

Protecting reputation rights from online defamation: China

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Practice notes | **Maintained** | China

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An overview of the regime governing online reputation infringement in China. It outlines the jurisdiction, statute of limitations, elements of infringement, evidence preservation, defences and liability in relation to online defamation litigation.

Scope of this note

Mobile internet usage is part of the daily life of smartphone and tablet users, enabling consumers to access and share information on the go. Additionally, social media has replaced traditional media including newspaper, TV and radio to become our main source of news and information. Smartphones and mobile internet make it easy, convenient and tempting for everyone to comment and spread whatever they find interesting on social media platforms. So called "self-media" (自媒体) and self-publishing businesses have emerged and rapidly developed, accompanied by a series of problems due to the lack of censorship and supervision and media ethics training for self-media engagers.

Driven by profits and manipulated by some people with ulterior motives, self-media has become a hub for misinformation. As online defamation emerges and influences people's work and life, online reputation infringement cases have captured public attention.

This note explores the importance of protecting reputation rights on the internet by introducing the regulatory framework governing online defamation disputes in China. It also discusses several key aspects of online defamation litigation, including jurisdiction, the statute of limitations, the elements of a cause of action for infringement of reputation rights, evidence preservation, defences and liability.

Regulatory framework

The right of reputation, as part of the underlying right to personal dignity, is protected under the China's Constitution, as well as civil, commercial and criminal laws.

Constitution

The *Constitution (2018 amended)* contains some general principles on protecting personal dignity. It prohibits acts that damage a citizen's reputation, including insult and libel (*Article 38*).

Civil law principles and civil code

Citizens, legal persons and unincorporated organisations enjoy various civil rights including the right to reputation under Chinese civil law. Online or offline infringement of their rights to reputation is prohibited. (*Article 101, General Principles of the Civil Law 1986* (1986 Civil Law Principles) and *Article 110, General Provisions on the Civil Code 2017* (2017 Civil Code).)

Tort Liability Law

An infringement of civil rights can trigger tort liability. The *Tort Liability Law 2009* (2009 Tort Law) gives persons whose "civil rights and interests" are infringed the right to pursue a claim against the infringing party. Civil rights and interests include, among other personal and property rights, the right to name, the right to reputation and the right to honour (*Article 2*).

Anti-unfair Competition Law

Commercial defamation is governed by the *Anti-unfair Competition Law 2019* (2019 AUCL), which prohibits a business operator from fabricating or disseminating false or misleading information to impair the goodwill and reputation of a competitor or its products (*Article 11*). Where the business operator defames those other than its competitors, the act may still constitute the infringement of reputation rights even it does not constitute unfair competition.

Criminal Law

Both online and offline defamation may also constitute criminal offences. Those publicly insulting others by force or other methods or those fabricating stories to defame others, if the case is serious, may be sentenced to up to three years in prison, put under criminal detention or surveillance or deprived of their political rights (*Article 246(1)*, *Criminal Law 1997* (1997 Criminal Law)).

A judicial interpretation jointly issued by the *Supreme People's Court* (SPC) and the *Supreme People's Procuratorate* (SPP) further explains Article 246(1) of the 1997 Criminal Law by setting forth (among other factors) the elements of the crime of online defamation. According to the joint interpretation, the offence of "fabricating stories to defame others" is established where a person:

- Fabricates stories that damage another's reputation, or spreads, or organises or instigates others to spread fabricated stories on an information network.
- Falsifies online information involving others to damage another's reputation, and spreads, organises or instigates others to spread falsified information on an information network.
- Knowingly spreads fabricated information that damages another's reputation on an information network, if the circumstances are serious.

Any of the following circumstances involving online defamation constitutes a serious case:

- A piece of defamatory information has been clicked on or viewed more than 5,000 times or has been forwarded more than 500 times.
- The act caused derangement, self-mutilation, suicide or any other serious consequence to the victim or close relatives.

- The defaming offender has received an administrative penalty for defamation within the last two years.

The term "information networks" includes the internet, broadcast networks, wired communication networks, mobile communication networks that use electronic devices such as computers, televisions, wired telephones and mobile terminals and local area networks to which the public has access.

(Articles 1-2 and 10, *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases involving Defamation and Other Acts Committed through Information Networks 2013* (2013 Defamation Case Interpretation).)

