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ISPs and content liability: The original Internet law twist

Whenever you publish text or images, you face potential liabilities based on the meaning or message of that content. For any content you produce, you could face claims of libel or slander (defamation), trade libel, invasion of privacy, promotion of illegal activity, or something else.

In all these situations, everyone in the publishing/dissemination chain is potentially liable in the bricks-and-mortar world. But through an Internet twist, intermediaries aren't liable in the Internet world.

The Business Law Basics

Libel and slander are classic content-based legal claims. Both refer to disparaging statements about an individual or entity that seriously damage its reputation. Various special defenses and doctrines apply, many of them based on free-speech interests. See my ["Steps in a Libel or Slander Case"](#) chart for the most common elements and defenses. Trade libel (business disparagement), invasion of privacy, and various other torts, such as tortious interference with contract and intentional infliction of emotional distress, may also be asserted based on the publication of alleged objectionable content.

In the physical world, all of these content-based liabilities apply not only to the original authors, but also to everyone who takes part in the authorship, publishing, and distribution process. If you believe a newspaper has libeled you, you can sue the reporter, the editors, the publishing company, and even, in certain circumstances, the distributors.

Under two landmark pre-Internet cases, courts made it clear that anyone who has and exercises control as to the content of a publication is liable in the same way as the writer. In a newspaper, that means the editors and publishers. But in [an important 1995 case](#), a court held that content liability could extend to online service providers. That case involved Prodigy, one of the earliest consumer online service providers. The court ruled that because Prodigy used a computer software program to screened content on its service for certain objectionable words, it functioned like an editor or publisher, and would be liable like one.

In another [landmark case involving CompuServe](#), a court ruled in 1991 that even a distributor who did not have any ability to edit content was still potentially liable, just for making the content available. That liability began only when the distributor received actual notice of the objectionable nature of the content.

The Internet Law Twist

Any of the events covered by traditional content publishing laws can occur on the Internet. You can be defamed on a blog. Your privacy can be invaded through a social media posting that reveals private facts or places you in a false light. Your company's product can be disparaged on a message board, causing commercial damage to your company. Internet postings, such as those on so-called date revenge sites, can be used to attempt to inflict emotional harm.

But because of a legal twist, content liability law nonetheless applies differently on the Internet. In the early days of the Internet's popularity, the Internet industry told Congress that the Prodigy and CompuServe decisions, applied strictly, would make the Internet impossible. Specifically, if service providers were faced with potential liability for every message republished by their services, they would find it costly and cumbersome to weed out objectionable or unlawful content from the vast feeds they processed. In that situation, service providers would probably simply eliminate most or all of the user-generated content that makes the Internet so vibrant. This kind of blanket self-censorship – or "heckler's vetoes" that would force providers to take down any content that prompts complaint – would stifle the Internet.

Congress, in an important act known by several different titles ([Section 230](#); the Online Providers Immunity Act; the Communications Decency Act; and Title V of the Telecommunications Act of 1996), created one of the most important Internet law twists.

Section 230 treats original authors and Internet intermediaries differently. It doesn't affect original authors but it protects intermediaries from liability. Intermediaries often hold key positions in the Internet publication process:

Problem	Intermediary
Libel on a blog	Blog host
Privacy invasion on social media page	Social media company
Disparagement on message board	Message board host
False advertising on website	Website operator

Section 230 provides that neither providers or users of interactive computer services will be liable as publisher of any information provided by a third party. By judicial rulings, section 230 has created what one court called "federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service." Specifically, an Internet service provider cannot be held liable as a publisher of the third-party content, nor can it be held liable for exercising "traditional editorial functions," such as deciding whether to publish, withdraw, postpone or alter the content of a third party.

Even defamatory or harmful content is covered by Section 230 – with the effect that Internet intermediaries are not liable for that content, and liability rests solely on the original author. This original Internet law twist baffles and frustrates many people. But it has been recognized and affirmed repeatedly as the foundation for enabling the Internet communications that, on the whole, have contributed so much to global knowledge, discourse, and commerce.

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