

The development of a new model of governance for online defamation in light of the emergence of social web technologies

ABSTRACT

The emergence of social web technologies has provided the average individual with a power online the likes of which they have not had previously. Such a power however presents problems for the law of defamation that the current cyberpaternalistic approach is not able to address. It requires a greater understanding of sociology and technology to develop a new model of governance that proposes the dissemination of values and norms across the online world. This paper highlights the research currently being conducted and its role within Web Science.

KEYWORDS

Social Web Technologies, Twitter, Law, Defamation, Sociology

1. INTRODUCTION

Web Science is about understanding the way in which the Web interacts with various aspects of our lives towards ensuring that the Web remains pro-human. One of the most pertinent ways in which the Web has become more pro-human in the recent past has been the development of social web technologies; providing the average individual with an ability to create and disseminate content; a power previously not had.

This power unsurprisingly has spurred legal problems whereby in the context of defamation, the approach of that that works in the physical world will work in the online world is no longer appropriate. As a result, there needs to be the development of a more appropriate model of governance based upon the proliferation of norms and values within cyberspace.

An understanding of the technology underpinning social web technologies allows

proof of the fact that cyberpaternalism will not work, while understanding sociology addresses the cyberlibertarian critique.

This paper first describes social web technologies, followed by establishing what the law of defamation is and explaining what cyberpaternalism and cyberlibertarianism are and how a new model of governance can develop.

2. SOCIAL WEB TECHNOLOGIES

Social web technologies have profoundly changed individual's interactions with the Web; moving from passive observers of the content online to becoming active participants and contributing to the online world [15][1]. Social web technologies have allowed the harnessing of the power of the collective to occur through collaboration and participation as opposed to that that existed previously [18], the result of particular individuals.

As well as allowing individuals the opportunity to create content, just as importantly social web technologies allow individuals the opportunity to disseminate the content they have created with 'content' being anything from audio to visual to simply plain text [20]. This content can be spread through various chains of causation with one individual disseminating to another and so on or through individuals being able to for particular references and coming across the content [4].

One of the most prominent social web technologies is Twitter and it very much encapsulates the idea of disseminating content as far and as wide as possible with its ability to do so being one of the reasons why it has been as popular as it has with more than 300 million users. More than any other form of social web technology it allows individuals the opportunity to disseminate content to not just people they know but also those with whom they have no relationship and therefore build new contacts.

This is achieved through individuals being able to republish content from someone that they are following to those that are following them, 'retweeting', along with being able to search for particular keywords or phrases that have been attached by others to their tweets as #hashtags, allowing others to search for particular words later on. These alongside the trending topics, allow for the spread of content beyond those that it was initially intended to, as a means of engaging the largest number of people possible [4].

It allows individuals the opportunity to voice their views and opinions and engage with others on topics of interest in ways that were not previously possible. At the same time, the limited number of characters means that individuals do not have to think about composition for long periods of time [16], as they do with traditional weblogs, while also meaning that the turnover of new tweets is high resulting in it being a source of breaking news.

The site's largely unilateral relationships means that many see it as a platform to gossip [6] which makes sense in light of the fact that the perception of Twitter and other social web technologies still very much remains as jovial places in which accountability is limited if existent at all.

In the wider context of social web technologies generally the ability to release emotional stress is very important [14][19]. Research suggests that releasing frustration to others assists in what is perceived to be a fuller release than in an instance in which the individual is alone. The idea is that where an individual is able to release stress the release is greater where there is someone else or the perception of another individual who is able to hear that and as a result social web technologies are perceived a great avenue through which one can do so.

These conceptions of why individuals use Twitter, make the threat of unlawful actions a real one with the most pertinent being the potential cases of defamation. The limited number of characters and the way in which individuals write without taking long periods to

contemplate their compositions, combined with the perceived jovial nature of social web technologies and release emotional stress and nature of the platform as a gossip avenue, make the threat of defamation on Twitter a very real one and something that has already occurred.

A local politician in the U.K. was forced to pay £50,000 in compensation for defamatory comments he made about a rival in Twitter [5]. When questioned about why he had behaved in the way that he had, he remarked that he had not thought about what he was saying, the potential size of the audience and did not take the remarks as likely to be taken seriously and libellous.

3. THE LAW OF DEFAMATION

Defamation is the mechanism by which the law seeks to protect the reputation of individuals by balancing the competing interests of freedom of expression and right to free speech¹. Essentially a remark which lowers the subject of the remark in the thinking of the right thinking members of society will be defamatory and actionable unless the defendant can succeed with a defence².

One of the most important aspects of the law of defamation is that in the U.K. there is the multiple publication rule. The rule dictates that every time a defamatory comment is published, it forms the basis of an action with publication being the point at which it has been read³. Therefore a defamatory comment could be the basis of numerous causes of actions.

