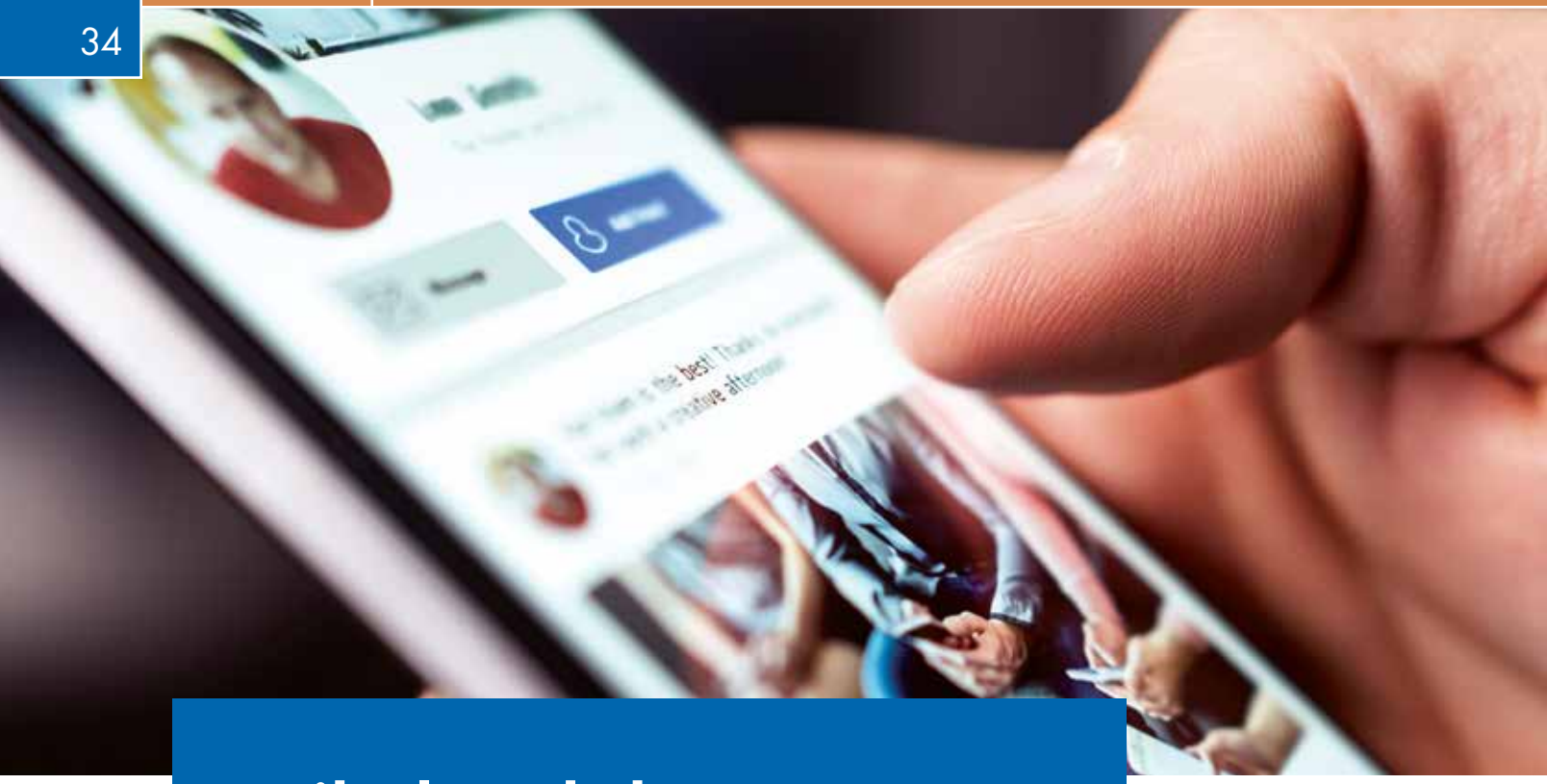

Libel and the Internet:

The Growth of Twibel in the Social Media Age

By Paige Serra

At a Glance

Twibel, a term formed by combining "Twitter" and "libel," has developed due to the large social media presence in our lives. The Communications Decency Act can offer website hosts and individual users protection from liability they might otherwise have incurred — though plaintiffs can still seek redress for their reputational damages.

In an age of posting life updates, pictures of children, well-lit food photos, and business reviews on various online platforms, it's no surprise that "Twibel"[1] is one of the fastest-growing areas of law and is generating significant buzz. Twibel combines "Twitter" with "libel" and colloquially refers to defamation that occurs on any online platform. The law in this area is still shaking itself out on a path to finding a clear-cut solution. For now, businesses can pursue claims for defamation based on Twibel or, in the alternative, tortious interference and injunctive or declaratory relief.

