A “Brave New World” of Defamation and Libel on the Web

C. Peter Erlinder, William Mitchell College of Law

Full Text: COPYRIGHT 2002 Dolan Media Newswires

Editor's Note: The Minnesota Supreme Court last month ruled that a Minnesota resident who posted allegedly defamatory messages about an Alabama resident on a publicly accessible Internet bulletin board was not subject to suit in Alabama. The decision, Griffis v. Luban, was reported in the July 16 edition of *Minnesota Lawyer* ("Web posting didn't give foreign state jurisdiction.") In the following article, William Mitchell College of Law Professor Peter Erlinder provides a review of Web jurisdiction jurisprudence and gives his view of the potential impact of Griffis. Erlinder, along with Richfield attorney Ralph J. Overholt, represented the plaintiff in the Griffis case. A petition to rehear the case is currently pending before the Minnesota Supreme Court.

By Prof. Peter Erlinder

Imagine a fictional Minnesota lawyer in her home office on a summer morning. Like most mornings, she boots up her computer to check her favorite "lawyers newsgroup." But unlike other mornings, our fictitious lawyer finds that she is the subject of the "LawNews" site. Someone in cyberspace is attacking her professional credentials, claiming that her law practice in Minnesota is "fraudulent." The postings say that her Minnesota law license was obtained illegally, that she cheated her way through the University of Minnesota and that she bribed members of the Minnesota Supreme Court.

Of course, the allegations aren't true, but the newsgroup is regularly read by lawyers and potential clients, and can be accessed by anyone, anywhere in the world. She fears for her Minnesota-based practice and her professional reputation. She later learns that her tormentor has a mailing address in Kazakhstan and demands retraction by registered mail. But the only response is even more virulent elaboration on the original attack.

What should she do to protect her professional reputation?

A lawyerly answer might be the equivalent of "sue the bastards!" But this leaves the questions of who to sue and where to sue them.

Certainly, anyone involved in writing, publishing or distributing the libelous accusations is a potential defendant. And considering the remote location of the author and the potential harm to our fictitious lawyer's reputation, suit in Minnesota seems an obvious choice.

Under current Supreme Court doctrine, if the same statements had been published in a newspaper, or broadcast media, these questions could be answered quite easily and this would be a relatively simple case. But because the hypothetical libel was posted on the Internet, the case is likely to be a lot more complicated than it might appear.

The pre-Internet world

Before the Internet existed, international circulation of libelous accusations could only have occurred with the assistance of publishers and distributors of international scope. A lawyer representing our fictional
colleague would certainly look to publishers or distributors who disseminated the author's work worldwide as the prime defendants.

The author would also be a potential defendant, but in the "hard copy world," the author would rarely be essential to successful recovery. After all, few authors have pockets deeper than international publishers or distributors, and a monetary award against either would make the victim whole.

Moreover, it is the publisher and distributor who would have to agree to print and distribute a retraction. Because they have a lot to lose, money damages against either would also be an incentive to prevent redistribution of any similar libels.

Locating a site for the litigation would not be difficult either. The publisher and the distributor could certainly be sued where they are based or anywhere they distributed a significant number of copies or that was reached by their broadcast signal. If the author could be joined in one of those jurisdictions, so much the better, but joining the author would be of secondary importance.

In the pre-Internet world, the author was often not the central figure in libel or defamation claims. However, the Internet has completely changed this equation, and has also changed the very nature of libel/defamation litigation itself.

Democratization by the Web

Not since Gutenberg's first printing press has a technology promised a democratization of mass communication on the scale promised by the Web. And not even the printing press, the telephone, radio or television, could promise worldwide communication that was interactive and instantaneous.

The proliferation of the Web seems to have brought Marshall McLuhan's 1970s vision of the "Global Village" within reach. Yet 50 percent of the world's population has never made a phone call, and it is equally plausible that the Web will actually widen the existing technological divide between the "wired world" and the people left behind in the "real" world.

The Internet has "democratized" access to information in a way that was unimaginable when research meant finding hard copy that was archived in libraries. The Web has certainly reduced the power of the information gatekeepers of the past. But as the post-Sept. 11 civil liberties debates have made clear, the Web has also created the potential for intrusion into private lives that makes George Orwell's vision of the future seem almost quaint.

The Web has also democratized communication between individuals, and has made obsolete the famous observation that "Freedom of the press exists for those who own one."

The Internet has "virtually" eliminated the capital intensive print or broadcast infrastructures that were necessary to reach a mass audience in the past, at least with respect to direct Web postings, and has recast the author as the central actor in worldwide communication.

