

4-30-2012

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Recommended Citation

William Charron, *Twitter: A “Caveat Emptor” Exception To Libel Law?*, 1 Berkeley J. Ent. & Sports L. (2012).

Available at: <http://scholarship.law.berkeley.edu/bjesl/vol1/iss1/4>

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Twitter: A “Caveat Emptor” Exception To Libel Law?

William L. Charron*

This article addresses the challenges that plaintiffs should face in asserting claims for libel over Twitter. Recent cases support that the overall context of Twitter should often negate the expectations of reasonable readers that they are absorbing statements of objective, provable fact, as opposed to statements of non-actionable opinion. As such, courts should view with some skepticism claims of libel rooted in Twitter’s “tweets.” Twitter should be understood to represent a “buyer beware” marketplace of expression, where followers of Twitterers should generally beware of the “truth” in tweets.

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I. INTRODUCTION

Twitter describes itself as “a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting. Simply find the accounts you find most compelling and follow the conversations.”¹ The “conversations” occur in no more than 140-character snippets, or “Tweets.”² To give a sense of calibration, the first sentence of this article totals 159 characters. Tweets are meant to be quick and short.

Twitter invites both passerby voyeurism and engaged participation. As Twitter’s co-founder, Jack Dorsey, explained: “[W]e came across the word ‘twitter’ [in the dictionary], and it was just perfect. The definition was ‘a short

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1. Twitter About Page, <http://twitter.com/about> (last visited Mar. 12, 2012).
2. *Id.*

burst of inconsequential information,' and 'chirps from birds.' And that's exactly what the product was."³

Individual Twitter users must decide for themselves whether they are seeking to add meaningless "bird chirps" to a range of other noisy communication, or whether they seek to announce something more pronounced and substantive. It is certainly possible to spread a limited amount of provably false factual information about someone in 140 characters. It is thus possible to defame someone over Twitter.⁴

Nevertheless, the basic concept of Twitter is to invite the quick, loose, real-time, and robust sharing of ideas in a marketplace of expression. The overall context and purpose of Twitter should be understood by courts to potentially mitigate the otherwise libelous effect of a "tweet." Tweets are not deep discourse. Nor should those who follow "Twitterers" reasonably be understood, at least in the aggregate, to be seeking the embodiment of "truth" in 140 characters. Rather, Twitter is a "buyer beware" shopping mart of thoughts, making it an ideal public forum to spark imagination and further discussion. In and of itself, however, Twitter should be viewed as a dubious medium through which to spread libel.⁵

II. THE "BROADER SOCIAL CONTEXT" OF INTERNET CHAT ROOMS PROVIDES PROTECTION FROM CLAIMS OF LIBEL

According to California law, "[l]ibel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."⁶

Falsity is a "*sine qua non* of a libel claim."⁷ Because only assertions of fact, and not assertions of opinion, "are capable of being proven false," a libel

3. Jack Dorsey, *Twitter Creator Jack Dorsey Illuminates the Site's Founding Document*, Part I, L.A. TIMES (Feb. 18, 2009), available at <http://latimesblogs.latimes.com/technology/2009/02/twitter-creator.html> (last visited Mar. 12, 2012).

4. Twitterers can also expand upon their tweets by using attachments or special programs, which could more readily facilitate a defamatory act. See Twitter About Page, *supra* note 2.

5. This article is based primarily upon California and New York libel law.

6. *Wong v. Jing*, 189 Cal. App. 4th 1354, 1369 (2010); *Sandals Resorts Int'l, Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 412 (N.Y. App. Div. 2011) (discussing New York law).

7. *Sandals*, 925 N.Y.S.2d at 412 (quotation omitted); see also *id.* at 413 ("When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable [under New York law]. The actionable element of a 'mixed opinion' is not the false opinion itself – it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.") (quotation omitted); *Wong*, 189 Cal. App. 4th at 1370 ("Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected.") (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990)) (quotation omitted).

action must be “premised on published assertions of fact.”⁸ As discussed below, Internet chat rooms provide an environment in which it has become easier for courts to interpret assertions spread over the Web to be non-actionable statements of opinion rather than fact.

