1979).

and injury. However, the three-part test applied in *Melvin* is ultimately a more practical and thoughtful approach that allows a court to find a balance between the rights of the speaker to speak freely and the right of plaintiffs to recover for defamation without placing the plaintiff in an overly burdensome, if not paradoxical, position of proof.

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