

An affair to remember--defamation following the Ashley Madison hack

02/09/2015

IP & IT analysis: Could the Ashley Madison hack create the possibility for defamation actions? Christina Michalos, a barrister at 5RB, considers the defamation law aspects of the hacking affair.

If an individual is identified as belonging to the Ashley Madison site, but denies it, could they bring a defamation claim against anyone who publishes the information?

Any publication is only defamatory if it causes or is likely to cause serious harm to a person's reputation. This is a statutory test set down in the Defamation Act 2013, s 1 (DA 2013).

In principle, it's certainly possible that identifying someone as a member of the Ashley Madison website is defamatory. This is likely to be in one of two ways. Firstly, mere membership of a website designed to facilitate affairs for married people or those in committed relationships is effectively an allegation of betraying or attempting to betray one's partner. Secondly, if a person has denied membership, then a publication to the contrary is also an allegation of dishonesty.

However, whether either of those allegations is actually likely to pass the 'serious harm' test will depend on the nature of the claimant. So, for example, if this were said about someone similar to the late Conservative minister Alan Clark--who was notorious for having affairs and was very open about it--there wouldn't be any prospect of establishing serious harm. Obviously, there are plenty of people who would suffer serious harm from this type of allegation, but equally plenty of Alan Clark types who wouldn't. It would be both fact and situationally dependent.

And, of course, it remains the case that truth is an absolute defence to a defamation action--so paid up Ashley Madison members should not be rushing to the Royal Courts of Justice, claim form in hand. A privacy claim on the other hand is a different matter.

Could those who share the leaked information (eg on social media) be drawn into any libel action?

Yes, if it is untrue. There are no special exemptions for social media users. If a statement is defamatory and someone repeats it, they too are legally liable. Anonymous users can be tracked down by using *Norwich Pharmacal* third party disclosure orders against the social media providers like Facebook and Twitter (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943). The end result will usually reveal their computer IP addresses or other underlying identifying information like bank accounts or mobile phone numbers. These type of applications have become pretty standard in internet defamation cases. The internet is not a cloak of invisibility.

Having said that, if a defamation claim against the first and primary publisher has resulted in a payment of damages to a claimant, this is something that other defendants who just repeated the same words can rely on in mitigation of damages. This is provided for in the Defamation Act 1952, s 12 (which remains in force post-DA 2013) states:

'In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication.'

Does the Dark Web provide a particular challenge for defamation actions (identifying publishers, authors etc)?

Absolutely. The clue is rather in the name--the Dark Web is a concealed and shady place. It is a term used to refer to websites and networks, including some peer-to-peer networks, that while publicly visible, hide their origins and are encrypted. The stolen Ashley Madison data was uploaded on to the Dark Web. Many of these sites require an encrypted browser like Tor to access them in the first place. So a simple *Norwich Pharmacal* disclosure application will not help identify the people behind these sites.

It is important to remember that not all of the Dark Web is criminal--a lot of it is mundane and in some cases, it is a force for good. In some states where there is censorship and limited access to the internet, the Dark Web allows for external and internal communication and freedom of expression. Beyond the Dark Web, there is also the Deep Web. This is a term sometimes used interchangeably with the Dark Web but really is more accurately used to identify the Dark Web that also can't be indexed by search engines.

The positive side of this is that defamation is ostensibly about public damage to reputation. The less accessible defamatory publications are to the public and the less they can be found on internet searches, the better. Obviously, there is no guarantee that any off the radar publication remains below the line. The Ashley Madison incident demonstrates that sometimes Dark Web publications do hit the mainstream media.

Keeping a defamatory allegation in the dark is rarely a bad thing. The fewer people read it, the less damage there is.

Interviewed by Alex Heshmaty.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



CLICK HERE FOR
A FREE TRIAL OF
LEXIS®PSL

[About LexisNexis](#) | [Terms & Conditions](#) | [Privacy & Cookies Policy](#)
Copyright © 2015 LexisNexis. All rights reserved.