The issue of whether a statement is one of “fact” or of “opinion” is a question of law.⁹ Courts in both California and New York apply a “totality of circumstances” test to determine whether a statement is an opinion. In particular, courts in both states look to the “general tenor of the entire work,” “the reasonable expectations of the audience” based upon the kind of language used and the context in which the statement was made, and whether the challenged statement is “susceptible of being proved true or false,” in deciding whether the speaker asserted “an objective fact” or an opinion.¹⁰

The invention of online speech has not required the formulation of a new area of “cyberspace tort law” in which to evaluate allegations of defamation.¹¹ Nevertheless, it has been widely observed in defamation cases that postings over Internet “chat rooms,” “message boards,” and “blogs” are often characterized by “a looser, more relaxed communication style,” necessitating an emphasized focus on the overall context of the allegedly defamatory words under review.¹² As one appellate court in New York recently explained:

The culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a “freewheeling, anything-goes writing style” “It is . . . imperative that courts learn to view libel allegations within the unique context of the Internet . .

8. *Sandals*, 925 N.Y.S.2d at 412.

9. *Obsidian Fin. Group, L.L.C. v. Cox*, 812 F. Supp. 2d 1220, 1222-23 (D. Or. 2011) (citations omitted).

10. *Id.* at 1223 (citations omitted); *Global Telemedia Int’l, Inc. v. Doe*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (citations omitted); *Gorilla Coffee, Inc. v. New York Times Co.*, 936 N.Y.S.2d 58 (Sup. Ct. 2011) (discussing New York’s functionally equivalent four-factor test, including “a consideration of the broader social context or setting surrounding the communication including the existence of *any applicable customs or conventions which might ‘signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.’*”) (quotation omitted) (emphasis supplied); *Sandals*, 925 N.Y.S.2d at 413-14 (“[O]ur inquiry must address both the words and the context of the e-mail as a whole, as well as its broader social context, to determine whether the content of the e-mail constitutes defamation.”).

11. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. LEGAL F. 207, 207-08 (1996) (“[T]he best way to learn the law applicable to specialized endeavors is to study general rules.... Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the law about horses.”); see also *Obsidian*, 812 F. Supp. 2d at 1223 (“[G]enerally, ‘online speech stands on the same footing as other speech,’”) (quoting *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011)).

12. *Too Much Media, L.L.C. v. Hale*, 20 A.3d 364, 378-79 (N.J. 2011) (quotation omitted); *Obsidian*, 812 F. Supp. 2d at 1223 & n.1 (“[B]logs are a subspecies of online speech which inherently suggest that statements made there are not likely provable assertions of fact.... [A]n online blog is a ‘frequently updated website consisting of personal observations, excerpts from other sources, or, more generally, an online journal or diary.’... Thus, a blog is distinct from other online speech affiliated with, for example, a major media publication.”) (citations and quotation omitted).

. . . [O]nline ‘recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts.’”¹³

In other words, defamation claims wither in an atmosphere where readers and listeners generally understand they have accessed a free-for-all forum of ideas and are thus unlikely to believe they are receiving statements of “fact” as opposed to personal statements of opinion.

Before the advent of blogs, the law had already established that seemingly defamatory words – such as calling someone a “liar” or a “criminal” – are not actionable if, in context, the words are more reasonably understood to be “figurative” or “hyperbolic.”¹⁴ By the same token, the nature of the Internet, and the practical ease and speed in which one can communicate over the Internet, provides a context to more readily perceive and excuse seemingly defamatory statements as emotional, unguarded, and imprecise “opinions.” That is why courts generally and reasonably understand third-party blog readers as individuals who expect to read informal and personal content.¹⁵

For example, in *Global Telemedia International, Inc. v. Doe*, the court confronted claims of trade libel arising out of statements published on a financial chat room website that the plaintiff company was “mismanaged” and had engaged in a practice of “lying” to raise and then “steal” investor money.¹⁶ Notwithstanding the fairly definite published attacks, the court dismissed the plaintiff’s complaint under California’s anti-Strategic Litigation Against Public Participation, or “SLAPP,” statute, Cal. Civ. Proc. Code § 425.16.¹⁷ The court observed:

The statements were posted anonymously in the general cacophony of an Internet chat-room Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, [such as supposedly having information “that will make you puke about this stock”] *To put it mildly, these post-*

13. *Sandals*, 925 N.Y.S.2d at 415-16 (quoting Cheverud, Comment, *Cohen v. Google, Inc.*, 55 N.Y. L. SCH. L. REV. 333, 335 (2010/11), and O’Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2774-75 (2002)).

