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Twibel Tweak Needed for Tweeters

by Thomas R. Julin & Henry R. Kaufman[1]

Here's a 63-character idea whose time has come: Immunize not just Twitter, but also tweeters, from tort claims. Let every birdie vent. Call your boss a thief, your husband a cheat, your friend a foe, your Congressman a fool, and all without fear of summons or complaint and no worries other than that the subjects of your ire will tweet back that you are a liar. But until that brave new world arrives, tweeters – and their employers – must add to the growing list of risks and perils what the Citizen Media Law Project has dubbed "twibel" (read, libel on Twitter) claims.

Since 1996, section 230 of the Communications Decency Act has assured all interactive computer service providers like Twitter that they would not themselves be treated as publishers for purposes of tort claims even if they policed content posted by others. Congress deemed this law critical to ensure that those who built websites could open them to uncensored voices without fear of untold liability. This has worked (although some say too well) and today the Internet is a free speech haven that has resulted in a vast accumulation of not only opinions, but wealth.

Twitter market capitalization is $4 billion. LinkedIn is worth $3 billion. Google, Apple, Yahoo! and many others also boast huge fortunes and credit must be given at least in part to section 230 immunity which guaranties a steady flow of free, controversial content from the masses yearning to be heard – masses of bloggers, bloviators, netizens, posters, and, of late, tweeters. Tweeters, content providers of 140 characters or less to Twitter, do not share the immunity of their host and few have found effective ways to monetize their chirping, but they certainly have enjoyed the free platform section 230 has opened for them by immunizing their hosts.

Many tweeters, we think it is safe to say, may have nothing to lose. They need no immunity because they have no assets or so few that no respectable advocate would bother chasing them down. And so they tweet and tweet and tweet with little or no regard for truth, reputation, or the civil conventions. In other words, they behave as if they are totally free to speak their minds. And for the naïve and the asset-less, perhaps they are. This siren song of libel-free tweeting can lure even the wealthy and the insured to believe that they too can enjoy unfettered tweeting, especially during the wee private hours fueled by substances of choice, vitriol of the moment, and the intimacy of glowing handheld devices.

But unless and until the law of twibel is dramatically reformed, Twitter cannot be viewed as a libel-free zone. Quite the contrary: because every Smartphone-wielding employee is now an instant publisher, with a potentially world-wide audience, tweeting is now a highly volatile legal risk.

Courtney Love may have overlooked this risk when on March 17, 2009, she tweeted that Boudoir Queen fashion designer Dawn Simorangkir was a felon with a history of dealing cocaine who had lost custody of her children and engaged in assault, battery and prostitution. Elsewhere, Love posted, among other observations, that the designer is "the nastiest lying worst person I have ever known."

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Simorangkir's lawyers at Freedman & Taitelman LLP wasted no time filing suit against Love for libel, false light, intentional infliction of emotional distress and other wrongs. One year of litigation later, Love capitulated for a cool $430,000. The designer's lawyer explained: "Personally I think $430,000 is an appropriate way to say she's sorry."

Love is not the only tweeter who has been targeted for twibel.

- Dr. Sanford Siegel sued Kim Kardashian in Florida on December 28, 2010, for tweeting foul about his COOKIE DIET® products.

- Welsh pol Colin Elsbury was tagged with a $4800 judgment (plus $81,500 in attorneys' fees) for falsely tweeting that his rival had been plucked from a polling station by police.

- Chicago bar tender Amanda Bonnen twibel torment after she tweeted that "Horizon" thought it okay for her to sleep in a moldy apartment. Judge Diane Larsen in a tweet-like order found "the tweet nonactionable as a matter of law" but provided no written explanation of her ruling.

And libel is not the only old tort migrating to Twitter. In *Maremont v. Susan Fredman Design Group, Ltd.*, No. 10 C 7811, 2011 WL 902444 (N.D. Ill. Mar. 15, 2011), a former employee of a Chicago interior design firm sued her former employer for violation of the Lanham Act, abridgment of her right of publicity, and invasion of privacy when the employer's current employees capitalized on the former employee's Twitter fame by continuing to post tweets under her old account. That suit recently survived a motion to dismiss.

We think more – and maybe many more – such suits are on the way against both tweeters and their employers when, as in *Maremont*, the tweeting is done in the course of a tweeter's job or for the benefit of the boss.

It's not that twibel claims are indefensible under traditional legal standards. We need only look back to the ancient history of blogging to find what may be the most promising of the established defenses to twibel claims. In a series of musty old cases, some of them dating all the way back to near the turn of the 21st-Century, courts have recognized that blogs – arguably like tweets as their modern successors – are widely and appropriately understood by computer-literate readers as homes of legally protected "hyperbole" or "opinion," not legally actionable fact. But the costs of vindicating protected speech are high even if twibel courts are ultimately receptive to these and other traditional defenses. So, it might be appropriate to step back from all this to ask whether the heavy iron of ancient tort law is the best solution to tortious tweeting.

The justification to tweak section 230 for tweeters can be found in Justice Hugo Black's concurrence in *New York Times Co. v. Sullivan*. "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment," he wrote. To be sure, Justice Black was not thinking about protecting fashion designers against rock star rants or cookie doctors from cable muses. His focus was on criticism of public officials who themselves had easy access to mass communications. Libel, to Justice Black, seemed unnecessary for public officials because they could strike back in the press. Counter-publication could be a far more effective, efficient tool to expose lies and prevent harm than years of litigation.

Justice Black could hardly have foreseen the ease of response for Everyman that modern computing – and certainly Twitter – allows. Today section 230 guaranties all an easy way to respond immediately and often to salacious slander, so there is a serious case to be made for pruning libel back. Corrections can be published immediately. Skepticism among readers is high. Competing claims are easily tested for accuracy. Truth is divined from many sources, not judges or juries. No one has time to wait for courts or money to fund their clumsy ways.

What a better place to start the needed tort trimming than Twitter? Extend section 230 immunity to tweeters now. O 'twill be a glorious morrow. Till then, think twice afore tweeting not nice.