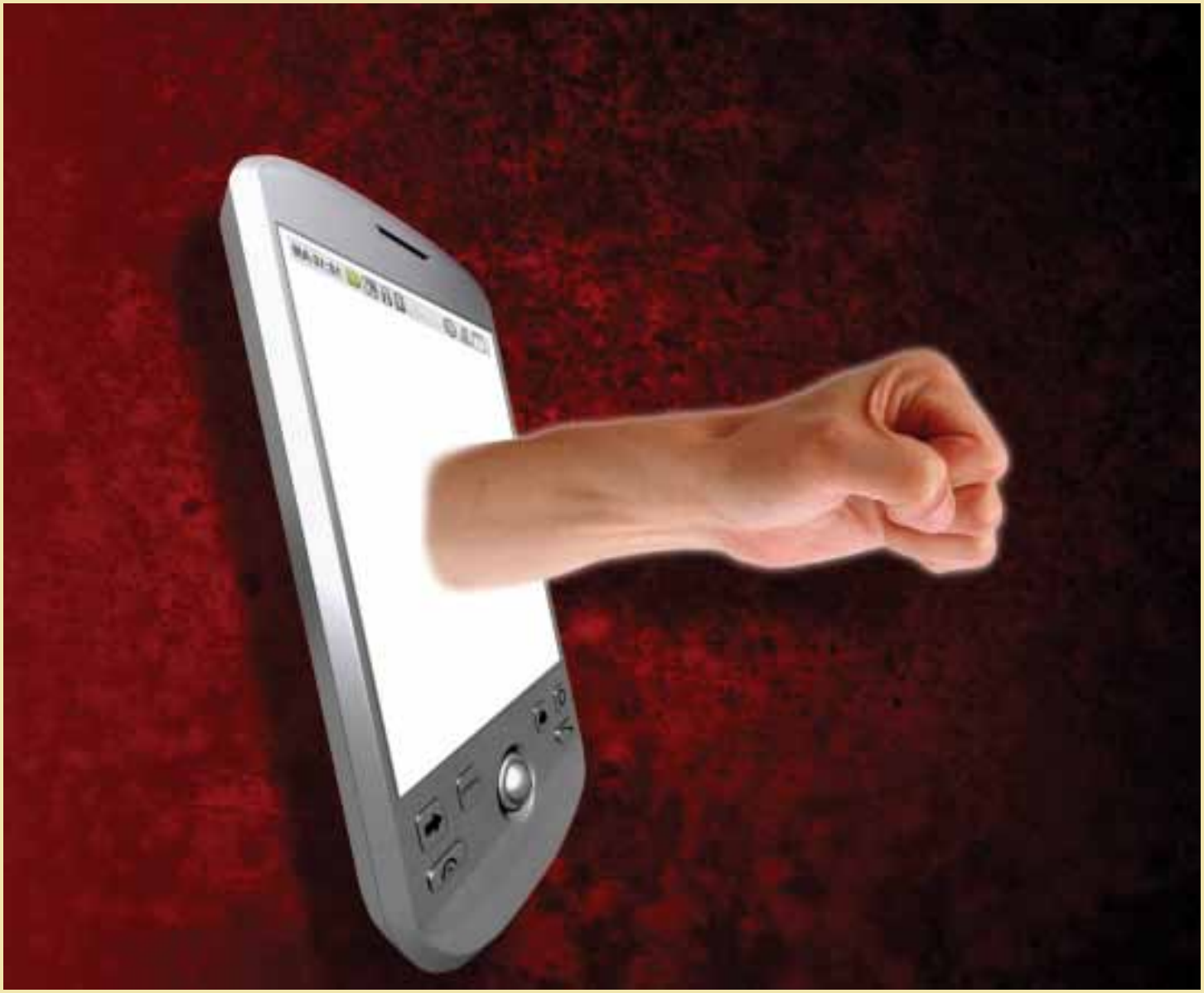
By Mitchell L. Marinello and Andrew P. Shelby

The Need to Change Illinois and Federal Law



Over several months, a physician notices that some of her patients have moved to other doctors and that her office is seeing fewer new patients than usual. She thinks it is just coincidence or a bad economy, but a friend pulls her aside at a medical conference and asks whether she is aware of the nasty rumors circulating about her practice. The doctor searches the internet and discovers that 18 months earlier three purported patients of hers anonymously and falsely accused her of flagrant medical malpractice on an internet message board.

