ANTISOCIAL MEDIA: INTERNET DEFAMATION, ONLINE LIBEL AND FREE SPEECH IN THE FACEBOOK ERA

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The phenomenon of social media touches the lives of nearly everyone in the world. From elementary school children, college kids and parents to business owners, movie stars and world leaders, billions of people all around the globe have access to this digital medium. In a matter of seconds, information can be shared, liked and linked across state lines, national borders and beyond. Different nations with varying laws of expression treat the use of social media by its people in differing ways. The United States has the First Amendment, but most countries have nothing remotely close to the venerable concept of protecting free speech. Even so, the U.S. currently has no federal regulations in place to address all the myriad issues with social media (e.g., hate speech, blocking, censorship, search engine results, etc.).

Former United States Supreme Court Justice Anthony Kennedy wrote that social media was among the most important places for the common exchange of views. He even compared the Internet to the public forum, akin to a public street or park. Indeed, commentators seek to analogize social media giants as public squares. That assessment seems a bit too generalized and not such a seamless analogy.

The greater access to a vast online forum introduces many virtues that did not exist in other more traditional arenas. On the one hand, a forum exists so that the average person can engage in robust debate or rectify damaging opinions or commentary. But in the modern age, an individual can simply express his or her view in mere seconds, so long as bandwidth exists. At the same time, the amount of hate speech and utter lack of accountability raises genuine concern of how to forge ahead in this digital world. Should the government enact more regulation? Should we rely on the social media giants to be the final arbiter? Or, better yet, can basic common law defamation remedy the situation? Unfortunately, there is no clear answer or path. The law is still evolving, and it certainly must.

Undoubtedly, social media has assumed the predominant means for the exchange of views and ideas. As a completely different vehicle from traditional newspaper, radio and other forms of mass communications, issues arise about the impact of defamation actions in this new "social" world in which we live.

Elelments of Defamation

While the digital world thrives on constant change and permutations, the elements of defamation remain the same. The elements are: 1) a false/derogatory statement asserting to be fact; 2) published to a third person; and 3) resulting in actual harm to the defamed person. The cause of action is fairly straightforward at first blush. However, a certain amount of nuance in the handling of these types of actions has evolved over time. For instance, a heightened pleading standard exists because courts are inclined to accept the public policy underpinning that litigation has "a chilling effect" on reporting the news and expressions of free speech. Therefore, motions to dismiss have a predominant role in defamation actions.

Similarly, if you are a public figure, then the plaintiff must prove actual malice. The public policy rationale in this

scenario presumes a public figure has 24/7 access to media, be it a television talk show, radio broadcast or print journalism, and can therefore swiftly address alleged defamatory comments. As expected, proving actual malice is not easy. And as is often the case, a plaintiff must use circumstantial evidence and argue inferences. The plaintiff must also explore motives and attempt to piece evidence together to withstand summary judgment or even motions to dismiss.

In addition to the public figure exception, there are also a host of jurisdictions which have adopted certain qualified privileges (e.g., the fair reporter privilege). These privileges germinate from the public policy that news organizations are tasked with reporting on matters in the community, including crime, and should be provided ample latitude to do so.

Defamation is Harder and Harder to Define

There is a wealth of case law touching all the issues with a defamation case, whether it is libel (written) or slander (oral). Considerations for what constitutes defamatory statements are dynamic and certainly not static. A defamatory statement in one area may not be in another. As a society, we arguably have become more desensitized to the impact of belittling comments or false assertions.

While false, defaming statements exist and are actionable, the defenses are equally at play. Opinions are excluded. Even those belittling comments – if in the form of an opinion – are protected speech. Hyperbolic language, sales pitches and satire are also not considered defamatory for the purposes of an actionable case. Examples abound. Our Commander-in-Chief provides prime, frequent fodder in this arena. His tweets of "major loser" and "begged for a job" are merely hyperbolic language.[1] Or when addressing the Stormy Daniels story, President Trump's response on Twitter included the phrases "total con job" and "playing fake news media for fools." The language in this tweet was protected rhetorical hyperbole.[2]

Issues with Defamation in the Digital Medium

The developing case law with the digital medium comes in all forms. Some are less obvious than others, like when a public official "blocks" someone or removes critical comments from either their Facebook or Twitter account. This act of blocking may seem fairly harmless, but in some circumstances, it can be a violation of the First Amendment. The First Amendment prohibits the government from limiting one's speech. So, if a public official who does not like criticism blocks a citizen from having access to their social media content, this can prove problematic. The public official can argue that it is a personal account. The obvious counter to that argument is that since the account is tied to a public figure, the page should be considered a public – not private – forum. Thus, the First Amendment comes into play. There is a host of lawsuits of this nature pending.[3] The inquiry is whether the private account has a sufficiently close nexus with the state to be fairly treated as that of the state itself.

