

# The Reasonable Social Media User – An Overview on the Law on Defamation in Social Media

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In the modern age of technology, the emergence of social media has created a new forum (i.e. the online platform) for people to share anything and everything they desire. And by virtue of this participatory culture, anyone and everyone can easily convey messages to a wide range of audience nowadays.

## The New Class of Readers – Social Media Users

As such, the advent of social media has introduced a new class of readers – the social media user. As shall be explained below, the birth of this new class of readers have thus placed the law on defamation in a precarious position.

In this new realm, information of all kinds can be distributed in mass with just the click of a button. Theoretically, no safeguards are in place, nor are there any verification processes involved, to weed out any information that may be false and/or defamatory. Under such circumstances, social media platforms are effectively prone to be exploited by bad actors in damaging another person's reputation.

## The “Reasonable Social Media User”

In response to this new frontier, the English Supreme Court in the case of **Stocker v Stocker [2020] AC 593** (“**Stocker**”) introduced a new standard in handling social media defamation cases – the reasonable social media user.

Acknowledging that social media is **(i)** a casual media; **(ii)** in the nature of conversation rather than carefully chosen expression; and **(iii)** is pre-eminently a circumstance where a typical reader would read and pass on, the English Supreme Court opined that a typical social media user does not pause and reflect, nor ponder on what meaning a statement might possibly bear. Rather, the reaction of a typical social media user towards a post is “*impressionistic and fleeting*”<sup>1</sup>.

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<sup>1</sup> At para 44



Ever since, **Stocker** has become a landmark decision in social media defamation law, offering the Courts a general standard as to how social media posts/messages ought to be read and understood in defamation lawsuits.

It is worth noting that **Stocker** has even been referred to in Hong Kong cases involving defamation via social media<sup>2</sup>.

### The Importance of Platform and Context

Nevertheless, even though the “reasonable social media user” standard is now an applicable approach towards determining liability in Hong Kong social media defamation cases, it is worth noting that such standard is not an all-encompassing standard covering all types of social media defamation cases.

Ultimately, the nature of the social media platform is a crucial factor towards determining whether a statement is defamatory, and like all defamation cases in general, an analysis of context is still involved.

### Existing Practical Obstacles

Furthermore, it should also be noted that **Stocker** has not necessarily resolved any existing practical obstacles towards establishing a social media defamation claim.

With reference to the decision in *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* – [2013] 5 HKC 253 (“**Oriental Press**”), the following practical obstacles still exist against aggrieved individuals:-

#### 1. Difficulty in holding social media platform providers/operators liable

In defamation law, a social media platform provider/operator (“**Platform Provider/Operator**”) falls under the category of “subordinate publishers” or “secondary publishers”.

Yet, unlike other types of traditional media such as newspapers or television broadcast, publication on a social media platform involves “open, interactive, ‘many-

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<sup>2</sup> See (i) *Chow Wing Kai (周榮佳) also known as Wave and Wave Chow v Liang Jing (梁京)* – [2021] HKDC 609; (ii) *Well Born Real Estate Management Limited (偉邦物業管理有限公司) v Lee Tak Lun Andrew (李德麟) (also known as Andrew Lee)* – [2023] HKDC 430



to-many' communications"<sup>3</sup>. In large-scale social media platforms, such as HKGolden Forum<sup>4</sup>, these providers/operators are realistically unable to become aware of each and every statement made therein, nor would they have the ability or opportunity to prevent the publication of such in the immediate timeframe thereafter.

So long as reasonable care was proven to have been exercised by a Platform Provider/Operator, a valid innocent dissemination defence can be advanced to negate liability. And in ***Oriental Press***, one of the relevant factors towards determining whether reasonable care has been exercised by the Platform Provider/Operator focuses on its response **after** it became aware of the relevant defamatory statement. In other words, a Platform Provider/Operator will only be held liable if reasonable care has not been exercised **after** it has become aware of the relevant defamatory statement.

As a result, an aggrieved individual would unfortunately have a heavy burden in establishing a defamatory claim against a Platform Provider/Operator. Active steps would have to be first taken to (i) alert the Platform Provider/Operator of the existence of the defamatory statement; and (ii) request the Platform Provider/Operator to remove the relevant defamatory statement. It is only after the relevant Platform Provider/Operator has failed to comply to the above within a reasonable time, that defamatory liability may then be pursued against said Platform Provider/Operator.

## 2. The damage has been done

At the same time, since Platform Providers/Operators may not be actively aware of defamatory statements being published on their own platforms **until only after** they are alerted to the same, some time may have passed already before any action can be taken against a defamatory statement that was posted online (with reference to ***Oriental Press***, such passage of time may be a few days<sup>5</sup>).

Given how fast information can be disseminated and transmitted nowadays, it is highly possible that a defamatory statement posted online would reach a large number of audience before it is taken down, not to mention that it may be further forwarded or re-posted at the same platform or other platforms. Correspondingly,

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<sup>3</sup> ***Oriental Press***, at para 59

<sup>4</sup> ***Oriental Press***, at para 12

<sup>5</sup> At para 100



reputational damage would nonetheless have been dealt onto a person at the instant the defamatory statement is published online.

In any event, defamatory action against the statement maker (or even the Platform Provider/Operator, if applicable) would arguably only afford an aggrieved individual symbolic, rather than substantive, relief.

### 3. Identification of the statement maker

Furthermore, in the online world, individuals can create a fake persona by using fictitious email addresses and usernames. This causes great difficulty for an aggrieved individual to locate the true identity of the statement maker for the purposes of taking out legal proceedings thereafter.

This difficulty is somewhat evidenced in *Oriental Press*, where platform users were said to often register their accounts with fictitious particulars<sup>6</sup>. One saving feature was that, such platform users had to also provide a traceable email address with a recognised internet service provider, rather than a mere anonymous email address from a web-based provider such as Gmail, Hotmail or Yahoo.

However, for some large-scale social media platforms such as Facebook, Instagram, Threads, or X (formerly known as Twitter) etc., the account registration process generally only requires platform users to provide particulars which can all be fictitious, including the email address. Under such circumstances, given the complete anonymity that an individual may potentially have, the identification exercise will be extremely difficult, if not impossible.

Correspondingly, combined with the difficulty of holding Platform Providers/Operators liable, an aggrieved individual may effectively have no substantive recourse against the defamatory statements made.

### Concluding Remarks

By giving recognition to the more casual and conversational nature of social media, *Stocker* reconciles defamation law with modern-day developments in communications. Depending on the platform used and the context of the statement made, the Courts can flexibly rely on the relevant standard in determining defamatory liability.

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<sup>6</sup> At para 14



However, it is undeniable that, practical obstacles still exist in social media defamation cases, in which aggrieved individuals are still placed in an evidently uneven playing field requiring a heavy burden of proof.

Given that social media (and the internet as a whole) is fast-growing and ever-evolving, there is great anticipation in seeing how social media defamation law (or defamation law in general) develops. Even so, the need to strike a balance with the right of free speech has to be taken into consideration as well. As much as it would be desirable for the law to show sympathy and offer assistance to aggrieved individuals, it may be undesirable for the law to evolve towards the direction that a chilling effect is imposed against the freedom of speech. A careful balance has to be reached in this regard.

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