

Overview

Tom Rudkin and Molly-May Keston

Farrer & Co LLP

A global perspective on reputation management law and trends

While the fear of featuring on a national newspaper's front page still unnerves many, the remit of a media or (to use the more modern terminology) reputation management lawyer has expanded significantly in recent years. That role now extends beyond countering negative exposure in traditional news media to tackling an array of threats: from injurious Google search results, disparaging social media posts and online reviews, to issues of harassment and misappropriation of personal data.

This diversification in threats can be attributed largely to the surge of digital content and the increasingly pivotal role that data plays. As an introduction to *Getting the Deal Through's 2023: Defamation and Reputation Management*, this overview highlights global trends and examines how different jurisdictions are handling both existing and emerging challenges.

Emerging global trends

Social media surge

The proliferation of social media platforms has intensified the demand for swift action as damaging content can go viral at an unprecedented pace. Such rapid spread not only necessitates quick responses but also more proactive online monitoring, careful engagement with social media companies and advising clients on the implications of their online behaviour.

Additionally, online platforms introduce challenges such as anonymous posts and constantly evolving trends, such as 'cancel culture'. Addressing these issues requires a multifaceted approach, with legal professionals, PR experts and digital teams often working collaboratively to navigate the intricacies of the online landscape.

Digital dangers

Interrelatedly, the expanding role of the online world underscores the need for robust safety measures. As global interaction on digital platforms intensifies, risks to individuals rise. Consequently, many jurisdictions are focusing on strengthening online protections for individuals, while still preserving individual users' freedom of expression.

The EU recently unveiled the Digital Services Act, aiming to enhance online safety across the EU. Similarly, the UK is steering its long-awaited Online Safety Bill into place, and it is hoped that it will be formally enacted by the end of 2023. This Bill seeks to ensure that platforms that host user-generated content shield users from harmful materials.

For children, content that is technically legal but potentially harmful is under scrutiny. Ireland's response is its recently enacted Online Safety and Media Regulation Act and the introduction of a Media Commission to oversee both digital spaces and traditional broadcasting. Central to these measures is a straightforward aim: to curb the tide of harmful online content, whether outright illegal or posing undue risks.

In stark contrast to the UK and EU, the US continues to function under the aegis of section 230 of the Communications Decency Act. This provision provides online platforms with immunity from liability concerning user-generated content, meaning that the country remains on a markedly different trajectory.

AI's new frontier

Meanwhile, the buzzword that is generative-AI presents its own set of challenges. With tools like autonomous chatbots and deepfake creation, lawmakers worldwide grapple with the challenge of balancing innovation against potential risks of misuse. Currently, there is some uncertainty as to how existing legal instruments might apply to such risks, for example, in relation to inaccurate content produced by chatbots such as ChatGPT, although the authors' view is that the current legal frameworks applied sensibly ought to provide at least some of the necessary protections. And while concerns about generative AI may prove to be overblown, both clients and lawyers must remain vigilant of the inherent risks for now, while simultaneously considering how these tools might be leveraged positively. This evolution has the potential to make reputation management more forward-thinking than ever.

SLAPPs – the debate continues

Stepping back from the realm of technology and social media, a debate about the balance between safeguarding individual rights and reputations versus perceived manipulation or misuse of such rights continues. The term SLAPPs (Strategic Lawsuits Against Public Participation) highlights this dilemma. Originating in the US during the 1980s, the perception was that SLAPPs were being employed by powerful groups and individuals in an aim to suppress dissent through legal means. Recognising this challenge, numerous US states enacted anti-SLAPP laws.

The waves created by this phenomenon reached England only recently, spurred by claims that oligarchs allied with Putin utilised costly litigation to silence criticism and deter investigations into their UK dealings. There is much discussion currently about whether a general SLAPP provision should be introduced into English law. For now, an amendment to the Economic Crime Bill (if it comes into force) will introduce powers for courts to dismiss legal actions aimed to limit freedom of speech or the publication of information released in the public interest to combat economic crime, where the litigation is intended to cause harm or expense that goes beyond the ordinary cut and thrust of court proceedings. It would be fair to say that there is a healthy dose of scepticism in some quarters as to whether SLAPPs are really as prominent as they have been presented in some parts of the media and/or whether new legislation is required.

The dialogue is far from over, as jurisdictions spanning Europe to parts of Asia weigh up how to deter baseless and expensive lawsuits without stifling genuine legal concerns.

General legal principles

Navigating defamation and reputation management matters requires an understanding of certain foundational legal concepts. In this next section, we explore how different jurisdictions are currently approaching and applying these principles, contextualising them against their historical and cultural backdrops, where relevant.

Defamation

Broadly speaking, defamation refers to the publication of a false statement that harms the reputation of an individual or entity.

