

Twibel A Matter of Internet Privacy

Raymond Placid
Florida Gulf Coast University
United States
rplacid@comcast.net



ABSTRACT: *The legal aspects of Internet is explained in the paper through the framework called as Twibel. The evolution of Twibel is traced with Twitter. In this paper the evolution is described with the description of the model. It is possible that the Twibel can create legal liability on the part of the sender if the defamatory material is not protected under the first amendment and the material is either maliciously or intentionally tweeted to the general public.)*

Keywords: Twibel, Twitter, Web security, Legal aspects of web

Received: 18 December 2014, Revised 20 January 2015, Accepted 27 January 2015

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1. Introduction

What is twibel?

The short answer is libel plus a non-privatetweet equals twibel. The long answer is explained below.

Twibel is a relatively new phenomenon in the legal system and the legal rights of the parties involved in a twibel lawsuit are still in the evolutionary stage. This article will explore the legal impact of a defamatory statement that is placed in cyberspace through Twitter where the privacy of the tweet is breached either intentionally or by accident.

It should be noted that the legal principles discussed below are not restricted to Twitter. These principles are broad enough to capture any web based activity that reaches the eyes of the public. If reasonable precautions are not taken to secure the privacy of data that is sent over the internet - legal liability may follow

We will begin our analysis of twibel with the evolution of Twitter.

2. Twitter

Twitter was created in 2006 by a small group of coworkers to use SMS (Short Message Service) to send texts on their cell phones. The first tweet was sent on March 21, 2006, which stated “just setting up my twtr” (Johnson, 2013).

Twitter rapidly gained popularity and its growth has been exponential. In the first quarter of 2007, approximately 5,000 tweets were sent per day. In 2010, Twitter users were sending 50 million tweets per day and by 2013 Twitter had more than 500 million tweets per day (Twitter Usage Statistics, 2013).

Twitter facilitates real-time dissemination of breaking news from its location. As a result, Twitter has been “embraced by journalists, governments, and businesses as a crucial source of real-time information on everything from natural disasters to celebrity gossip, and from debates over sexual violence to Vatican politics” (Puschmann, Bruns, Mahrt, Weller & Burgess, 2014).

The mechanics of Twitter are fairly simple. Users post tweets (messages of 140 characters or less) using the Twitter website or via SMS on their cell phones. The developers of Twitter restricted messages to 140 characters, since SMS has a 160 character limit and 20 characters were allowed for the username (Johnson, 2013). Although the web interface or smartphone apps are commonly used to access Twitter today, it can still be accessed using SMS – that is, texting from a cell phone. Common activities for Twitter users are tweeting, replying, retweeting, and mentioning.

Unless a user protects his tweets in the account settings, anyone can read them. The default setting for a Twitter account is that all tweets are public – that is, they can be read by anyone with or without a Twitter account. A user may change the account setting to protected, which means that he must approve each person who wants to subscribe to (i.e. read) his tweets. Normal tweets will be seen on the poster’s home timeline (i.e. home page) and on the home timelines of all the poster’s followers (Types of Tweets, n.d.). Unless a user has protected his tweets, anyone may choose to “follow” them, or subscribe to their tweets. A user may reply to a tweet posted by another user by selecting “Reply” following the tweet. The reply will start with @username.

The original tweeter (i.e. recipient of the reply) will see the reply on his mentions page and, if he follows the replier, the reply will appear in his home timeline. It will also be in the home timelines of anyone who follows both the sender and responder (Types of Tweets, n.d.). For example, assume there are three users, X, Y, and Z. X tweets “Z wasn’t at work today.” Z replies, “@X I was at work today - for 10 hours!” Each of their tweets will appear on the home pages of their respective followers. If Y does not follow either X or Z, she will not see either tweet. If Y is following X, then Y will see X’s tweet on her homepage. However, she will not see Z’s reply on her home page because she is not following Z (Schmidt, 2014).

If a user wants his followers to see a tweet, he can “retweet” the item. Retweeting can greatly extend readership of a tweet by exposing it to new audiences. Retweets will appear in the retweeters’ followers’ timelines marked with their name and “retweet”. If a user has a protected account, his followers cannot retweet his tweets using the “official” Twitter retweet button. However, a tweet can be retweeted as it was in the past, by copying the original tweet and pasting it into a new tweet preceded by the Twitter convention “RT @[username]”. So if Y has a protected account, but has allowed X to follow her, and Y tweets X “@X Maybe Z was at work but I heard his boss Q was at the beach”, X will not be able to retweet the message using Twitter’s “retweet” button. However, X can copy and paste it and post as either his own tweet or precede it with RT@Y and it becomes a public tweet. This is analogous to a “mention”. Mentions will display in the same places that replies will be displayed (What are @replies, n.d.).

