CHAPTER 7

Intermediary Liability

In modern communications, no one speaks alone. For example, in a long distance telephone call, you often need the assistance of a local exchange carrier and an interexchange carrier to transport your speech to the person you called. If you say something "harmful," should the telephone companies be held morally or legally responsible? What about a broadcast licensee? May a television station owner/broadcast licensee respond to criticism about too much TV violence by pointing her finger at the studios that produced the television shows? (Who chose to show the program anyway?)

As new communication industries come into being, new intermediaries that facilitate communications also come into existence, fulfilling new roles. Accordingly, new questions are asked about their responsibility, social as well as legal, for the content that they help distribute. Consider, for instance, the internet. To what extent should Google, YouTube, Twitter, Instagram, Snapchat and Facebook bear responsibility for bad content that they help distribute? We will begin by looking at how courts approached this issue in defamation cases brought before Congress passed the Communications Decency Act (which was part of the Telecommunications Act of 1996).

A. Before 47 U.S.C. § 230

NOTE: DEFAMATION LAW

Defamation is a false statement of fact that injures a person's reputation. According to the Restatement (Second) on Torts §558, the elements of the defamation cause of action are:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged *publication* to a third party;
>
> (c) fault amounting at least to negligence on the part of the *publisher*; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[*]

"Publication" is a term of art. It means the intentional or negligent communication to any person who is not the person defamed.[†] Thus, scribbling a message on a napkin, and leaving it on a table for others to see can count as publication.

Historically, one's sincere but mistaken belief in the truth of the statement was no defense to a defamation suit. If the statement turned out to be false, the defendant was strictly liable. Obviously, such laws inhibited the flow of information in a free society. Thus, the common law managed numerous, complex privileges that insulated parties from liability. Matters grew still more complicated by the 1960s, as defamation law became significantly constitutionalized.

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[*] Restatement of Torts, Second § 558 (Elements Stated) (emphasis added).

[†] *See* § 577(1) (What Constitutes Publication).

Like obscenity and child pornography, defamation is not protected speech; however, because of the fear of chilling non-defamatory speech at the margins, a complex set of constitutional defenses have come into being. For example, in order to hold a defendant liable for defamation of a public figure on a matter of public concern, the plaintiff must show "actual malice" (that the defendant knew of the falsity or acted in reckless disregard of the truth).* By contrast, a statement about a private figure on a matter of public concern requires only a showing of "negligence."† Due to these constitutional defenses as well as changes in state defamation law, strict liability for false but defamatory statements is rarely the appropriate standard. These constitutional doctrines should be studied carefully in your First Amendment class. Here, we focus on whether intermediaries, such as ISPs, should be held liable for the defamation they help distribute.

Let's explore intermediary liability using an age-old technology, the book. Suppose that an author ("Ann") writes a false and defamatory statement in a book manuscript. Let's say it concerns a matter of private concern,‡ and she knows that the defamatory statement ("Bill is a sodomizing felon") is false. When she emails that manuscript to her publishing house ("Fair Press"), she has—for purposes of the tort—"published" the defamation. On these facts, Ann is liable to Bill.

What happens when the Fair Press prints 10,000 copies of the book? Can Bill go after the publisher too? (Be wary

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* *See* New York Times Co. v Sullivan, 376 U.S. 254 (1964).

† *See* Gertz v Robert Welch, Inc., 418 U.S. 323 (1974).

‡ The Supreme Court has suggested, although not ruled explicitly, that false statements of purely private concern could be subject to strict liability. *See* Dun & Bradstreet, Inc. v Greenmoss Builders, Inc., 472 U.S. 749 (1985). Many states have nonetheless imposed negligence requirements in this situation.

about how the word "publisher "is used in this area of law. Sometimes, it is a tort term of art—one who has engaged in a publication of a defamation. Other times, it is used in an everyday, business parlance to refer to publishing houses, magazines, and newspapers.) What if Fair Press defended with the claim that "We did not write the book. It was written by Ann, who is not an employee."

A careful review of the elements of the defamation cause of action suggests that this defense fails: the defamation tort does not apply only to the original author ("Ann") or first publication (the e-mail transmission to Fair Press). Republishing creates the same liability.* Fair Press re-"published" (i.e. intentionally communicated via reproduction of the book) a false and defamatory statement. As long as Fair Press has the requisite amount of fault, it will be held liable as a repeater or republisher of the defamation. Suppose that under the applicable state law, defamation on a matter of private concern requires a showing of negligence. If Bill could demonstrate that Fair Press was negligent in failing to fact-check Ann's allegation, then Fair Press could also be held liable.

Once the books are manufactured, they are distributed through outlets such as libraries, newsstands, and bricks-and-mortar bookstores (e.g. BARNES & NOBLE). Could Bill also sue BARNES & NOBLE (B&N)? Again, if we parse literally the elements of the cause of action, it seems plausible to view B&N as republishing the defamation by selling a hardcopy of Ann's book. If B&N has the requisite fault—negligence, in our case—then it could be liable for defamation. What counts as negligent behavior for a bookstore? Do they have a duty of care that includes

* *See* § 578 (Liability of Republisher).