In order to prevent cases of defamation arising the law has attached liabilities on all actors involved in the publication process. As well as the original author being held liable, so does any individual who repeats the defamatory comment, being treated to the same standard. Distributors of newspapers or magazines are now expected to play part in preventing the dissemination of defamatory content, not required to monitor all

¹ *Sim v Stretch* [1936] 2 ALL ER 1237, per Lord Atkin 1240.

² *Parmiter v Coupland* (1840) 6 M& W 105, Lord Wensleydale 108

³ *Duke of Brunswick v Harmer* (1849) 14 Q.B. 185.

content that they distribute but act reasonably to prevent dissemination, when they know or ought to have known that they were distributing defamatory content⁴.

It has hardly been surprising that the Web has been used as a medium for dissemination of defamatory remarks and the law has responded by applying the same standards to the actors involved as in the physical world; the cyberpaternalistic theory.

Cyberpaternalism, developed as a counter to cyberlibertarianism, argues that the Web is best regulated by the same rules and regulations that are applied in the physical world [3]. It argues that the nature of the Web is that in actuality you would not need the adoption of new flexible national boundaries in cyberspace as had been suggested as states would not want to give up their sovereignty while the role of regulation was to regulate behaviours as opposed to the method by which such behaviours have been carried out and there the method of regulation should be the constant across all mediums. The second element of this theory was that you have the application of control over the Web by exercising control over ISPs in their position as gatekeepers of the Web [13].

Cyberlibertarianism developed as a theory that argued that the Web should be left very much to its own devices and that great interference on the part of the state was neither wanted nor feasible [17][10].

John Perry Barlow contended that *'Weary giants of flesh and steel you are not welcome among us and have no sovereignty where we gather... You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.'* [17].

According to libertarians the nature of cyberspace was very different from the real world with the application of real world rules being futile [10] as values and norms would develop organically to reflect the values held by the community [17].

⁴ *Emmens v Pottle* (1885) 16 Q.B.D. 354.

The governance of online defamation in the U.K. has occurred in a cyberpaternalistic way with the application of the same standards on the various actors as in the physical world with the clearest example being liability on authors.

In *Berezovsky v Forbes Inc.* the U.K. High Court, Russian businessman, Boris Berezovsky had been the basis of defamatory comments by U.S. magazine Forbes and wanted to bring an action in the U.K.⁵ The magazine argued that the case should be brought in either the U.S., as 98% of copies sold had been sold in the U.S. with only 0.25% being sold in the U.K. or Russia as this was where Berezovsky resided and worked primarily.

Berezovsky argued that as he had a reputation in the U.K., given his business dealings in the U.K. that he should be able to bring an action in the U.K. The real reason why he wanted to bring the action in the U.K. was that traditionally the U.K. has been more lenient towards plaintiffs than other states.

The court was asked to consider whether there should be the application of a single publication rule in the context of online publication where the point of publication would be the point at which the material had been placed on the server as opposed to be accessed.

Lord Steyn rejected this as he stated that *'such an argument runs counter to well established principles of libel law... [the present case is one] in which all the constituent elements of the torts occurred in England ... in such a case it is not unfair that the foreign publisher should be sued here'*.

The decision was affirmed in the subsequent case of *Gutnick v Dow Jones*, in similar circumstances, where the court held that wherever damage had occurred to the claimant's reputation, the subject be able to bring an action⁶.

⁵ *Berezovsky v Forbes Inc.*, (NO1) [2001] 1 WLR 1004.

⁶ *Dow Jones & Co. Inc v Gutnick* [2002] HCA 56.

The result of these two decisions was affirmation of the act that the multiple publication rule should apply to cases of online publication in the same way it had to publications in the physical world, in spite of the model of publications being markedly different.

In online publishing an individual uploads content and then at that point that can be accessed by any individual with the publisher having little control over who is doing so. In contrast to this in the case of physical world publishing, there needs to be some positive action on the part of the publisher for to be further afield than had initially been intended.

Despite this there was a complete rejection of the potential adoption of a single publication rule for online publication rule as this would be counter to the existing principles of defamation law while to treat the Web as medium of dissemination would be wrong [8].

As well as author liability being the same, the position for individuals who repeat defamatory content is the same too⁷ while online intermediaries are treated akin to distributors as they are not expected to actively monitor all content that they host⁸ but rather on being informed of the existence of defamatory content, act to remove it quickly and prevent further dissemination⁹.

The second element of the cyberpaternalistic theory is control over ISPs which has been exercised through a combination of the threat of punishment and compulsion to act to prevent the dissemination of unlawful material further afield. In *Godfrey*, the ISP was found liable for a failure to act to remove defamatory content when informed of its existence and the threat of punishment causes ISPs to act in particular ways and therefore allows for control over the architecture of the Web¹⁰.