Users can also send Direct Messages on Twitter. A Direct Message is sent to specific individual(s) with Twitter accounts and will only be seen by them. This is done by selecting the “Direct Message” icon. If using SMS to send a direct message over the phone, the message starts with “d username”. A pitfall here is that if a user enters a total of more than 160 characters, some service providers may divide the message into more than one message. Only the first part will be sent as a private message. Subsequent messages are sent as normal, open tweets. (Twitter SMS, n.d.)

In summary, a tweet can be misdirected, or made public (non-private), when it was meant to be private. If a user is not careful about privacy settings, they may be set to the default – that is, anyone can view all the user’s tweets. Even if a user has a protected account, an approved follower can manually retweet (i.e. copy and paste) the original tweet, thereby making it public. When using SMS to send a Direct Message, a Twitter user may mistakenly send over 160 characters and the second half of the message may be displayed as a regular tweet.

To appreciate the legal impact of a non-private tweet (i.e., a tweet that is available to the public) consider the following headline - Producer wins million-dollar defamation lawsuit. The producer sued a person for twibel. The defendant claimed that the tweets were a form of speech that was protected under the first amendment of the US constitution. The court entered a default judgment in favor of the producer. The judgment is allegedly for one million dollars (Shropshire, 2014).

Given the legal ramifications of a non-private tweet, does this mean that all libelous tweets (i.e., twibel) will expose the sender to legal liability? Not if the Tweet involves a matter that concerns the First Amendment to the Constitution (i.e., free speech) or the tweet was published by accident. To fully understand the constitutional shield for a non-private tweet, we must first examine the legal impact of a defamatory statement that is placed in cyberspace through Twitter where the secure nature of the tweet is breached either intentionally or by accident. As part of this exploration, we will examine the evolution libel and thereafter address the constitutional shield, if any.

3. Evolution of Libel

Libel is a form of defamation. Defamation is “Tort” and is defined as the act of harming the reputation of another person by making a false statement to a third party about such person. There are two types of defamation, slander and libel. Slander is a verbal form of defamation whereas libel is a written form of defamation (Garner, 2009). Twitter is a form of libel since it is written.

In its early stages of development, libel was viewed as a strict liability cause of action, which means that liability was not predicated upon fault. Under the strict liability system, publication of a false or unprivileged libelous statement about a person to a third party is forbidden and created legal liability on the part of the defendant, even if the defendant reasonably believed that the statement was true when it was published (*Beli v. Orlando*, 1967).

Not all statements made by a defendant are deemed libelous; truth is an absolute defense to libel lawsuit. In addition, if the statements are protected by a privilege, then liability will not attach to the defendant. In general there are two privileges—absolute and qualified privilege. Absolute privileges are generally related to judicial or legislative proceedings. The purpose of the absolute privilege in the judicial process is to provide immunity to participants (e.g., witnesses) to assure all concerned that they can speak freely without fear of personal liability. Qualified privileges allow a person to publish defamatory material to protect his own legitimate interest or the interest of another. In order to preserve the qualified privilege, the statement must be published without malice. For example, statements made without malice to the police concerning a crime are protected under qualified privilege even if the statements are untrue (Dobbs, 2004).

The libel laws evolved with little or no consideration for the U. S. Constitution and the free speech rights protected therein. In 1964, the U.S. Supreme Court attempted to balance society’s interest in free speech under the U.S. Constitution and the state’s interest in protecting the reputation of their citizens. In *New York Times v. Sullivan* (1964), the U.S. Supreme Court ruled that state defamation laws, including libel, are limited by the principles espoused in the First Amendment where the matter involves a public issue (Placid & Wynekoop, 2011).