A JOB-SEARCHING EXECUTIVE IS REPEATEDLY rejected for positions for which he is well-, or even over-, qualified. He eventually learns that prospective employers are uncovering false accusations of fraud and financial misdeeds about him on an anonymous "public" Facebook profile. The executive utilizes pre-suit discovery procedures to learn the identity of the poster, but that process takes a year before his anonymous defamer is unmasked.

Janet, a married woman with three children, is contacted by a friend who has received an email about her. The email purports to be from another of Janet's friends. It is well-written and contains a lot of information about Janet, including the names of her husband and children and her husband's employer. Then it expresses sympathy for Janet, because, it says, Janet's husband has been having sex with prostitutes and has given Janet AIDS. The statements are untrue. Plus, it turns out that many of Janet's friends and acquaintances received the email. The person under whose name the email was sent does not exist, and Janet has no idea how to determine the person's identity. Janet has ideas about whom the author might be, but she has no proof, and it takes her more than one year to make any headway.

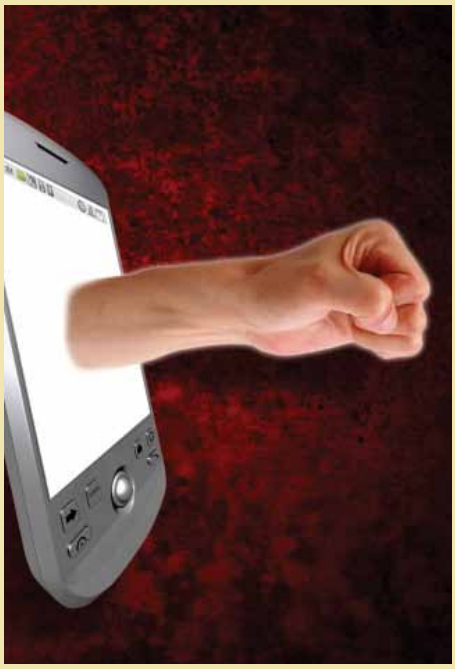
Once they discover their identities, can the physician, the executive and Janet sue the anonymous libelers for defamation? Not in Illinois, because the one-year defamation statute of limitations, 735 ILCS 5/13-201, began to run the second the defamatory material was posted on the internet (for the doctor and executive) or the instant it was discovered (for Janet). This is true even when the victims do not learn of the defamation for several months and even when the authors of the defamation hide their identities. It does not matter if the victims immediately take legal action to find out the identity of the defamers. It also does not matter if the material is posted on the internet and, like a billboard on the highway, is seen each day by new people passing by. And, here's another rub: under federal law, the internet site that posted the defamation has no legal responsibilities whatsoever to the doctor, the executive or Janet. The internet site cannot even be required to remove the defamatory material. A newspaper, television station or radio broadcaster could not get away with such outrageous behavior, but internet providers (and defamers) have been granted an exalted position. Federal and Illinois law on this subject are in need of substantial revision.

Illinois Law

To seek timely redress for defamation, the victim must discover the defamatory statements, discover the identity of the author, and file suit within one year of publication. Period. It does not matter what the legal hurdles are or how well the anonymous defamer has hidden his, her or its tracks. If the internet provider takes a long time to respond to subpoenas designed to elicit information about the defamers, then that simply puts more time pressure on the victim. It does not help to try to file a "John Doe" suit until the identity of the anonymous perpetrators can be uncovered: Illinois law does not allow them.

The current Illinois statute of limitations provisions that apply to defamation are behind the times. Created in a day when most defamation was printed on paper and had limited distribution and a short shelf-life, current law has little relevance to an electronic age in which defamation not only can be more widely publicized but also can seemingly last forever. By effectively requiring that a defamation victim discover that he or she has been defamed in one year, it ignores the enormous size of the internet and the fact that not everyone uses it regularly and knows what is on it. In addition, it unreasonably requires a victim to discover the identity of a person who has defamed him, even when the wrongdoer hides his identity and regardless of how well he does so. In this way, Illinois law ignores the nature of the internet and the cumbersome nature of its own legal procedures. On the whole, Illinois' archaic statute of limitations law for defamation unfairly protects individuals who use the anonymity of the internet to defame others and places extremely unrealistic burdens on innocent defamation victims.

It is time for an update to bring that statute into the internet era. Illinois law can be improved by making three simple modifications that together more fairly balance a victim's right to seek redress and a defamer's concerns about finality and stale proof. First, a "discovery rule" should be created that tolls the limitations period until the victim discovers or reasonably should discover the defamation. Second, the statute of limitations should be tolled when the defamation victim files a Rule 224 petition or takes other legal action to uncover the identity of the person who published the defamation. Third, to prevent these changes from extending the time to bring a defamation action for too long, a statute of repose should be created that cuts off defamation claims within five years of the defamatory material's publication.