Today a worldwide audience is within the reach of anyone at a keyboard at a public library. The Web has liberated authors from the editorial oppression of centralized distribution channels. For the first time since all human beings on earth could huddle around one campfire, the Web has made it possible for an individual to reach a worldwide audience, as Commander Marcos of Mexico's Zapatista movement proved with his laptop in the jungles of Chiapas.
Web problems

But there is another side to the democratized communication that the Web has made possible. By eliminating the role of the capital intensive "middlemen," the Web has not only liberated authors, but also it has eliminated the legitimate editorial role provided by these institutions.

The Internet provides no "filter" to prevent abuses by authors, like the Kazakhstani author in our hypothetical. The Web also has no legal department to advise whether the requirements of the 1964 U.S Supreme Court decision New York Times v. Sullivan are being respected before an author can reach a worldwide audience.

Publishers and distributors of hard copy, or broadcasters of electronic media, could be held financially responsible for harm caused by the libelous works of authors they carried. The threat of money damages was a serious incentive for large institutions to "get it right" or at least not make the same mistake twice.

Unless an Internet author has significant resources, pursuing a claim for money damages for libel or defamation against an Internet author may not be financially viable for a plaintiff, and is much less likely to make a plaintiff whole. Even if a claim is successful, a determined, judgment-proof Internet author is not likely to be deterred by the threat of uncollectible money damages from publishing the libel again.

In addition, the Internet not only eliminates the roles of the publisher and distributor in litigation, but Web posting eliminates the act of physical distribution itself. Without physical distribution of hard copy by a publisher or a distributor, the choice of forums available to an Internet plaintiff, under the "minimum contacts" requirements of the 1945 U.S. Supreme Court decision in International Shoe, is much more limited than the choice available to a plaintiff in the hard copy world.

An author who posts an offending work to a site in cyberspace can't really be said to have distributed in any jurisdiction. This passive role is not the sort of "purposeful availment" of the benefits of a forum that traditionally has constituted distribution for purposes of personal jurisdiction.

This lack of distribution by the Internet author, and the absence of publishers and distributors, would normally result in personal jurisdiction only where the Internet author resides, no matter how extensive the audience that had accessed the author's work.

Personal jurisdiction

Since authors are at the center of Internet libel/defamation claims, and "distribution in the forum" by publishers and distributors is no longer a factor, there is precious little Supreme Court precedent to guide the lower courts in resolving newly presented "personal jurisdiction on the Internet" questions.

However, one place to look for guidance is Supreme Court precedent addressing personal jurisdiction involving authors in the "hard copy world." The only U.S. Supreme Court case that addresses personal jurisdiction over authors in libel/defamation claims is the 1984 decision, Calder v. Jones. Calder, a unanimous opinion written by Chief Justice William Rehnquist, holds that a Florida author of an alleged libel, who was not involved in distribution, could be sued in California, where the plaintiff "lived and worked."
The defamation claim in Calder was filed in California by actress Shirley Jones against the Florida-based National Enquirer, the California distributor of the Enquirer, and the author and editor who were employed by the Enquirer in Florida.

The author's story charged that alcohol abuse and other personal problems made Jones professionally unreliable. Both the National Enquirer and the California distributor readily acknowledged proper personal jurisdiction in California because that was the state with the largest percentage of the newspaper's distribution.

However, the author and editor argued that they had performed their work in Florida, that they had no other contacts with California, and that the distribution of the story by their employer could not be charged to them because they had no control over distribution.

Rehnquist agreed with these contentions, but nevertheless held that the author and editor could be sued in California because the writer and the editor committed intentional acts in Florida that they knew would cause harmful "effects" in California.

The court agreed that personal jurisdiction over the author and editor did not lie because of distribution in the forum. Rather, the court held that California could exercise personal jurisdiction over the author and editor because the content of story they created in Florida focused on California. The writer and editor knew, or should have known, that the "brunt of the harm" caused by their story about the California plaintiff would be felt most directly "where the plaintiff lived and worked."

According to Rehnquist, when it comes to libel or defamation claims against the author of the work, "An individual in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused injury in California."

Disregarding distribution

Perhaps the most important aspect of Calder, with respect to Internet author cases, is that the court recognized that, even when physical distribution was an essential part of disseminating a libel in the days before the Internet, distribution had no bearing on personal jurisdiction over the author of the offending work. The Due Process Clause itself requires each defendant's actions to be considered independently and a potential defendant can never be fairly held to answer in a jurisdiction because of the acts of another over whom the defendant has no control.

Because the Calder "effects" test specifically excludes consideration of distribution when considering personal jurisdiction over an author, it seems particularly well-suited to the Internet, where an author's postings exist in only cyberspace.