Twibel is based on traditional defamation law and thus requires "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication."[2] Defamation law balances the competing interests of First Amendment free speech protections with the personal right not to be harmed as a result of someone else's conduct; it's designed to carve out "'breathing space' so that protected speech is not discouraged."[3] Unlike traditional defamation once rooted in print communication, Twibel's unprivileged communication is published online and can reach third parties instantaneously.

Historically, defamation claims dealt with newspapers or print publications based on protestations of the government.[4] In more modern times, the concerns shifted to false statements of fact causing reputational damage to individuals.[5] While there is no such thing as a false idea under the First Amendment,[6] false statements of fact "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[7] The U.S. Supreme Court in *New York Times v. Sullivan* held that for public figures to collect damages in a defamation suit, they must show that the publisher acted with actual malice,[8] unlike private individuals and businesses, which need only meet traditional defamation elements. While defamation law has become more settled since *Sullivan*, it is difficult to speculate on the impact to online publications. Due to its inherent nature, most of the content published on the internet is opinion. Tweets and status updates generally demonstrate an opinion that the publisher is expressing rather than a false statement that person is trying to pass off as the truth. However, "a statement of opinion is not automatically shielded from an action for defamation because 'expressions of opinion may often imply an assertion of objective fact.'"[9]

The Communications Decency Act

The Communications Decency Act (CDA) of 1996[10] was a response to the growth of the internet and lawsuits against internet service providers (ISPs), or website hosts. The statute initially intended to make it harder for minors to view obscene material online; now, it's used as a liability shield for online platforms from third-party content published on their sites. In *Barrett v. Rosenthal*,[11] the California Supreme Court determined that the term "user," as part of the statutory language, included individual users and ISPs. While the statute treats the two types of users the same, there is a practical difference — individual users can self-regulate their speech easier than ISPs and can put time and thought into their posts, making it easier for individuals to act with malice.[12]

Sites like Google, Yelp, Trip Advisor, and Facebook typically do not write the reviews or content they publish. Instead, those sites host the content that individual users publish. In most cases, the ISP will only be liable if they materially contribute to the publication of a libelous statement.[13] An ISP will not be found to have materially contributed simply because it selected a specific post for publication.[14] The ISP will also not be liable for its decision to remove a post.[15]

Facebook and Twitter have been in the news for allegations of censorship based on their decision to delete posts from their sites. Unless or until Section 230 changes, ISPs will not be liable for performing editorial functions relating to content posted on their sites. The protection afforded to ISPs can result in a chilling effect regarding filing of Twibel suits. However, negative Google and Yelp reviews can have a significant effect on a business's reputation and will ultimately drive away customers if not addressed. All of this is to say, if you run a business and plan on suing for reputational harm caused by an internet post or review, you won't get anywhere going after Google.

Michigan Twibel

Since it is a relatively new issue, Michigan Twibel is still developing. MCL 600.2911, also referred to as the fair reporting statute, outlines the statutory elements, aims, and protections for libel/slander claims while protecting reporting or publication of information that is fair and true. In 2010, the Michigan Supreme Court issued the *Smith v. Anonymous Joint Enterprise*[16] decision, reaffirming both *New York Times v. Sullivan* and the MCL 600.2911(6) standard requiring clear and convincing evidence to show a publisher acted with malice when issuing a statement that was allegedly defamatory. While the *Smith* opinion focused on public figures and malice, the decision illustrates Michigan's dedication to implementing traditional libel law with respect to Twibel claims.

A potential hurdle for businesses could be the author's anonymity. The Michigan Court of Appeals in *Ghanam v. Does* reiterated that "the right to anonymous expression over the Internet does not extend to defamatory speech, which is not protected by the First Amendment."[17] Michigan courts respect the right of internet users to express themselves how they choose, but that protection does not extend to low-value speech. The practical application of this rule is still lacking, however.

In order to balance the competing interests of protecting the right to anonymous speech with the idea that free speech does not extend to defamatory statements, courts use a specific

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set of standards when faced with a plaintiff who is a public figure seeking to identify an anonymous defendant who has posted defamatory content.[18] These standards include a "good-faith basis to assert the claim pleading sufficient facts to survive a motion to dismiss, showing of prima facie evidence sufficient to withstand a motion for summary disposition, and 'hurdles even more stringent.'"[19] The Michigan Court of Appeals has repeatedly held that "Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity."[20] This lack of identity disclosure could make it difficult for plaintiffs to collect damages owed to them and increase the chilling effect of filing claims.

In *Gursten v. Doe*, a 2019 Oakland County Circuit Court case, Judge Jeffrey Matis echoed another point outlined in *Ghanam* — that the context and forum in which statements appear affect whether a reasonable reader would interpret them as asserting provable facts.[21] In *Gursten*, the only allegation of libel was that the defendant left a one-star review on the plaintiff's Google Review page. A one-star review without any other comments or words written by the individual user is "pure opinion and is not a statement capable of being defamatory."[22] If a published statement is an opinion, it cannot be defamatory and will fail as a matter of law.