Judicial interpretations

The SPC and the SPP have promulgated several judicial interpretations to guide the handling of defamation disputes, including:

- *Answers of the Supreme People's Court on Certain Issues Concerning the Trial of Cases Involving Rights to Reputation 1993* (1993 Reputation Cases Answers).
- *Interpretation of the Supreme People's Court on Certain Issues Concerning Trial of Cases Involving Rights to Reputation 1998* (1998 Reputation Cases Interpretation).
- *2013 Defamation Case Interpretation*.
- *Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Hearing of Cases of Civil Disputes over the Use of Information Networks to Infringe upon Personal Rights and Interests 2014* (2014 Network Infringement Interpretation).

Identification of the claimant and defendant

To successfully bring an online reputation infringement case before a Chinese court, the claimant must be a "proper claimant" (that is, the natural person or legal entity against which the defamatory statement is directed) and there must be a specific defendant.

In judicial practice, the courts reject many online infringement cases for reasons including:

- The claimant cannot locate the infringers as network users mostly do not disclose their real identities.
- The infringing article or information insinuates but does not clearly point to a specific person or company by using a nickname or code name. It can be challenging for a claimant to prove that a nickname or code name relates specifically to the claimant.

In addition, where the target of the infringement is a legal entity, its shareholders and employees might have suffered reputational damage because of their relationship with the target. However, these individuals may not be considered as proper claimants under this circumstance.

Where a deceased person's reputation is harmed, a close relative, that is, the deceased person's spouse, parents, children, brothers, sisters, grandparents and grandchildren, has the right to file an action against the infringer (Q&A 5, [1993 Reputation Cases Answers](#)).

In online reputation infringement suits, the defendant usually involves:

- The network user who posts, uploads or forwards the infringing information.
- The network service provider (NSP) which runs the platform on which the infringing information is posted or uploaded.

In practice, it is not difficult to pinpoint an infringer whose real name has been authenticated for an official account, a public account or Weibo account or who is the operator of a news website. These infringers' identities have been verified and are available to the public. While some users anonymously post, upload or forward infringing information, a claimant may file a lawsuit against the NSP and request the NSP to disclose the real identity of the infringing user.

For joint infringement where the claimant only files a lawsuit against the network user or NSP, the courts must approve the defendant's request to add the alleged infringing NSP or user as the co-defendant or third party ([Article 3, 2014 Network Infringement Interpretation](#)). A person who employs, organises, instigates or assists a defendant to publish or forward online defamatory information is also jointly and severally liable for the infringement ([Article 15, 2014 Network Infringement Interpretation](#)).

Jurisdiction and limitations period

Online defamation disputes are generally governed by the courts in the place of the infringement or at the domicile of the defendant, including the courts where:

- The computers and other terminal equipment used for the alleged infringement are located.
- The claimant resides.
- The newspapers and magazines are published and sold (deemed place of infringement), if the online infringing information was published or reproduced in newspapers or magazines.

(Q&A 4, [1993 Reputation Cases Answers](#) and [Article 2, 2014 Network Infringement Interpretation](#).)

In practice, claimants often choose the courts of their domicile for the sake of convenience.

In Beijing, Hangzhou and Guangzhou, first-instance online defamation disputes are handled directly by the respective internet courts. China piloted its first internet court in Hangzhou in August 2017 and launched the second and third internet courts in Beijing and Guangzhou respectively in September 2018. The internet courts handle a broad variety of first-instance cases involving disputes that arise from e-commerce transactions (including product liability), online copyright ownership and infringement, domain names and online personal rights infringement (including online defamation disputes), among others ([Article 2, Provisions of the Supreme People's Court on Several Issues Concerning Trial of Cases by the Internet Courts 2018](#) (2019 Internet Courts Provisions)). For more information, see [Legal update, SPC issues judicial interpretation on internet courts](#).

The statute of limitations for a civil case is three years from the date a claimant knew or should have known about the fact of infringement (*Article 188, 2017 Civil Code*).

Elements of infringement

When analysing a potential act of online reputation infringement, the same four elements used to determine traditional offline reputation infringement apply, despite the differences between online and offline infringement. The four elements are:

- Misconduct by the defendant.
- Fault of the defendant.
- Causation between the misconduct and the damage.
- Damage caused to the reputation of the claimant.

(Q&A 7, *1993 Reputation Cases Answers*.)

Misconduct

For online reputation infringement, misconduct may be in the form of posting, uploading or forwarding false or misleading information and news, insults and defamatory statements on any internet platform.

Distributing true and accurate information may not be deemed as misconduct, even where this information impairs someone's reputation. For example, an author or a publisher may not be liable for authoring or publishing an article that criticises others if the content is basically true and not insulting (Q&A 8, *1993 Reputation Cases Answers*).