14. *E.g.*, *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (finding term “blackmail” to be “rhetorical hyperbole”); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-85 (1974) (finding term “traitors” to be figurative); *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995) (finding term “lying” to be “no more than nonactionable rhetorical hyperbole” or “a vigorous epithet”).

15. *See Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1106 (N.D. Cal. 1999) (“[I]n the context of the heated debate on the Internet, readers are more likely to understand accusations of lying as figurative, hyperbolic expressions.”) (citation omitted); *Too Much Media*, 20 A.3d at 379 (“Message boards ‘promote[] a looser, more relaxed communication style.’ . . . They lack ‘formal rules setting forth who may speak and in what manner, and with what limitations from the point of view of accuracy and reliability.’”) (quotations omitted).

16. *Global Telemedia Int’l*, 132 F. Supp. 2d at 1264, 1268-70.

17. *Id.* at 1270-71.

*ings . . . lack the formality and polish typically found in documents in which a reader would expect to find facts.*¹⁸

The court further found that the challenged statements were “written with a great deal of linguistic informality, thus alerting a reasonable reader to the fact that these observations are probably not written by someone with authority or firm factual foundations for his beliefs.... Given the tone, *a reasonable reader would not think the poster was stating facts* about the company, but rather expressing displeasure with the way the company is run.”¹⁹

Global Telemedia is an early case that helped lay a foundation for courts to perceive chat rooms as a context in which to assume lower reasonable expectations by readers, even with respect to someone claiming to have information to support his demeaning characterizations.²⁰ A more recent case embracing the same foundation is *Sandals Resorts International Ltd. v. Google, Inc.*²¹

In *Sandals*, an anonymous e-mailer accused a Jamaican resort of hiring foreigners to fill senior management positions, while relegating menial jobs to “dark-skinned” Jamaican nationals, even though the resort was supported by Jamaican taxpayers.²² The e-mail was composed in all capital letters, included grammatical errors, and offered a number of exclamatory statements as well as rhetorical questions.²³

The court first credited the “validity to Sandals’ argument that the ‘natural connotation’ of the e-mail is that Sandals’ hiring policies are racist,” which would be libelous.²⁴ Nevertheless, the court explained that “[t]he question of whether a defamation claim may be maintained *does not turn on whether the writing contains assertions that may be understood to state facts.*”²⁵ Rather, the court explained that the overall context of the writing determines whether a “reasonable reader would have believed that the challenged statements were conveying facts.”²⁶

According to the court, “readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts,” and in particular to “posted remarks on message boards and in chat rooms” as well as “blogs.”²⁷ Within such context, the court found that the “tone of the e-mail” reflected that the e-mail was meant only to express “per-

18. *Id.* at 1267 (emphasis supplied).

19. *Id.* at 1269-70 (emphasis supplied).

20. This foundation has withstood the test of time in California. *See, e.g.*, *Art of Living Found. v. Does*, No. 10-05022, 2011 U.S. Dist. LEXIS 63507, at *19-22 (N.D. Cal. June 15, 2011) (“In the broad context, the statements are made on obviously critical blogs ... with heated discussion and criticism.... In this context, readers are less likely to view statements as assertions of fact rather than opinion.”) (citations omitted).

21. *Sandals*, 925 N.Y.S.2d at 412.

22. *Id.* at 409, 414.

23. *Id.* at 410-411.

24. *Id.* at 413-14.

25. *Id.* at 414 (citations and quotations omitted) (emphases supplied).