There is no objective or subjective test, but the courts are to review the totality of circumstances that might bear on the question of the nexus between the challenged action and the state.[4] The questions to vet: Were the posts on behalf of the public body? Did he or she list their address as that of an official of the state or government? Did he or she not categorize their social media account as government official? There are several other pivotal questions.

The leading case on this issue is Davison v. Randall.[5] The Fourth Circuit held that an individual did have First Amendment rights to not be restricted from a Facebook page that was held out to be an official county page. In making this finding, the court noted that the page was identified as a government official page.[6] The court explained that the Facebook page was created to perform actual or apparent duties of the office.[7]

Certainly, if the sole intention of the public official is to suppress speech that is critical of his or her conduct, of official duties or fitness for public office, their actions are more fairly attributable to the state.[8] The public official with the private account argues that he or she is merely curating the content and audience of his personal promotional account – not carrying a function of the state.

The Conundrum with Policing Anonymous Speech

Another predominate issue is how the law deals with all the anonymous hate speech on social media. Censorship today is not from the government or nation states, but rather from the likes of Google and other online technology titans. Social media companies police the content pursuant to their own terms of service

1 Jacobus v. Trump, et al., 2017 NY Slip Op 08625

2 Clifford v. Trump, 339 F.Supp. 3d 915 (C.D Cal. 2018). Ms. Daniel's real name is Stephanie Clifford.

3 Attached is a brief prepared by our firm in a pending action, the style of which is Windom v. Harshbarger, (N.D. W.Va.. 249), C.A. 1:19-cv-00024.

4 Rossignol v. Voorhaar, 316 F.3rd 516 (4th Cir.), cert. denied, 540 U.S. 822 (2003).

5 Davison v. Randall, 912 F.3d 666 (4th Cir. 2019).

6 Id.

7 Id. at 679.

8 Woolsey vs. Ojeda, No. 2:18-CV-00745, 2019 384956 at 2 (S.D. W.Va. an.30,2019)(quoting Rossignol, 316 F.3d at 524).

agreements. Facebook and YouTube, for example, have removed a newspaper's online postings as well as a radio personality from their services.[9] Commentators note a disturbing trend with social media companies applying their service agreements where media giants have chosen to move away from their initial First Amendment inclinations. Commentators suspect this move is triggered by the European Union employing more censorship. In other words, countries tend to be more inclined to restrict expression and not view comments as protected speech.

Indeed, the censor today is social media, which uses certain A.I. algorithms to filter a whole host of online language trends, including hate speech. Meanwhile, censorship continues to rise as these media companies operate in a multitude of nation states with widely differing laws. As such, social media companies tend to adopt the strictest regime and thus prove to be a legitimate threat to truly free expression.

Available Means to Address Social Media as Censors

One option is to hold online platforms to First Amendment standards. By applying First Amendment standards, this would reduce the censorial action of private companies. As simple as it sounds, this approach raises another problem.

The State Action Doctrine, a venerable concept in Constitutional law, limits state action, not individual invasion of an individual's rights. The Constitution limits government actors, not private actors like media companies. In Nyabwa v. Facebook, the district court in Texas aptly explained the problem with applying the First Amendment to private companies. In dismissing a lawsuit by a private individual against Facebook, the district court stated: "…the First Amendment governs only governmental limitations on speech."[10]

Litigants have attempted to use dicta from the leading Supreme Court case involving free speech and the right to regulate it through quasi-government action in Marsh v. Alabama.[11] In Marsh, the Supreme Court in 1946 found that a private town was not technically private and thus allowed for First Amendment protection. The court reasoned ownership does not always mean absolute dominion. The more the owner opens his property for use by the public in general, the more do his rights become circumscribed by the Constitutional rights of those who use it.[12] In response, the Supreme Court adopted the "public function" test where litigants attempt to cloak otherwise private companies with pubic government characteristics to curtail and control their action.

The holding in Marsh, however, has not been successfully transferred to social media companies. Facebook, Instagram, Twitter and the like are not stepping in the shoes of the state, and thus are not held to First Amendment standards. Accordingly, we must presently rely on the social media companies to filter, manage and take down hate speech. Even so, there are large swaths of the web that are completely unfiltered and unrestricted.

Recourse Against Social Media Companies

So, the question is, what recourse does one have against these social media giants? You lose on First Amendment grounds because, for the most part, these companies are private. What about the harmful false and offensive content that remains in the digital world? What about the political bias that may exist with certain platforms?

First Amendment and Communication Decency Act

In general, as noted, lawsuits against social media companies have been unsuccessful for two primary reasons: first, doctrines that prevent the First Amendment from being applied to private companies; and second, Section 230 of the CDA (Communications Decency Act of 1996), which protects media companies from being held liable under federal or state laws. The Marsh decision, which created the "public function" test under which the First Amendment, would apply if a private entity exercises powers traditionally reserved exclusively for the state.