In *Shanghai Yidi Wine Trade Co., Ltd v China Food News [2016] Shanghai No.1 Intermediate People's Court (Hu01 Min Zhong No.3588)* (上海意帝酒业贸易有限公司诉中国食品报社名誉权纠纷案(上海市第一中级人民法院(2016)沪01民终3588号)), the court found that the report posted by the defendant on the website was basically true and that the document mentioned in the report was an official document obtained from a local administration for industry and commerce. Therefore, the court held that the elements of misconduct had not been met and ruled against the claimant.

The fact that the information is true, however, does not necessarily provide a defence to a claim for reputation infringement. Even if the information is accurate or not completely false, it must not contain words that are outrageously insulting. In *Hu Juezhao v Guangming Network media Co., Ltd [2014] Beijing No. 2 Intermediate People's Court (Er Zhong Min Zhong Zi No.00385)* (胡觉照诉光明网传媒有限公司名誉权纠纷案(北京市第二中级人民法院(2014)二中民终字第00385号)), despite the fact that the allegedly infringing article was based in fact, the court found that the infringing article used words such as "hypocrite, parasite, and ascaris" and stated that "the plagiarist should be treated like ascaris in the abdomen and exterminated and excreted into a cesspool", which is clearly abusive and insulting in nature and goes beyond the reasonable scope of academic debate. The court therefore held the elements of misconduct had been met and ruled against the defendant.

Fault

The fault element can be established with proof that the defendant acted wilfully, knowingly, recklessly or negligently.

In relation to the re-posting of online information, the courts will determine the fault of a network user and an NSP by considering the following factors comprehensively:

- Whether the duty of care borne by the network user and NSP was compatible with the nature and scope of influence of the online platform. For example, "Big V" online bloggers (namely, verified Weibo accounts with a significant number of followers) are more likely to be found liable than ordinary user accounts if the information they re-post is defamatory.
- The degree of impairment of another's personal rights and interests.
- Whether any substantial amendment has been made to the information, or whether the subject title has been added or amended, resulting in material misrepresentation and misleading the public.

(Article 10, [2014 Network Infringement Interpretation](#).)

Causation

The causation element refers to online infringing activities that directly or indirectly cause damage to the claimant's reputation.

This is straightforward where the claimant is named or clearly identified. For online reputation infringement, however, it can be difficult to match a virtual identity online with a real person. Since network users mostly do not disclose their real identities, their online reputation is often built on their virtual identities. When the reputation of a virtual identity is attacked, the attackers may not even know the person's real identity. Arguably, the reputation of the real person behind the virtual identity stays intact.

Therefore, the key to the causation element is to prove that a reasonable third person would know the real identity of the one being infringed.

Damage

Infringement can cause damage to a person's civil rights and interests. For online reputation infringement, this damage occurs in the decline of a person's social evaluation (社会评价), which can lead to property losses in some cases. A decline in social evaluation may extend to both the cyber world and real life.

Damages for mental distress

Damages are recoverable if a natural person's personality rights related to name, image and likeness, reputation, honour and privacy are infringed on and the person suffers mental distress as a result.

The courts will determine the amount of compensation for mental distress based on the following factors:

- The degree of the infringer's fault.
- The means and manner of the tortious act and the place where the act was conducted.
- The consequences of the tortious act.
- The benefits obtained by the infringer.
- The infringer's financial ability.
- The average living standard in the area where the court accepting the case is located.

(Articles 1 and 10, Interpretation of the Supreme People's Court on Certain Issues concerning Determination of Liability for Compensation for Spiritual Damage Arising from Civil Torts 2001.)

Property loss

Defamation can cause reasonably foreseeable property losses for those whose economic well-being depends on their reputation. For instance, defamation of product quality may cause a business operator to lose its customers and defamation of a celebrity's personality may cause a loss of endorsement contracts. For those who rely on their online popularity, for instance, the host of a live-show on the internet, their reputation with network users can result in increased data flow, and in turn money or property.

Evidence preservation

For online reputation infringement cases, evidence is mostly generated and stored on the internet. As electronic data can easily be changed or deleted at any time, the claimant may not simply take screenshots or print the pages containing infringing contents for use as evidence in court. Therefore, it is crucial to preserve the evidence.

Notarisation of evidence

A notarisation institution can verify, keep and preserve evidence which tends to easily vanish or may be difficult to obtain in the future. Webpages containing infringing information fall within this description and can be preserved by notarisation before the lawsuit begins. Once notarised, the infringer cannot deny the existence of the infringement by deleting it.