26. *Id.*

27. *Id.* at 416.

sonal views” of the poster, and to raise “an allegation to be investigated, rather than [] a fact.”²⁸ Moreover, even though the court agreed that “isolated portions of the subject e-mail are arguably factual,” those portions did not “stand on their own” but rather “constitute[d] facts supporting the writer’s opinion,” making the “multi-page writing” as a whole reflective of “pure opinion.”²⁹

Thus, after initially crediting the e-mail as connoting a racist message, the court found the e-mail to be “an exercise in rhetoric, seeking to raise questions in the mind of the reader” but *not* seeking “to characterize Sandals Resorts as racist.”³⁰

Sandals illustrates how “the unique context of the Internet”³¹ enables courts, somewhat primly, to perceive seemingly libelous statements as “opinion” based upon the informal writing conventions and absence of editorial control that typify chat rooms and blogs. These characteristics accordingly prepare readers *not to expect* that they are ingesting statements of “fact.”

A similarly instructive case is *Obsidian Finance Group, LLC v. Cox*.³² In *Obsidian*, a blogger accused the plaintiffs, among other things, of engaging in “solar credit fraud,” of having “broken many laws,” of being “corrupt,” of having spread “flat out lies” to investors, of having “made millions” through “stolen” information, and even of having “hired a hitman to kill [the blogger].”³³ Most of the posts appeared on a website called “obsidianfinancesucks.com,” although one appeared, without any greater context, on “bankruptcycorruption.com.”³⁴ The court, upon a review of apposite federal case law nationwide, dismissed the plaintiffs’ claims of libel as to all of the posts except for the single post on “bankruptcycorruption.com,” which accused the plaintiffs of failing to pay taxes.³⁵

The court observed at the outset that the websites’ provocative titles “pre-disposed” readers to “view them with a certain amount of skepticism and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts.”³⁶ In addition, the court found that:

[T]he general tenor of the blog posts suggests that defendant has some sort of personal vendetta against plaintiffs. The frequency of the posts, the language, . . . the tone, and the occasional and somewhat run-on almost “stream of consciousness”-like sentences read more like a journal or diary entry revealing defendant’s feelings rather than assertions of fact.³⁷

28. *Id.* at 415.

29. *Id.* at 413, 416.

30. *Id.* at 415.

31. *Id.* (internal quotation omitted).

32. *Obsidian*, 812 F. Supp. 2d 1220.

33. *Id.* at 1226-33.

34. *Id.* at 1231-39.

35. *Id.* at 1238-39.

36. *Id.* at 1232.

37. *Id.* at 1232-33.

Although the court agreed that a number of statements “appear[ed] at first glance to imply provable assertions,” the court found that *all* of the statements on “obsidianfinancesucks.com” “los[t] the ability to be characterized and understood as assertions of fact when the content and context of the surrounding statements are considered.”³⁸ In particular, the blogger’s litany of name-calling and insults directed at the plaintiffs over the course of many entries, through a “looser and more relaxed communication style” that included only a “promise of future proof,” had to be taken as “diminish[ing] the reader’s expectations that statements posted by defendant on her blog are to be taken as provable assertions of fact.”³⁹

Therefore, the overall untidy nature of the defendant’s blog entries ironically had the effect of cleansing each of the statements therein of a stigma of “libel.” According to the court, a “reasonable reader” would have to understand even the defendant’s references to receiving “death threats” from “a man in Montana” as part of “a fanciful diatribe,” and would have to view all of the “collective posts on ‘obsidianfinancesucks.com’ . . . less seriously.”⁴⁰

In contrast, the court denied summary judgment in favor of the defendant with respect to the single posting on “bankruptcycorruption.com” because that entry was isolated.⁴¹ The court found that “the reader is unable to view it in the context of the dozens of serial posts defendant has placed on the ‘obsidianfinancesucks.com’ website,” thereby making “a full assessment of the flavor and tenor of the website [] not possible” and making the “suggest[ion of] a certain bias . . . not as strong or specific” as the defendant’s other website entries.⁴² Without a “broader and surrounding context,” the court found little to “necessarily negate the impression that the statements [of alleged tax fraud] are incapable of being proved true or false.”⁴³ In this regard, the court rejected the notion that “the use of a blog . . . automatically insulate[s] the poster from liability.”⁴⁴

Although a blog may not provide automatic insulation from claims of libel, as the cases discussed above illustrate, courts do appear to be affording a large measure of protection to postings in chat rooms and blogs based upon their “broader social context” alone.

