

Media & Entertainment - United Kingdom

The Internet: still the 'Wild West' of publication?

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Introduction

Under English law, website operators are potentially vulnerable to a damages claim being brought against them in the English courts for publishing defamatory user-generated content if – broadly speaking – it is accessible in England, there has been substantial publication in England which causes or is likely to cause serious harm and the defamed has a reputation in England. Taking such action has been the only option for some to seek redress for defamatory user-generated content published by anonymous publishers who are neither identifiable nor contactable and thus cannot be sued.

The new defence under Section 5 of the Defamation Act 2013 – a procedure which came into force on January 1 2014 – tries to strike a balance by redistributing the responsibility between the anonymous defamer, the publisher and the defamed; but does it help anyone at all?

New defence

Section 5 states that it is a defence to a libel claim for a website operator to show that it did not post the statement complained of on its website. In relation to user-generated content, this will be fairly straightforward. Operators of online forums, blogs, comment and review sites and social media platforms on which users post, tweet or comment can avoid their own liability in respect of such content on the basis that someone else put it there.

However, it is not a complete defence because a complainant defamed by user-generated content can defeat it, at least in relation to unidentified or anonymous users, if the complaint is made in the right way – at which point the burden falls on the operator to take action if it wants to stay protected. So how does it work?

Section 5 procedure

Imagine Timmy Sales, head of free online encyclopaedia company Trickapedia. A well-known blog publishes an article about his latest venture. Beneath it, anonymous bloggers post a series of false and defamatory statements about him alleging inappropriate behaviour. Some of the most serious comments – alleging sexual impropriety – are made by the same unidentifiable blogger and soon the comments start to appear in the Google search results for 'Timmy Sales', with some being retweeted. The allegations are completely false, but people are now asking questions at investment meetings and Sales is also worried that his friends and family may type his name into Google and see the comments. The mainstream media could also pick up the allegations. Sales wants to take action to have the content removed. Had the blogger been identifiable, the proper course of action would be to complain directly to the blogger.

From the website operator's point of view, Section 5 provides that until a valid notice is received, a Section 5 defence cannot be defeated. Valid notice must include (among other requirements) an explanation as to why the complainant thinks that the comments are defamatory and what meaning they attribute to them, as well as confirmation that there is insufficient information about the blogger to allow the individual to be sued directly. If the notice contains the required information, the burden to act shifts to the operator. In this case, what must the operator do?

Burden

If the operator cannot contact the blogger concerned, it must remove the postings complained of within 48 hours and notify the complainant.

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If the blogger is contactable, the operator must notify the blogger within 48 hours of receiving notice that:

- the notice has been received;
- the blogger's posting will be removed if he or she does not respond by midnight at the end of the fifth day;
- the allegations may be removed, unless the blogger confirms whether he or she wishes them to be removed;
- if the blogger disagrees with removal, the individual must provide his or her name and address and stipulate whether he or she consents to this information being passed to the complainant; and
- details will not be passed on without consent.

The blogger then has five days to respond. If the blogger does not respond, does not respond adequately or disagrees to removal, the operator must remove the comments within 48 hours in order to maintain the Section 5 defence. If the blogger does not consent to removal, the operator must notify the complainant within 48 hours. If the blogger consents to having his or her contact details disclosed, the complainant will have to pursue the blogger directly and the defence still applies; if not, the complainant must seek a court order compelling the operator to release the blogger's contact details. As long as an operator complies with this procedure, the Section 5 defence will remain intact.

Comment

This new procedure tries to address the complicated and troublesome area of defamatory allegations published by anonymous bloggers online and the difficulties that this presents to operators and complainants that cannot contact them. It tries to shift some responsibility onto the bloggers themselves, which – if they do not accept it – allows those that facilitate their defamatory content rightly to avoid liability for publishing it by means of removal.

Equally, the procedure allows the anonymous to defend what they publish before any removal has been made while protecting their freedom of speech and maintaining their anonymity, as contact details can still be withheld.

However, returning to the example above, costs are unlikely to be reduced, as Sales will still need to take legal advice to make sure that he provides the right notice to apply pressure on the operator to comply with the procedure, as the notice requirements are inconveniently and complicatedly spread over Section 5 itself and the accompanying regulations. Sales will also still need to incur the cost of going to court (potentially even in a foreign jurisdiction if the operator is based there) to obtain an order for the release of the blogger's contact details, should the blogger refuse consent to this disclosure and choose to defend the allegations. This will be particularly frustrating for Sales as, if the blogger wishes to defend, why should Sales have to pay more in legal fees to identify the blogger? Surely, the blogger should be required to step out of the shadows to allow a proper exchange to take place and on an equal footing, especially as the allegations about Sales (who is clearly identifiable) will remain and may even proliferate online, causing more damage in the meantime.

Operators should implement systems to process complaints in compliance with the new legal regime – but is there any incentive to comply with this procedure if there are other, better defences available? Herein lies another problem for Sales. As many website operators will be operating as 'hosts', Section 5 is just another defensive layer available, as they will also potentially have a defence to a damages claim under Regulation 19 of the E-Commerce Regulations 2002 (whereby an information society service need only remove content "expediently" if it has actual notice that it is unlawful). To jump this hurdle, Sales will also have to explain (and at further legal cost) both the strengths and weaknesses of the potential defences available and why those defences do not apply, the rationale being that this extra explanation is necessary as what is 'unlawful' is not the same as what is 'defamatory'. There is no requirement under the Section 5 regime to do this, so Regulation 19 remains the higher, parallel test which any website host can still fall back on and which any complainant must still pass. There are also other valuable defences, such as the 'mere abuse' doctrine and the requirements for substantial publication and serious harm, not to mention the fact that some website operators will not become publishers until provided with notice, while others are unlikely ever to be classed as publishers under English law (eg, search engines), although recent developments in data protection law have weakened that protection.

Therefore, it remains to be seen whether the administrative cost of implementing and operating the Section 5 procedure – which only partly helps the complainant – will be something that operators engage with at all, perhaps leading to more confusion. Further, despite the laudable efforts of Section 5 to simplify such matters, complainants will still need legal advice to navigate these hostile waters and, ultimately, should be prepared to fund doing so if they want to unmask an anonymous defamer who wishes to remain anonymous and is prepared to stand by what he or she published. The future will undoubtedly see complaints using other areas of law to deal with these issues. In the meantime, online libel law remains complicated and costly.

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