In several cases, the argument has been that social media companies act or possess qualities more akin to a government or state. Courts are apt to reject such arguments because, while these companies provide access, they are not performing any municipal power or essential public service. In other words, there is not sufficient nexus and entwinement for state action. To support this finding, the courts point out that the government did not participate in the operation or management of the website.[13] Instead, courts tend to see these media giants as simply providing a forum for the expression of diverse points of views.

The Communications Decency Act of 1996

The other obstacle with addressing recourse against

9 Alex Jones, an American radio show host, was removed from Facebook, YouTube, Spotify, and Apple.

10 Nyabwa v. Facebook, 2018 WL 585467 (S.D. Tex. Jan 26, 2018).

11 Marsh v. Alabama, 326 U.S. 501 (1946).

12 Id.

13 Quigley, 2017 U.S. Dist. LEXIS 103771, at *5-7; Estavillo v. Sony Comput. Entm't Am. Inc., No. C-09-03007 RMW, 2009 U.S. Dist. LEXIS 86821, at *5 (N.D. Cal. Sept 22, 2009); Cyber Promotions, 948 F. Supp. At 444-45. See also Fehrenbach v. Zeldin, No. 17-CV-5282, 2018 U.S. Dist. LEXIS 132992, at *7-8 (E.D.N.Y. Aug. 6, 2018) ("[N]o reasonable person could infer from the pleading that the state 'encouraged' or 'coerced' the Facebook defendants to enable users to delete posts or to 'look away' if and when they do.")

social media companies is 47 USC 230. The government made a public policy decision to protect social media companies. 47 U.S.C. §230(c) provides:

> (1) TREATMENT OF PUBLISHER OR SPEAKER – No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) CIVIL LIABILITY – No provider or user of an interactive computer service shall be held liable on account of ---
>
> (A) any action voluntarily taken in good faith to restrict access to or availability, of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph(1).

Clearly, the United States Congress chose to grant broad immunity. The statute expressly states that an entity which provides access is not a publisher. As noted, without a publisher finding, then there is a glaring missing element of any lawsuit based upon defamation. This statutory immunity applies beyond just common law defamation cases. Indeed, the theory of liability makes no difference in the application of immunity. In fact, courts applying Section 230 tend not to be impacted by the theory of liability (i.e., breach of contract, breach of privacy or defamation). Instead, courts focus on whether the media company is publishing other content. If so, then immunity applies, and the lawsuit is dismissed at the Rule 12(b)(6) stage.[14]

It bears observing that Section 230 distinguishes between interactive computer services and information content providers. Google,[15] Twitter[16] and Craigslist[17] are interactive providers. These companies enjoy statutory immunity. Information content providers do not enjoy immunity and are subject to common law defamation lawsuits. Whether a media company falls into the latter distinction depends on whether the media company materially contributed to the allegedly disputed content or specifically encouraged the development of the offensive content.

A case in point involved the website Roommates.com.[18] There, the court concluded that Roommates.com could be subject to a suit for discrimination because the site required all users to respond to questions about their sex, family status and sexual orientation by selecting preset questions. With these preset questions, the court reasoned that Roommates.com was more than a "passive transmitter of information provided by others; it became the developer of some of the information."[19]

The remaining part of Section 230 provides immunity to media companies that restrict access to content which it believes, in good faith, to be obscene. This section applies to those instances where the social media company restricts access or otherwise blocks a user. This immunity requires a threshold finding of good faith and, thus, cases here have a better chance to proceed to the summary judgment stage. While, Section 230 (c)(2) seems to focus on the removal of content rather than the publishing of content, it is unclear as to the interplay with the two sections. Arguably, there is broad immunity under Section (c)(1) which may encompass Section (c)(2). The end effect, no matter the interplay between the two sections, is that most lawsuits have failed as immunity applies no matter the theory of liability.

Conclusion

Lawyers can be and will certainly need to be creative in this space. Efforts to circumvent the statutory immunity and/or apply the First Amendment will continue to be aggressively pursued. While regulations seem difficult to implement, theories are percolating about ways to ensure accountability. Such theories include treating social media companies or platforms as common carriers or even cable companies. That said, defamation cases in the social networking era will definitely play an active role in court dockets across the country. But the stage as it is currently set significantly reduces the efficacy of that role.

14 47 U.S.C. §230. See also Universal Commc'n Sys., Inc., 478 F.3d at 418 ("The other courts that have addressed these issues have generally interpreted Section 230 immunity broadly . . ."); id. at 419 ("[W]e too find that Section 230 immunity should be broadly construed.").

15 E.g., Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

16 E.g., Fields v. Twitter, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016).

17 E.g., Chicago Lawyers' Comm. For Civil Rights under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008).

18 Fair Housing Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

19 Id.