Illinois' Movement Toward A Discovery Rule

In the 1960s and 1970s, responding to the harsh consequences of applying strict time limits to lawsuits for difficult-to-discover injuries, the Illinois Supreme Court tempered several statutes of limitations with a discovery rule. E.g., *Rozny v. Marnul,* 43 Ill. 2d 54, 72-73 (1969) (tortious misrepresentation); *Williams v. Brown Mfg. Co.,* 45 Ill. 2d 418, 432 (1970) (products liability); *Lipsey v. Michael Reese Hosp.,* 46 Ill. 2d 32, 40 (1970) (medical malpractice). Pursuant to the discovery rule, the time clock for bringing a claim does not start to run until the victim discovers (or reasonably should discover) that he or she has been injured. In *Tom Olesker's Exciting World of Fashion, Inc. v. Dunn & Bradstreet, Inc.,* 61 Ill. 2d 129, 132 (1975), the Illinois Supreme Court applied the discovery rule to a defamation case.

In the years thereafter, the Illinois legislature ratified the Supreme Court's actions by amending several statutes of limitations to incorporate the discovery rule and a statute of repose. *See Schweihs v. Burdick,* 96 F.3d 917, 920-21 (1996); 735 ILCS 5/13-212 (medical malpractice); 735 ILCS 5/3-213 (products liability), 735 ILCS 5/13-214.3 (legal malpractice). However, the legislature did not amend the statute of limitations for defamation. 735 ILCS 5/13-201. One might think this would mean that the discovery rule would apply to defamation actions–just as the Supreme Court said it did in *Tom Olesker's.* Legal matters are rarely that straightforward, however. Instead, the lower courts have limited the scope of the *Tom Olesker's* decision based upon the facts of that case. As a result, the discovery rule generally does not apply to internet defamation.

Tom Olesker's Progeny

In *Tom Olesker's,* the plaintiff did not discover the defendant's allegedly defamatory statement until 14 months after its publication because the defendant published the statement in a confidential credit report issued only to a third party. 61 Ill. 2d at 130-31. Lower Illinois courts have seized on the confidentiality of the credit report and the fact that the defamatory statement was not made in public media to limit the application of the discovery rule to defamatory statements that meet those criteria. As a result, they now apply the discovery rule only to defamation that is "hidden, inherently unknowable, or inherently undiscoverable." *Peal v. Lee,* 403 Ill. App. 3d 197, 207 (1st Dist. 2010) (citing *Blair v. Nev. Landing Partnership,* RBG, LP, 369 Ill. App. 3d 318, 326 (3d Dist. 2006)). Thus, unless internet defamation is password protected or somehow hidden from the public (e.g., in a private email), a court following *Tom Olesker's* progeny would compare the internet to a mass-media publication and conclude that the statute of limitations begins to run the instant the defamatory statement is published. *See, e.g., Schweihs v. Burdick,* 96 F.3d 917, 920 (7th Cir. 1996). Thus, for our doctor and business executive, the statute of limitations began to run the instant the defamation was published on the internet. In Janet's case, because the defamatory email was not sent to her, the statute of limitations probably began to run when she discovered it.

The Intervening Birth of the Internet

The Illinois statute of limitations for defamation has not been legislatively changed in more than 40 years. The *Tom Olesker's* decision was issued 36 years ago. In the meantime, the internet has fundamentally changed how Illinois' residents communicate. Illinois law needs to respond to this. Statutes of limitations are supposed to discourage delay in the bringing of lawsuits while balancing the rights of victims and wrongdoers. *See Blair v. Nev. Landing Partnership,* 369 Ill. App. 3d 318, 324 (3d Dist. 2006); *Tom Olesker's,* 61 Ill. 2d at 132. Illinois law does not strike this balance fairly because it does not take into consideration the unique attributes of the internet.

The Problem of the Needle in the Haystack

The internet's immensity is staggering. According to various studies cited in Wikipedia's "World Wide Web" article, there are over 100 million web sites and over 10 billion webpages that are "publicly indexable" (i.e., searchable). See World Wide Web, Statistics, Wikipedia, http://en.wikipedia.org/wiki/World_wide_web (last visited Oct. 26, 2011). Thus, if a person looks at one web site per second, it would take nearly two centuries to view them all. If a person viewed webpages–rather than web sites–at that rate, it would take nearly 20 thousand years. Further, an official 2008 statement from Google stated that–at that time–there were over one trillion unique URLs on the internet, which would take nearly two million years to view at the rate of one URL per second. See Official Google Blog, "We Knew The Web Was Big…" July 25, 2008, available at http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html (last visited Oct. 26, 2011).