The decision by the U.S. Supreme Court in the New York Times case altered the course of libel law in the United States. State laws concerning libel are now expressly limited by the First Amendment of the U.S. Constitution where the matter involves a public issue. In the aftermath of *New York Times v. Sullivan*, the plaintiff will have to prove that the statement was libelous under the state laws and if the matter involves a constitutional concern (i.e., a public issue), some degree of fault on the part of the defendant. At this point, the discussion turns to twibel

4. Twibel

As mentioned, libel plus a non-private tweet is tantamount to twibel. Twibel can create legal liability on the part of the sender if the defamatory material is not protected under the first amendment and the material is either maliciously or intentionally tweeted to the general public. However, the law is not settled where a secure (i.e., private) tweet is released into public domain by accident or perhaps by a defect in the program.

To appreciate the legal impact of a non-private tweet consider the case involving *Rhonda Holmes v. Courtney Love*. This is one of the first known twibel cases to go to trial (Transcript, 2014).

In this case, Courtney Love hired Rhonda Holmes, an attorney to pursue a claim against the estate of her late husband, Kurt Cobain. Six months later the Love allegedly fired the attorney. When Love later tried to rehire the attorney, the attorney declined. Thereafter, in 2010 Love went on Twitter and stated “I was f***ing devastated [sic] when Rhonda J. Holmes esq. of San Diego was bought off @FairNewsSpears perhaps you can get a quote.” (Transcript, 2014). Love was later quoted in an

article as saying an attorney had stopped answering the singer's phone calls because "they got to her" (Orzeck, 2014).

The attorney sued Love for libel seeking damages of \$8 million. Initially, Love argued that she should not be held accountable for her statements on Twitter because hyperbole and sensational language are par for the course in social media, and that claims made via Twitter should not be held to the same standard as information transmitted by news organizations. In response, the attorney argued that character assassination is character assassination, and that people "subscribe" to Twitter's feeds just like newspapers. The trial court rejected Love's argument and set the case for trial.

At the trial, Love was asked why she would have sent the disputed tweet if she hadn't meant to harm the attorney. Love responded that the tweet had been sent "late at night" and that it had been taken down as soon as she realized it was public. Love further stated that the tweet had been unintentionally published to her Twitter followers and that it was meant as part of a conversation with blogger "Ed," whose full name was not mentioned. "I'm sort of a computer retard, and now I know how to [direct message] perfectly, but then I didn't know how to [direct message] perfectly, so I thought I was [direct messaging] that guy Ed," Love said. "I thought I was making a private thing, and I was trying to convey that I thought she was bought off" (Siegal, 2014).

The jury ruled in favor of Ms. Love. The jury agreed that statements made by Love implying that her attorney had been "bought off" were false. The jury also agreed that the statements were harmful to the attorney's reputation. However, that jury decided that Love did not knowingly make false statements or act with reckless disregard to the truth when she sent the 2010 tweet.¹ Apparently, the jury was influenced by Ms. Love's statement that she was unfamiliar with Twitter's direct messaging features and intended the statements to be part of a private conversation with "Ed".

Unfamiliarity with a web based system was enough to shield Ms. Love from legal liability for defamatory material broadcast over the internet. However, this shield will disappear as these forms communication systems become commonplace in society. Therefore, it behooves the user of a web based system, such as Twitter, to make sure that secure nature of defamatory material is not subject to breach in order to avoid legal liability.

5. Conclusion

Under the current legal landscape, libelous statements made in a Twitter environment should not be a legal factor influencing the decision to grant a defendant free speech protection under the First Amendment to the U.S. Constitution. Matters that involve free speech are generally statements that concern public issues or statements of national or public concern. Twitter is nothing more than the medium where the statements are published. Therefore, in the event that libelous material is posted on a social media website and broadcast to the public, either intentionally or unintentionally, the first amendment may serve as shield against liability for libel if the material involves a matter of public concern.

In the short term, unfamiliarity (i.e., ignorance) with a web-based system may be enough to shield the user from legal liability for libel. However, this excuse may be short lived. The legal maxim - *ignorantia juris non excusat* (Grace, 1986) –could be translated to "ignorance in using social media websites will not excuse". As social media websites become more prevalent in our society, one should not rely on "Ignorance" as a defense to a claim. Instead, the sender or poster should take due care in assuring that libelous material is transmitted appropriately and securely through cyberspace in order to avoid legal liability.

Only time will tell if libel will impact the evolution of libel law in the American legal system. Generation Y has the technological capability to conduct libel wars through cyberspace. This generation will eventually make their way into the legal system as members of the juries and legal profession. What was once considered libelous may be nothing more than a form of annoying gossip in the eyes of the Internet generation.

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