38. *Id.* at 1234; *see also* *Knievel v. ESPN*, 393 F.3d 1068, 1078 (9th Cir. 2005) (addressing Montana’s defamation law and finding: “Although the word ‘pimp’ may be reasonably capable of a defamatory meaning when read in isolation, we agree with the district court’s assessment that ‘the term loses its meaning when considered in the context presented here.’ As discussed in more detail herein, the term ‘pimp’ as used on the EXPN.com website was not intended as a criminal accusation, nor was it reasonably susceptible to such a literal interpretation.”).

39. *Obsidian*, 812 F. Supp. 2d at 1232-34.

40. *Id.* at 1233, 1238.

41. *Id.* at 1237.

42. *Id.*

43. *Id.* at 1238.

44. *Id.* at 1238; *see also* *Sandals*, 925 N.Y.S.2d at 416 (“This observation is in no way intended to immunize e-mails the focus and purpose of which are to disseminate injurious falsehoods about their subjects.”).

III. SHOULD TWITTER BE PERCEIVED AS A PARTICULAR “BUYER BEWARE”
FORUM FOR EXPRESSION?

Twitter’s overall purpose and context should put its readers on notice that there is “more to the story” than the “Twitterer” can convey in a “Tweet.” A Tweet communicates sound bite observations or ideas.⁴⁵ Moreover, Tweets are not generally isolated but rather part of larger “accounts” of information sharing. By necessity, Tweets are composed in informal, loose, and haphazard fashion. Tweets regularly “lack the formality and polish typically found in documents in which a reader would expect to find facts,”⁴⁶ and often “read more like a journal or diary entry”⁴⁷ within a running “account”⁴⁸ of other entries, rather than as stand-alone assertions of fact that require no broader context to understand. Tweets are also innately personal and they can readily project emotion.

The lesson of cases like *Global Telemedia*, *Sandals*, and *Obsidian*, therefore, is that Twitter’s characteristics and limitations should negate any expectations of a “reasonable reader” that Twitter is a repository of stand-alone facts and unassailable “truth.” To the contrary, Twitter is a free-for-all marketplace for stream-of-consciousness thoughts and exclamations, and for unguarded and unedited personal observations, discussion, and entertainment.

It is possible, of course, that a Twitterer could find a way in 140 characters (or through enhancement programs or attachments, or in an independent stream of Tweets) to libel someone in an isolated context, without inviting further discussion or investigation from others. Were that to occur then, similar to the court’s finding in *Obsidian* relating to the single posting on “bankruptcy-corruption.com,” Twitter should not provide automatic immunity from a claim of libel.⁴⁹

Nevertheless, “Twitter is a real-time information *network*,” which is intended to spark imagination and discourse through streams of messages.⁵⁰ By definition, Twitter should involve and reflect “broader social contexts,” making most claims of libel improbable in the face of what a “reasonable reader” should expect Twitter’s “small bursts of information”⁵¹ to contain. As courts continue to examine libel law in the context of the Internet, Twitter may present a particular environment in which to more readily dismiss claims.

45. It is also possible to link “photos, videos and other media content” to a Tweet in order to invite further investigation or participation by followers. See Twitter About Page, *supra* note 2.

46. *Global Telemedia Int’l*, 132 F. Supp. 2d at 1267.

47. *Obsidian*, 812 F. Supp. 2d at 1233.

48. Twitter About Page, *supra* note 2.

49. *Obsidian*, 812 F. Supp. 2d at 1237-38.

50. Twitter About Page, *supra* note 2 (emphasis supplied).

51. *Id.*

IV. CONCLUSION

Black’s Law Dictionary defines “*caveat emptor*” as: “Let the buyer beware. This maxim summarizes the rule that a purchaser must examine, judge, and test for himself.”⁵² Users of Twitter should necessarily beware of the “truth” behind Tweets. The limited amount of information in loosely composed Tweets should most often be perceived as “opinions” to be examined, judged, and tested, not blindly accepted as authoritative “fact.”

Whether Twitter involves voyeurism of “inconsequential information,” or an engaged response to “bird chirps” that a reader finds meaningful, both of which Twitter was conceived to foster,⁵³ the unique context of Twitter may enable courts to regularly dismiss claims of libel as a matter of law.

52. BLACK’S LAW DICTIONARY 222 (6th ed. 1990).

53. See Dorsey, *supra* note 3.