Clearly, given the internet's size, no person should be reasonably expected to know that something is published about them on the internet just because it is "out there" and, theoretically at least, publicly accessible. Yet, that is exactly what Illinois law requires. Knowledge of the entire internet–with its billions and trillions of pages–is legally imputed to every victim of internet defamation. Even if potential victims use sophisticated search engines like Google to search for defamatory statements on the internet, unless the defamer uses the victim's full name or other precisely searchable phrases, the defamation could be hidden among millions of pages of false positives (e.g., compare the amount of pages that Google returns for a search of

your full name to a search of just your first name last name's initial). Thus, to protect themselves from losing defamation actions to a one-year time bar, potential victims must scour the internet to discover defamatory statements that–although not hidden, inherently undiscoverable or inherently unknowable–nonetheless may be obscure or hard to find. This is an unfair burden to place on defamation victims.

The Problem of Anonymity

Illinois' one-year limitations period also does not account for the ease with which anonymous defamation is possible on the internet. Indeed, even if a defamation victim discovers the defamatory statement within one year of its publication, an action based on it could still be time barred if the identity of the defamer is not known. This is because Illinois does not permit lawsuits against unknown parties. *Bogseth v. Emanuel,* 166 Ill. 2d 507, 513-14 (1995). Thus, a victim of anonymously published defamation cannot simply sue "John Doe" within the limitations period and then use discovery to uncover John Doe's identity. Instead, the victim must uncover the identity of the defamer before he brings suit and still file suit within the one-year limitations period. Determining the identity of an anonymous defamer is not easy or fast, however, even if you discover the defamation almost immediately after it first appears.

Illinois Supreme Court Rule 224 Actions for Pre-Suit Discovery

Illinois Supreme Court Rule 224 (Rule 224) permits an aggrieved party to institute an action against a non-party witness for the express purpose of determining a wrongdoer's identity. Under Rule 224, a victim of anonymous internet defamation can bring an action against the web site on which the defamer published the defamatory material to obtain information that will lead to the defamer's identity. A court could then order the web site to produce information in its possession relating to the defamer's identity. For example, if the defamer published a defamatory statement on Facebook, a court could order Facebook to produce the information the defamer provided when registering his or her Facebook account. If the defamer registered with his or her real name, then the pre-suit discovery need go no further: the perpetrator will be identified, and the victim can file suit for defamation.

But that is a best-case scenario. In the real world, a number of factors can hinder and delay efforts to uncover the identity of an anonymous defamer. Indeed, if the defamer takes even minor steps to conceal his or her identity, the use of a Rule 224 action to uncover it can become extremely cumbersome.

Practical Problems with Presuit Discovery

There are several practical problems with using a Rule 224 action to determine the identity of a person who posted defamatory material on a web site. First, the web site must be personally served (assuming, of course, that it can be served in Illinois at all). Second, the web site is afforded a 14-day notice period after service before the court conducts a hearing on whether the requested pre-suit discovery should be allowed. Yet, dockets are busy and there may not be a court date available the first day after the 14-day notice period. Third, the web site may fight the suit in order to protect it users' anonymity. That fight could be substantive (e.g., alleging that the statement at issue is not defamatory and thus does not warrant unmasking the writer's identity), procedural (e.g., challenging service, venue or jurisdiction), or both. Finally, the defamer may get wind of the action and move to intervene (anonymously) by arguing that the Rule 224 action is jeopardizing his or her constitutional right to anonymous speech under *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 342 (1995). Any of these impediments could substantially delay a pre-suit discovery action–or make it unsuccessful.

The IP Address Rabbit Hole

A Rule 224 proceeding also can be significantly delayed, or thwarted all together, if the defamer takes steps to conceal his or her identity. For example, the defamer can register with the web site on which the defamatory material was published under a false name and with other falsified personal information. If the registration information is false, then it is of very little use in identifying the defamer. In that situation, the only useful information the web site may be able to provide is the Internet Protocol (IP) address of the computer from which the defamatory material was published. (An IP address is an individual numerical code assigned to every computer.)

Armed with the IP address of the computer from which the defamatory material was published, the victim can run a "reverse IP address search" that will indicate the Internet Service Provider (ISP) that provided internet access to that computer. (An ISP is a company that provides internet access to internet users.) Then, the victim will have to amend the Rule 224 suit to include the ISP as a party and request that the court order the ISP to produce information regarding its customer that owns that computer. If that computer is registered directly to the individual who published the defamatory material, then the plaintiff's inquiry is over.