Trusted time stamp method

A time stamp is an electronic certificate that keeps track of the time a document is created or modified. A trusted time stamp (TTS) (that is, the one issued by an authorised server) is generally admissible as evidence in court (*Article 11, 2019 Internet Courts Provisions*). In China, a claimant can get a TTS certificate from the UniTrust Time Stamp Authority (TSA) to certify the time and content authenticity of electronic data or documents.

To obtain a TTS certificate, the claimant may register on the [TSA official website](#) to access the TTS, download a screen recording software to record the process of preserving the electronic evidence, use external recording equipment to record the operation process, and submit the evidence and the recording to the TSA for certification.

To prove the authentic source and content of the electronic data, the TSA lists certain steps to be followed during the evidence preservation process. For example, the claimant must:

- Conduct an anti-virus scan to make sure the computer is virus-free.
- Clear the browser to be used for evidence preservation by deleting information such as cookies, browsing history and other browsing data.
- Check the authenticity of the internet connection and standard time.
- Check and preserve the website's ICP filing (if applicable) and other necessary information.

The TTS evidence includes:

- Electronic evidence which needs to be preserved (RAR format) and corresponding TSA certificates (PDF format).
- Screen recording documents and corresponding TSA certificates.
- Recording document of the external recording equipment and corresponding TSA certificates.

When examining the electronic evidence, the courts will consider various factors, including the reliability of the methods for:

- The creation, storage or transmission of the data.
- Maintaining the integrity of the content.
- Identifying the alleged infringer.

(Article 8, [Electronic Signature Law 2019](#).)

In *Beijing Yulu Internet Technology co., Ltd v Huagai Chuangyi (Beijing) Image Technology co., Ltd [2016] Beijing Intellectual Property Court (Jing 73 Min Zhong No.147)* (北京育路互联科技有限公司诉华盖创意(北京)图像技术有限公司侵害作品信息网络传播权案((2016)京73民终147号)), one of the main issues was whether the electronic evidence preserved through the TSA system was admissible.

In this case, the court found the TTS electronic evidence preserved through the TSA system admissible because:

- The standard operational process of recording eliminated the possibility of influence from the operator's improper intervention and proved the cleaning of the computer and the authenticity of the network, which guaranteed the reliability of the generation and storage of the evidence.
- The TTS method effectively verified the integrity of the electronic data through cryptography.
- The national standard time and system time synchronisation of the TSA was allocated by the National Time Service Center of the Chinese Academy of Sciences (中国科学院国家授时中心), which ensured the accuracy of the electronic data formation time.

Defences

In addition to the general defence that the elements of online reputation infringement have not been met, there are other defences available to defendants facing online infringement claims.

Safe harbour principle

Where a network user commits a tort through a network service, the victim of the tort may notify the NSP to take necessary actions against the infringement (such as disconnecting, blocking or removing links to the allegedly infringing material). If, after being notified, the NSP fails to take these measures in a timely manner, the NSP will be jointly and severally liable with the network user for any additional harm. In other words, NSPs are not liable for infringement if they can prove that they were not notified or took the necessary measures (that is, the safe harbour principle or notice-delete rule). (*Article 36(2), Tort Liability Law 2009.*)

A valid notice given by the claimant must include the following information:

- The name and contact information of the one issuing the notice.
- The URL on which necessary measures must be taken or the relevant information that can accurately locate the infringing content.
- The reason for issuing the notice.

If the notice does not include all the required information, the NSP may be exempt from liability. (*Article 5, 2014 Network Infringement Interpretation.*)

The safe harbour principle applies only to NSPs. This is because an NSP is just a provider of server or platform for network users and cannot control what users post, upload or forward. An NSP will not be liable for user infringement where it takes necessary action within a reasonable time after being notified. Therefore, if a news website operator forwards or reposts infringing information, the website will not be deemed to be an NSP that can use the safe harbour principle as a defence because it is legally obligated to review the information before forwarding or re-posting it.

Reasonable comment

A person may not be held liable for making honest, fair and objective comments based on a given set of facts. However, the comments must be reasonable and must not contain excessively insulting language. For example, a consumer or news agency can criticise or comment on the quality of products or services of a manufacturer, operator or seller that are based in fact and do not contain insulting statements (*Q&A 9, 1998 Reputation Cases Interpretation*).

In practice, the media (especially network media) often use strong words to express criticism and attract public attention. In the absence of specific standards, it is difficult to decide whether the relevant comments are reasonable. In judicial practice, this determination falls within a judge's sole discretion.