An Internet author is no more responsible for a posting being downloaded in any particular place than was the author in Calder, who had no control over where the Enquirer might distribute his story after he handed it to his employer.

Application of the Calder effects test to Internet authors would go a long way to bringing some balance to Internet personal jurisdiction in libel/defamation issues by making it possible to expand personal jurisdiction beyond the defendant's home forum, at least in some circumstances.
Under the Calder test, Internet authors would still be able to take full advantage of the liberating absence of publishers and distributors. But authors who intentionally "target" a forum with their words, like the Kazakhstani Internet author in our hypothetical, would be subject to suit in the forum where the negative "effects" of their words are likely to have their biggest impact. Under the Calder test, an Internet author would still retain a great deal of control over the forums available to the plaintiff by refraining from making the forum where plaintiff "lives and works" the focus of the postings.

"Untargeted flaming" could continue unabated on the Web, free from the threat of suit in a foreign jurisdiction, unless the Internet author intentionally "targeted" another forum, as did the author in Calder and the author in our hypothetical.

Before the existence of the Internet, the Calder effects test had little relevance to defamation claims brought by Minnesotans because the Minnesota long-arm statute, Minn. Stat. sec. 543.19, subd. 1(d)(3), does not claim jurisdiction over nonresident authors in defamation claims. In the days of physical distribution, this didn't matter much because under Minn. Stat. sec. 543.19, subd. 1(b), publishers or distributors who were doing business in Minnesota could be sued in Minnesota, no matter where the author resided.

However, now that the Internet has eliminated these roles in practice, Minnesotans will have no choice but to bring their Internet defamation or libel claims in the forum where the Internet author is located. In our hypothetical, the Minnesota victim would be limited to filing suit in Kazakhstan, unless the Legislature reconsiders the current language of statute.

Deep impact

The Calder test is also likely to have little impact on Minnesota Internet authors as defendants - if a July 11 Minnesota Supreme Court opinion withstands a pending petition for rehearing.

In Griffis, an Alabama plaintiff sought enforcement of an Alabama default judgment issued when a Minnesota Internet author, on the advice of counsel, failed to appear in Alabama to contest a defamation claim. The plaintiff claimed that her professional reputation, and her Alabama-based consulting business, had been damaged by the defendant's postings to a professional newsgroup, not unlike the "LawNews" newsgroup in our hypothetical.

The trial court judge and the Court of Appeals found that Alabama properly exercised jurisdiction over the Internet author based on the content of her postings under the Calder effects test.

However, the Minnesota Supreme Court held that, although the Internet author admitted that she knew that the plaintiff lived and worked in Alabama, and her postings specifically referred to the plaintiff's professional activities in Alabama, the Alabama courts lacked personal jurisdiction over the defendant. The court held this was so because the Alabama plaintiff failed to show that the Internet author's postings had been distributed in Alabama, or read by an Alabama audience.

The petition for rehearing, filed on July 18, points out that the Calder court specifically rejected using distribution in the forum as a factor in determining whether an author targeted a forum, which is exactly what the Minnesota court did.

Further, the petition explains that under the Minnesota Supreme Court's reasoning, if the author in Calder posted the same story that gave California personal jurisdiction on the Internet, rather than handing it to
his employer, he could avoid the reach of California's long-arm statute. Essentially, the Minnesota Supreme Court's reasoning would require reversal of the outcome in Calder and, by implication, overrule Calder, which is probably not what the court intended.

To the U.S. Supreme Court

No matter how the Minnesota Supreme Court rules, a petition for a writ of certiorari to the U.S. Supreme Court is likely. Although Griffis is the first state supreme court opinion that applies Calder to an Internet author in a defamation action, there are several similar cases working their way up through the federal courts.

Whether the U.S Supreme Court decides to hear the Minnesota case or another, the application of the Calder effects test to Internet authors in libel or defamation actions is certain to be on the court's docket soon.

In the near future, the U.S. Supreme Court will also have to decide whether the Calder test applies equally to authors who are published and distributed in conventional media and authors who opt to self-publish on the Internet, or whether Internet authors have greater immunity from suit in foreign jurisdictions than authors who publish in the old media, as the Minnesota Supreme Court has decided.

Peter Erlinder is a professor of law at William Mitchell College of Law in St. Paul. He teaches Civil Procedure, Constitutional Criminal Procedure and Criminal Law. Erlinder is also a frequent litigator or consultant, often pro bono, in cases involving the death penalty, civil rights, claims of government and police misconduct, and criminal defense of political activists. Erlinder can be reached by e-mail at peter.erlinder@wmitchell.edu.