⁷ *Loutchansky v Times Newspapers Ltd* [2002] 2 W.L.R. 640.

⁸ *Bunt v Tilley & Others* [2006] EWHC 407 (QB).

⁹ *Godfrey v Demon Internet Services Ltd* [1999] EWHC QB 240.

4. THE PROBLEM & SOLUTION

The development of social web technologies like Twitter make scenarios possible that have not previously been possible and therefore the continued adoption of the cyberpaternalistic approach is not appropriate.

The case of Ryan Giggs, while not being a case of defamation, serves as an example of the kind of problem at hand. Giggs, a footballer in the U.K. obtained a superinjunction to prevent details of an affair from being discussed in the public. The nature of the injunction was such that the fact that he had an injunction could not be mentioned and anyone who did so would find themselves liable and potentially serving jail time.



Fig.1 The breaking of the superinjunction on Twitter [3].

Nobody in the press was therefore able to mention the Giggs's name and yet very quickly on Twitter there were thousands of individuals who had broken the injunction by retweeting the tweets of others; in excess of 80,000 users tweeted or retweeted the injunction [3]. No one has been held liable for making the remarks leaving the subject without redress.

These numerous chains of causation have made it impossible to hold any individual liable despite the fact that every individual who retweeted should be held liable with the application of the existing laws on online republisher liability. At the same time, the role played Twitter as the intermediary in providing for the incorporation

of hashtags and trending topics that made it easier for individuals to find the breaking of the injunction was not considered.

The solution to this is the adoption of an approach based more along the lines of the cyberlibertarian school of thought as opposed to the current cyberpaternalistic methodology.

The biggest critique of cyberlibertarianism is the lack of homogeneity on the Web [9][14]. The argument has been that the numerous groups in cyberspace have different norms and values that they hold true and therefore the development of a universally acceptable standard among them is impossible.

An understanding of Granovetter's theory on weak ties can help us to explain how it is that the critique of the lack of homogeneity can be explained away.

Granovetter argued that where there were numerous groups within a larger community that were unconnected, the most important ties were the weak ones; acquaintance relationships as opposed to strong relational friendships [4]. These weak ties were the most important in building relationships and bridging groups.

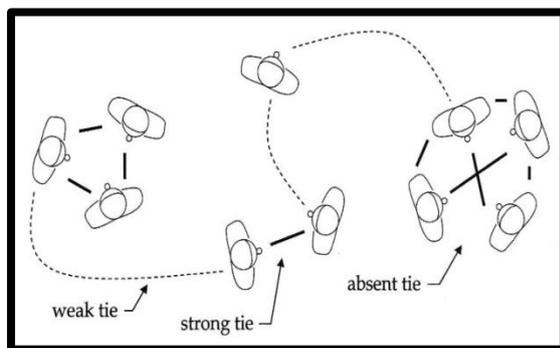


Fig. 2 Granovetter's theory on weak ties [4].

This theory can be transposed to explain the proliferation of standards, values and norms across various non-homogeneous communities in the online world whereby the existence of weak ties within large communities can allow the diffusion of norms even when there may be a lack of complete homogeneity.

5. ROLE WITHIN WEB SCIENCE

As a discipline Web Science is about understanding how it is that the Web can remain pro-human as it continues to evolve. In order to do this successfully, there needs to be a fuller understanding of what these beneficial aspects of the Web are and the potential threats that they pose going forward.

Social Web technologies as noted provide the average individual with a power that has not been available previously. The ability of any individual on Twitter to voice their views and opinions on a matter is certainly of benefit to society at large as there are more views and opinions and discussions occurring with all members of society.

In order for this benefit to remain however, the legal concerns raised around the usage of social web technologies need to be addressed. The continued adoption of the paternalistic approach is no longer appropriate in light of the development of social web technologies as they make possible scenarios and situations that have never had to be considered in the physical world.

As a result, there are two options; the first of which is the adoption of architectural change so that only those things that are viable in some way in the physical world are viable on social web technologies. No individuals in the physical world are able to republish content on mass, in real time to a potentially great audience and therefore individuals would not be able to retweet on Twitter.

In doing so, the parameters of what is possible from a technical perspective are dictated by those scenarios that the law is able to address as it currently stands with the continued adoption of the cyberpaternalistic approach of governance.

A more appropriate approach however, would be the adoption of a new regulatory model whereby the pro-human value of social web technologies is not lost but allowed to flourish; rather than forcing technology to regress to the wants of the law, the law and governance are forced to evolve so as to allow benefit of social web technologies to continue.

Through the interplay of computer science, law and sociology, the legal vacuum created by the continued evolution of the Web and development of social web technologies that has to be addressed is and the pro-human value of the Web allowed continuing to develop.

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