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LITIGATION

Repose in cyberspace: the single publication rule online

By Andrew J. Thomas

The last installment of this column addressed one major limitation on the common law rule that any repetition of a libel is actionable — namely, the immunity provided to Internet publishers by Section 230 of the Communications Decency Act. There is another important such limitation to consider — the single publication rule. But in this case, uncertainty about how the rule applies to Internet publications may unnecessarily inhibit online speech.

The traditional common law rule — still in force in England — treats any sale or distribution of defamatory material as a distinct actionable publication, regardless of when the statement was originally made. This rule dates back to an 1849 Queen's Bench decision called *Duke of Brunswick v. Harmer*, in which an eccentric German duke dispatched his manservant to an English newspaper office to purchase a back issue containing an article published 17 years before. The court held that this single purchase of the long-forgotten back issue constituted a new and separate "publication" on which suit could be brought, notwithstanding the six-year limitations period then in effect.

Content Matters

This is a monthly column devoted to matters of interest to those who create content of all kinds (entertainment, news, software, advertising, etc.) and bring that content to market. Our hope is to shed light on key issues facing the creative content community. If you have questions, comments or topic ideas, let us know at ContentMatters@jenner.com. Because content matters.

The American rule is different. Seven states, including California, have enacted the Uniform Single Publication Act. See California Civil Code Section 3425.3. Most other states have adopted the single publication rule by judicial decision. As the California Supreme Court has explained, under the rule the statute of limitations is triggered by the "first general distribution of the publication to the public...regardless of when the plaintiff secured a copy or became aware of the publication." *Shively v. Bozanich*, 31 Cal. 4th 1230, 1245 (2003).

The rule applies most obviously and often to mass media publications like newspaper editions, magazines and books, but it also reaches radio and television broadcasts, motion picture releases, and product sales. It applies to all causes of action that may arise from a publication, including right of publicity and fraud claims, as well as defamation suits.

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The benefit of the single publication rule is lost when a defendant republishes information in a separate or altered form. Thus, when a book publisher issues a paperback edition of a book previously published in hardcover form — even if the text is unchanged — the paperback release will restart the statute of limitations. The rationale for this exception to the rule is that the publisher intended to and did reach a new audience. Determining what acts amount to a republication can sometimes be a thorny, fact-specific inquiry.

Courts in the U.S. uniformly have concluded that the single publication rule applies equally to news articles and other information published online. Beginning with the New York Court of Appeal's decision in *Firth v. New York* (2002), courts across the country — including in Florida, Georgia, Massachusetts, New Jersey and Texas — have applied the single publication rule to Internet publications and have held that the statute of limitations begins to run from the first Internet posting of a statement, even if the posting stays up for years and is subsequently accessed and downloaded many times. The *Firth* court explained that allowing suit to be brought based on each separate download by a user would result in "endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants."

California courts likewise have rejected the argument that online content is "continuously published" for statute of limitations purposes. In *Traditional Cat Ass'n v. Gilbreath* (2004), the state appellate court followed *Firth* and held that the single publication rule applied to Internet publications, justified by the "need to protect Web publishers from the almost perpetual liability for statements they make available to the hundreds of millions of people who have access to the Internet."

But what happens when a Web publisher makes changes to content posted online years before? Does a new publication occur for statute of limitations purposes if the website operator moves content to a different part of the website, gives it a more prominent or different heading, or updates an article to correct outdated information or report on further developments?

A newspaper, for example, may wish to update an article on an arrest and arraignment by reporting that the charges were later dropped, or that the accused had his conviction reversed on appeal. But if an online publisher updates two sentences in a ten-paragraph article to reflect new information, does the statute of limitations restart as to just those sentences or the entire article?

The answer is not yet clear, and that uncertainty may cause publishers to think twice about updating portions of articles that are archived on the Web, lest they open the entire article up to a new limitations period.

As a general matter, changes to how information is accessed online, as opposed to changes in the nature of the information itself, are not likely to constitute republication — even where the result is to make

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the old information more prominent or more easily accessible. In one New Jersey case, for instance, the court held that moving and altering a menu bar and adding a "press release" that directly referenced the allegedly defamatory report and made it more prominent and more accessible were "merely technical" changes that did not effect a republication of the prior content.

Similarly, in *Canatella v. Van de Kamp* (2007), the 9th U.S. Circuit Court of Appeals ruled that moving information to a different part of a defendant's website, even if the web address (URL) is different, is not a republication that resets the limitations period. And federal courts in Kentucky and San Diego have held that merely mentioning or linking to a previously published article did not constitute an actionable republication of that article.

Even where changes to a website are substantive, a number of courts have held in the online context that "minimal editing" will not constitute republication. Thus, in *Yeager v. Bowlin* (2010), the U.S. District Court for the Eastern District of California held that removing the plaintiff's name from some text on the site's homepage and cropping him out of a photograph was not a republication. And in *Firth*, the New York high court squarely held that the addition of new material to a website did not reset the statute of limitations where the new material was unrelated to the allegedly defamatory content.

Where additions or modification to a website relate to the previously-posted content that is alleged to be defamatory or otherwise actionable, some courts have said the test is whether "the substance of the previously published defamatory statements [is] altered or the defamatory statements themselves are put forth in a new form." *Salyer v. Southern Poverty Law Center* (W.D. Ky. 2009). Where the new information is itself defamatory and relates directly to the previously-posted material, a republication of that material clearly occurs.

That was the result in *Davis v. Mitan* (W.D. Ky. 2006), where the defendants operated a "scandal sheet" website that insinuated that the plaintiffs were con artists. After the defendants obtained a dismissal of the plaintiff's libel claims on statute of limitations grounds, they published new "Breaking News" and "Update" sections on their website with additional derogatory statements about the plaintiffs. These additions were held to have restarted the limitations period as to the original material.

These decisions — albeit few and scattered — suggest that a Web publisher should be able safely to update archived reports and articles provided that the new information is not itself defamatory (or otherwise actionable) and does not have the effect of presenting the old material to a new audience. A short statement of the new fact or development, coupled with a link to the previous article, may be the safest way to go. In the absence of more clarity from the courts, it may be that legislative action is necessary — particularly in California where the single publication rule already is codified — in order to ensure that Internet publishers have the peace of mind to correct and update their online stories without fear of resetting the statute of limitations and exposing themselves to the risk of endless litigation.