In *American Transmission, Inc. v. Channel 7 of Detroit, Inc.*, the Michigan Court of Appeals stated that "a defamatory communication is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing with him."[23] This standard can be applied to how a business would measure reputational damage. Demonstrating lost profits, fewer customers, or fewer business collaborations could indicate that members of the community are declining to associate with the brand and not patronizing the business.

Claims business owners may have

Business owners have several options for relief when faced with this kind of online threat. If there are enough libelous statements against the business or individual statements that are extremely damaging, it might be worthwhile to file a Twibel lawsuit. The plaintiff must satisfy the elements of traditional defamation and argue the online content has tarnished the business's reputation. Because of the shield provided to ISPs by the CDA, it will most likely prove fruitless to sue Google for hosting the negative review. To be successful, the business owner would need to sue the individual poster, which could be difficult if the post was anonymous.

If the online statements harm a business relationship or expectancy, the plaintiff might be able to claim tortious interference. In Michigan the elements of tortious interference are "(1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted."[24] The biggest impediment to a successful tortious interference claim is that the online poster would need to

have knowledge of the relationship or expectancy, which may be difficult to prove.

Plaintiffs may seek injunctive or declaratory relief as well; this may be the option most business owners would pursue. Motions to enjoin for Twibel (i.e., force the poster or the site publisher to remove the post) are evaluated under the same standard as injunctions in other contexts.[25] Motions can fail because the reputational harm is not clearly identified, the post is clearly opinion and outside the scope of Twibel, or the seven factors for injunctive relief considered by the circuit court do not lean in favor of the plaintiff.[26] This creates additional work for plaintiffs to get relief they need, but the effort can be worthwhile if online statements are extremely damaging to the business's reputation.

Despite the protections afforded to publishers and internet users by the CDA, MCL 600.2911, and Michigan common law, there is still a cause of action for Twibel. A person or business harmed by a libelous tweet, post, review, or other online publication can seek redress for damages sustained, but the site hosting the content will most likely be immune from suit. Practically speaking, seeking damages from an individual poster can be reputationally dangerous, as other customers may believe the business is unfairly attacking its patrons, or fruitless, as the business may be seeking damages from an individual unable to pay a large judgment if the business were able to obtain one. In egregious Twibel cases, however, it can be worth litigating. These suits generally must be motivated less by money damages and more by a desire to publicly address online smears and redress reputational harm. ■

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ENDNOTES

1. *Twibel*, Wiktionary (November 14, 2020) <https://en.wiktionary.org/wiki/Twibel> [https://perma.cc/ZU9W-3FLP] (website accessed September 11, 2021).
2. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 114; 793 NW2d 533 (2010).
3. *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 686; 109 S Ct 2678; 105 L Ed 2d 562 (1989).
4. *Historical Highlights: The Sedition Act of 1798*, History, Art & Archives, US House of Representatives <https://history.house.gov/Historical-Highlights/1700s/The-Sedition-Act-of-1798/> [https://perma.cc/R24G-5SZ4] (website accessed September 11, 2021).
5. *Chaplinsky v New Hampshire*, 315 US 568, 570–571; 62 S Ct 766; 86 L Ed 1031 (1942), referencing *Lovell v City of Griffin, Ga.*, 303 US 444, 449; 58 S Ct 666 ; 82 L Ed 949 (1938).
6. *Gertz v Robert Welch, Inc*, 418 US 323, 339–340; 94 S Ct 2997; 41 L Ed 2d 789 (1974).
7. *Chaplinsky*, 315 US at 572.
8. *New York Times v Sullivan*, 376 US 254, 279–280; 84 S Ct 710; 11 L Ed 2d 686 (1964).
9. *Smith*, 487 Mich at 128.
10. 47 USC 230
11. *Barrett v Rosenthal*, 40 Cal 4th 33; 146 P3d 510 (2006).
12. *Id.* at 58.
13. *Jones v Dirty World Entertainment Recordings LLC*, 755 F3d 398, 413–414 (CA 6, 2014).
14. *Id.* at 415–416.
15. *Id.*
16. *Smith*, 487 Mich at 102.
17. *Ghanam v Does*, 303 Mich App 522, 534; 845 NW2d 128 (2014).
18. *Id.*
19. *Id.* citing *Doe v Cahil*, 884 A2d 451, 457 (Del, 2005).
20. *Sarkar v Doe*, 318 Mich App 156, 175; 897 NW2d 207 (2016), quoting *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 257; 833 NW2d 331 (2016).
21. *Gursten v Doe*, unpublished opinion of the Oakland County Circuit Court, issued September 30, 2019 (Docket No. 2019-171503-NO).
22. *Id.*
23. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000).
24. *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 90, 706 NW2d 843 (2005), citing *Badiee v Brighton Area Schools*, 265 Mich App 343, 365–366, 695 NW2d 521 (2005).
25. *Detroit Firefighters Ass'n IAFF Local 344 v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008).
26. *Kernan v Homestead Dev Co*, 232 Mich App 503, 514–515; 591 NW2d 369 (1998).