Public interest

A person who publishes materials or provides comments online concerning matters of public interest may use this defence to an action for defamation. Matters concerning public interest include:

- Administrative acts and decisions of the central and local governments.
- Various policies and measures of the legislative and judicial organs.
- Artistic performances by individuals and groups, and public figures.
- The truth of major events.

The concept of public figures originates from the US and was adopted by Chinese courts in *Fan Zhiyi v Wenhui Xinming Union Newspaper Co., Ltd* [2002] Shanghai Jing'an People's Court (*Jing Min Yi Min Chu No.1776*) (范志毅诉文汇新民联合报业集团名誉权纠纷案(上海静安区人民法院(2002)静民一(民)初字第1776号案)). In this case, the court held that as a public figure, the claimant had more obligations than ordinary people to tolerate and accept the minor damages caused by the media in the course of exercising proper supervision to express public opinion. This case established the tolerance obligations of public figures in subsequent reputation infringement cases.

Public figures generally include the following groups of people:

- Celebrities with a wide social reputation, such as sports stars, movie stars and entertainers.
- Government officials.
- Those who become public figures because of specific events.

These tolerance obligations do not completely override the reputation rights of public figures. In *Yuchuanglvye v Beijing Aiqiyi Technology Co., Ltd* [2014] Beijing No.1 Intermediate People's Court (*Yi Zhong Min Zhong No.7538*) (于川绿野诉北京爱奇艺科技有限公司名誉权纠纷案(北京市第一中级人民法院(2014)一中民终字第7538号)), the defendant used the tolerance obligations of public figures as a defence. However, the court held that the relevant video contained words such as "Lvchabiao" (绿茶婊) which had a strong derogatory meaning and were an insult to the claimant and therefore exceeded the scope of the tolerance obligations.

Consent

Where the alleged infringing information was made with the consent of the victim, the infringer may be exempt from infringement liability. A defendant using this defence must meet the following conditions:

- The consent of the victim was made voluntarily without coercion.
- The content of the information does not exceed the scope of the victim's consent.
- The consent of the victim was made before the infringement occurred.
- The consent of the victim does not violate public order or damage the legitimate rights and interests of a third party.

Liability and remedies

An infringer may bear civil, administrative and even criminal (see *Criminal Law*) liability for online reputation infringement. The general civil remedies include ceasing infringement, rehabilitating reputation, eliminating negative effects, making a public apology and providing monetary compensation for losses (*Article 120, 1986 Civil Law Principles* and *Article 15, 2009 Tort Law*).

Where a business operator engages in unfair competition that damages its competitor's reputation rights, its liability is governed by the anti-unfair competition law and the available remedies include:

- Cessation of infringing acts.
- Elimination of negative effects.
- Compensation for losses. The amount of compensation is equal to the actual losses suffered by the infringed operator as a result of the infringement, or, where the actual losses are difficult to determine, the gain of the infringer obtained from the infringement, plus the reasonable costs of relief.
- Administrative penalty. The supervision and inspection authorities may impose a fine on the infringer ranging from RMB500,000 to RMB1 million, or a fine from RMB3 million to RMB5 million for a serious violation.
- Criminal liability. Any violation that constitutes a crime may be investigated for criminal liability.

(*Articles 17, 23 and 31, 2019 AUCL.*)

Removal of the infringing content

To cease infringing acts, the infringer must remove the infringing content to prevent the reoccurrence and expansion of damages. The specific methods for carrying out this remedy depend on the infringer's capabilities and the infringing acts. For example:

- Network users must delete insulting information from the websites and public accounts on which the infringing information is posted and uploaded.
- NSPs must take proper actions after receiving the notice of infringement, such as disconnecting links and deleting infringing information.

Public apology

An apology may be made in writing, or verbally, depending on how the infringement was committed. The scope of the apology must be commensurate with the scope of the damages, and the content of the apology must be examined in advance by the courts or the claimant.

The time of posting depends on the network propagation speed, influence range and other relevant factors. The posting period usually lasts from days to months to eliminate the negative effects. If the infringer refuses to apologise,

the courts may publish a notice or the whole judgment online or in other media and the defendant must bear the expense of the publication.

Economic compensation and reasonable costs

An infringer is liable to compensate the infringed person for the reasonable loss of existing property or vested interests due to reputation infringement. The claimant is required to prove property losses and damages from mental distress (if any). The amount of compensation is determined by the financial capacity of the defendant, the method of infringement and the scope of influence. The claimant's costs incurred for handling the defamation disputes, including preserving evidence and engaging litigation counsel are also compensable on a reasonable basis.

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