Different jurisdictions continue to grapple with balancing freedom of speech and protecting reputations. England, once a hotspot for 'libel tourism' due to its claimant-friendly stance, underwent a seismic shift with the Defamation Act 2013, which introduced the requirement for claimants to prove 'serious harm', signalling a renewed commitment to freedom of expression. A specific threshold on claims against defendants domiciled outside the United Kingdom has also introduced a new jurisdictional hurdle. Similarly, while Ireland's Defamation Act 2009 was previously seen as leaning more towards reputation protection (evident from its lower threshold for proving defamation and lack of a serious harm requirement), the reformation of Irish defamation laws (which would strengthen the position of defendants in defamation actions) is on the horizon.

Jurisdictions such as Singapore appear to prioritise individual reputation over freedom of expression, allowing for both civil and criminal actions in defamation cases. Similarly, Japan has long criminalised defamation. Due to the rise of online defamation, Japan has recently updated its laws to simplify user data requests for online providers and to expand the scope of accessible information, such as login details. With the never-ending growth of social media, a higher volume of claims to remove posts and access (otherwise anonymous) user details in Japan is anticipated. In contrast, the USA reveres its First Amendment, setting a high threshold for defamation claims, especially for those in the public eye.

Privacy

While certain jurisdictions have distinct, standalone privacy rights, other jurisdictions' rights are embedded within their broader legal frameworks. Article 8 of the European Convention on Human Rights, combined with case law, serves as the foundational pillar for European privacy norms. England's commitment to these standards is reflected in the Human Rights Act 1998, as developed by a long line of case law. One recent significant development has been the establishment (through case law) of a general rule where suspects in a criminal investigation have a reasonable expectation of privacy. While not a blanket rule, this has greatly restricted the ability to name individuals under investigation before they are charged with an offence, and may also transmit to other types of non-police investigation.

In Japan, while there is no codified law or constitutional provision on privacy, case law has paved the way for the recognition of the tort of invasion of privacy.

The US, though lacking a specific provision akin to Article 8 ECHR, offers a composite of constitutional safeguards, case law precedents and state-specific rights that collectively form similar (although not identical) protections. A shared characteristic between legal frameworks is a universal challenge: seeking to strike the right balance between individual privacy rights, freedom of expression and public interest.

Harassment

As societal norms have evolved; nations have bolstered their anti-harassment laws. England's Protection from Harassment Act 1997 stands as a strong example of this, prohibiting a persistent course of unacceptable and oppressive conduct targeted at another person, which is calculated to and does cause that person alarm, fear or distress. The United States echoes this sentiment with state-specific anti-harassment provisions, with each state framing its definitions and penalties. In the European context, Sweden, for example, has its Penal Code, which criminalises gross violations of a person's integrity, whether through molestation (sexual or non-sexual), stalking, violation of the privacy of the home or unlawful harassment. Globally, while the scope, remedies and penalties of legal frameworks vary, the unified objective remains clear: to fortify protections against harassment.

Data protection

The EU's GDPR is a beacon for data protection in imposing obligations on all organisations (including publishers of user-generated content) that hold and control the way in which personal information is disseminated and giving individuals right in relation to such data.

The UK, post-Brexit, maintains its GDPR alignment, and is enriched by its nuanced case law. Notably, 'the right to be forgotten' plays a pivotal role in allowing for the removal of harmful content from online search engines such as Google, which (in broad terms) must delist URLs containing personal data that is irrelevant, outdated, inaccurate or unlawful (although as ever the consideration of any request must be balanced with freedom of expression rights). Crucially, this can be relied on by clients from all over the world to try to combat content available to users in the UK and EU.

The US's eclectic stance is a patchwork of federal and state laws, sector-specific regulations, and industry best practices, while nations such as India continue to navigate the data protection realm, drawing inspiration from GDPR yet imbuing their own sociopolitical imprints. Indeed, at the time of writing, India is poised to enact a controversial and long-delayed personal data protection bill, marking long overdue legislation not dissimilar from the GDPR demanded by business and civil society groups that is set to regulate the internet and the sharing of online data.

Conclusion

As is clear from the above, reputation management now involves a much broader legal toolbox than simply defamation. Questions of media law and reputation now must encompass a careful consideration of any applicable right to privacy, data protection and

harassment, all set against a legal landscape that is continually broadening to address myriad new and evolving challenges.

Overall, while each jurisdiction's legal landscape reflects its cultural and historical nuances, they all grapple with the global challenge of striking the right balance between individual rights, individual and collective freedoms, and technological evolution.

FARRER&Co

Tom Rudkin
Molly-May Keston

thomas.rudkin@farrer.co.uk
molly-may.keston@farrer.co.uk

Farrer & Co LLP

[Read more from this firm on Lexology](#)