However, the ISP's customer may not be an individual, but may instead be an entity, for example, a business, a school, a library, or an "internet café." In that case, the victim would have to amend the Rule 224 action yet again to add yet another party: the ISP's customer. The court may then order the customer to determine which employee, student, library user, or other person accessed the particular computer when the defamatory material was posted. This may or may not be possible. An internet café user may have paid in cash, leaving no trace of his or her identity. Or, a computer in a library could be "unlocked" such that any person with access to the library could have accessed the internet from it. In these instances, additional steps must be taken to try to discovery who made the defamatory posting.

Federal Law Protects the Easy Target–The Web Site Itself

What about the potentially deep pockets of the web site on which the defamatory material was published? Can't our business executive just sue Facebook? Can't

THE RULE 224 PROCESS

The Rule 224 process easily could include no fewer than a dozen steps: (1) filing a Rule 224 action against the web site on which the defamatory material was published; (2) waiting for service and the statutory notice period; (3) conducting a hearing as to the web site; (4) giving the web site sufficient time to produce the IP address of the computer from which the defamation was published; (5) seeking leave to amend the action to include the ISP that provided internet access to the computer at issue; (6) serving the ISP and waiting for the statutory notice period; (7) conducting a hearing as to the ISP; (8) giving the ISP sufficient time to determine the identity of its customer; (9) seeking leave to amend again to include the customer; (10) serving the customer and waiting for the statutory notice period; (11) conducting a hearing as to the customer; and finally (12) giving the customer reasonable time to determine the identity of its employee, student, or other person who actually published the defamatory material.

Even if every step in this process runs smoothly, with no parties delaying the process by asserting procedural or substantive defenses, it could easily take longer than a year–during which the Illinois statute of limitations will expire. In such a case, the wronged plaintiff's claim is lost even though he or she immediately discovered the defamatory material and diligently pursued all remedies available under the law.

our doctor sue the web site that posted the malicious and false accusations of medical malpractice? No, says Congress. In 1996, Congress passed the inaptly named Communications Decency Act. Section 230(c) (1) of that Act immunizes web sites from liability for statements published on them by an internet user. Further, Section 230(e)(3) expressly preempts any state-law liability inconsistent with Section 230(c)(1)'s blanket immunity. Relying on these provisions, courts have concluded that Congress completely insulated web sites from liability for defamation committed by internet users. E.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

Ironically, Congress passed Section 230 to encourage web sites to monitor and edit internet users' postings by immunizing them from being considered the "publisher" of the edited content and inadvertently incurring defamation liability therefor. But Section 230 has had precisely the opposite effect. Because web sites are immunized from liability for their users' postings, web sites have no incentive to hire a staff to monitor the postings' content. So they don't. Moreover, even if a defamation victim discovers that he has been defamed on a web site and asks the web site to remove the defamatory material, the web site has no obligation to do so. So, often it won't. Indeed, it risks nothing by leaving the allegedly defamatory posting up on the internet. Thus, a result of Section 230's disincentives, innocent victims are given no protection while the web sites on which anonymous defamation is published are insulated from liability. Newspapers, magazines, television and radio stations do not have such protection. What makes internet sites so special?

A Proposed Federal Solution

Federal law is also in need of amendment. Federal law grossly misbalances the rights of defamation victims and the right of the public to use web sites as a medium of free speech. Section 230 can be rewritten in a responsible way that protects everyone's rights. All web sites should be required to verify the identity of their users before those users may post material. Web sites could do so by requiring new registrants to verify their identity with phone or bank-account numbers (as do Paypal.com and Google's popular email site, gmail.com). Once the registrant's identity is verified, the registrant could still make anonymous posts. But if a court finds good cause to believe those posts are illegal, a court could order the web site to unmask its anonymous user's identity. That judicial oversight will protect anonymous free speech while also protecting honest citizens from being defamed by people who violate the law and have neither the courage nor the integrity to stand behind the false and harmful public statements that they make. Moreover, federal law should require all web sites to remove statements that a court finds to be defamatory–whether or not any underlying state statute of limitations has run. To do otherwise is to permit defamatory material to remain on the internet indefinitely–like an eternal billboard–just because the defamed party did or could not discover it or the identity of its author quickly enough.

Conclusion

In effect, current federal and Illinois law affords anonymous defamers safe harbor from legal redress and insulates web sites from responsibility for a tort committed through their servers. The severe restrictions on a victim's efforts to assert a defamation claim come without any corresponding increase to the statute of limitations counterbalancing factor–a defamer's right to avoid defending stale claims–which would only be marginally impaired by changes in the law that this article proposes. ■

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