



## Protecting Yourself and Your Business From Online Defamation

by Danielle Stone

Originally published in *Commercial Litigation Update* (June 2011)



Danielle Stone is an associate in Blaney McMurtry's Commercial Litigation group. Prior to becoming a lawyer, she was an investigative journalist with CBC's Fifth Estate. She is a member of Ad Idem - an organization of lawyers specializing in defamation and media law.

Danielle may be reached directly at 416.597.4898 or [dstone@blaney.com](mailto:dstone@blaney.com).

Some time or other, most people give in to the temptation. You turn on your computer or smart phone, find your way to an Internet search engine, and type your own name into the search engine toolbar. Typically, you will come across links to your professional profile, or reports about your business and charitable dealings. But what do you do if you discover a website, message board, social media page, or other online publication containing false and damaging statements about you or your business?

The quickly expanding sources of defamatory content on the Internet have raised new challenges for people seeking to protect their reputation. The ease of Internet publishing, the potential world-wide span of Internet content, the immediacy of publication, and the indefinite availability of defamatory statements on the world-wide-web can cause devastating reputational effects for you or your business.

But there are unique circumstances to Internet publications that make defamation actions even more complex. Before you pull out your litigation armour, consider the following challenges, and options:

### **Whom to sue?**

Unlike traditional media, in the world of Internet publishing anyone with a computer and a few technical skills can publish truths or falsehoods to the world, often anonymously. If the statement is on an author's personal social media page or blog, or a reputable news organization's website, you may be able to easily identify and locate those responsible for publishing the statements. If the offending material is on an Internet message board, or some other ambiguous website where members of the public can post anonymous comments, taking action against the author and publisher may not be so simple. In these cases, consider putting the Internet Service Provider (ISP) or Website host on notice about the defamatory statements. Consider the advantages of pursuing remedies against the ISP and Website host as publisher of the statements and/or the advantages of compelling the ISP or Website host to provide the name and location of the person who posted the statements.

### **Litigate or mitigate?**

Often times, a statement may be on a message board, or in some other format that allows others to immediately rebut or post additional comments about the defamatory statements. If so, be sure to mitigate your damages by posting a response to the comment. This is obviously much more of an immediate and cost-effective response than a defamation action, and will help protect your reputation, especially if you have discovered the statements on a timely basis.

**Are there credibility issues?**

Defamation actions are time-consuming, complex, and expensive. Before proceeding with an action, consider the Internet source of the statement, and the potential for a reasonable person to trust the credibility of that Internet source. While legally, the source of a statement does not have to be proved as one with credibility, some websites may be so remote that they have minimal reader traffic, or cater to readers who are insignificant to you or your business. The general content of a particular website may also indicate unreliability. If the website is obviously an unreliable source, ask yourself whether there is actual damage to your reputation justifying the commitment and expense of pursuing a defamation action.

**Can you prove publication?**

To succeed in a defamation action, you must be able to prove that third parties read and understood the statements to be defamatory. Unlike newspaper or television and radio broadcasts, the courts may not automatically assume this publication. For example, in *Crookes v Newton*, the British Columbia Court of Appeal decided that a website providing a hyperlink to defamatory statements on another website did not establish publication of the material by the person who posted the hyperlink. Neither would the court accept evidence of the number of “hits” to the website as sufficient evidence of publication (we are awaiting the Supreme Court’s decision in the case). Consider whether you have any proof, or can get proof, that third parties viewed and understood the defamatory statements.

**Where to sue?**

Similarly, you may not be able to successfully bring an action against an author and publisher of a statement on a foreign Internet site and beyond the reach of the Ontario courts. In such circumstances, you may have to prove that the online publication reaches significantly into Ontario. Evidence of your reputation in Ontario, and damage to your reputation in Ontario, will help convince Ontario courts to hear the matter. Additional evidence that the publisher targeted Ontario readers, or that Ontario residents downloaded the statements, will help convince the courts to hear the case.

**What's your goal?**

If you are successful in a defamation action, remember the goal. You have accomplished very little in salvaging your reputation if the defamatory statement is still accessible on the Internet in its original form. Unlike a newspaper or television broadcast, Internet publications can spread quickly and last indefinitely. In addition, “the truth rarely catches up with a lie” (*Crookes v Newton*). Either at the negotiation stage, or as the relief sought in a defamation action, seek removal of, or amendments to, the statements on the defendant’s offending website and archive databases. Even if the publisher removes the statement from the offending website, Internet search engines may still publish links to a “cached” version of the offending material. For this reason, and as much as possible, removal of the material from all Internet sources should be the goal. ■