

Police Federation
Of England and Wales



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FROM THE GENERAL SECRETARY'S OFFICE

IR/sg

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Dear Colleagues

PUBLICATION OF VIDEO CLIPS OF POLICE OFFICERS ON THE INTERNET

The publication of video clips of police officers on websites such as YouTube is increasingly common. This gives rise to a number of questions about the legal position and I have asked our lawyers to prepare a FAQ sheet, which hopefully will be of assistance.

What areas of law are relevant?

If officers are concerned that video clips portray them in a way which harms their personal or professional reputation, the law of defamation could be applicable.

If officers feel that the publication of a video clip amounts to an invasion of their privacy, the developing law in this area may be relevant.

DEFAMATION

An officer concerned about a publication on the internet which damages his or her reputation would have a possible claim for defamation. A defamatory publication on the internet is a libel (as distinct from the spoken word which is a slander). This gives rise to a number of questions:

Is the footage defamatory of the officer?

The meaning of the video clip must be defamatory of the officer to give rise to a claim. This means that the footage must lower the officer in the estimation of right thinking members of society generally.

Represent · Influence · Negotiate

Is the officer identifiable from the footage complained of?

No claim can be brought unless the officer is clearly identifiable from the video clip. That does not necessarily mean his or her image has to be shown, but it must be possible to prove that any allegations complained of refer to him or her.

What do the images say about the officer?

The meaning attributable to the footage is the meaning which would be reasonably understood by an ordinary person using their general knowledge and common sense. Sometimes a seemingly innocuous publication will carry a defamatory meaning to people who possess some special knowledge based on particular facts known to them but not to the general public. This is called an “innuendo” meaning and such meanings can be particularly relevant to the technical and complex area of policing.

What defences might defeat a libel claim?

If the publisher of the offending video clip can prove that the meaning conveyed by the footage is true in substance and in fact, this amounts to a complete defence known as ‘justification’. This defence exists because clearly a claimant should not be entitled to compensation for damage to a reputation which he does not in fact possess.

A further defence is that of ‘fair comment’ which protects honest expressions of opinion on issues of public interest. If, for example, a police officer featured in a video clip broadcast on the internet is the object of criticism which is clearly expressed as an opinion and not an assertion of fact, then the defence could be raised successfully if a fair minded person could honestly share the comments expressed on the basis of true and proven facts. The defence can be defeated if it is possible to show that the defendant acted maliciously. For the purposes of libel law, this means proving that the publisher knew the publication was false, or was reckless whether or not it was true, or had a dominant improper motive for publication.

A further important and technical defence is that of ‘qualified privilege’ which protects certain publications irrespective of whether they are true or fair provided they were not motivated by malice. Qualified privilege can cover many different circumstances, but in relation to the posting of video clips on the internet, it is most likely to arise where a potential defendant claims that the footage was published pursuant to a legal, social or moral duty on a matter of public interest, to an audience who had a corresponding duty or interest in receiving the information. It would need unusual circumstances for this defence to be raised successfully in relation to video downloads where no obvious duty exists, and where access to the downloads is likely to be available to the world at large through the global nature of the internet. As with fair comment, a qualified privilege defence can be defeated if the claimant can provide the defendant acted maliciously.

Who is responsible for the publication?

The individual who took the footage and made it available for download on the internet can be liable for defamation. However, often it is not possible to identify the person responsible because the material will have been posted anonymously or the individual will have used an alias. In such circumstances it may be possible to obtain their details from the website administrators, but that is by no means certain. Unless the identity of the individual who posted the offending material can be ascertained, no claim against them can realistically be pursued. In addition, even if the poster of defamatory material can be identified, there may be commercial reasons which dictate that legal action against him may be futile.

Internet Service Providers (“ISPs”), who enable the information to appear on the internet, can also be held liable for defamatory publications. ISPs are not expected by the law to be aware of all the content which is on the websites that they facilitate. Due to the sheer volume of material they cannot practically be expected to police every item which appears. Consequently, the law will only hold an ISP liable after they have first been notified of a defamatory posting which they then fail to remove.

Can I get the video clip removed?

As a first practical step, a letter or email demanding removal of the offending material should be sent to the website featuring the video clip, to the ISP, and, if appropriate, also to the poster of the material. If the website and ISP are UK based, they will normally oblige (at least in the short term while they investigate the matter) to avoid the possibility of legal action. The situation is somewhat different if the website and the ISP are based outside the England & Wales jurisdiction. In such cases, although our law of defamation will apply to the publication of the material when it is downloaded in this jurisdiction, those responsible are likely to be in jurisdictions where the defamation laws are very different. Inevitably, taking action to deal with publications which emanate from overseas is more complicated and expensive (not least in relation to the service of proceedings). The large international companies such as YouTube and Google tend to be quite responsive to legal concerns. However, small foreign-based ISPs present greater problems and to pursue one of these may be both frustrating and costly.

If correspondence fails to get defamatory footage removed, one can consider legal action. The commercial and practical factors will now assume great importance when conducting the cost/benefit assessment of whether to proceed. The scope and seriousness of, and the damage caused by, the defamatory material will be key considerations. A claim may not be worth pursuing for pragmatic and cost reasons, even where the allegations are appalling, for example if the offending material was posted by an anonymous individual hosted by a South American ISP which has only attracted a handful of hits.

Is there a limitation period for legal action?

Yes – one must take Court action within 1 YEAR from the date of publication of defamatory material. However, on the internet, each time a video clip is downloaded for viewing it constitutes a fresh publication and consequently renews the limitation period. Inevitably, however, a new item tends to be viewed more frequently in the days or weeks immediately after it first appears, and in defamation law, one is expected to take action promptly against an attack on one's reputation.

PRIVACY

What is the applicable law?

Article 8 of the European Convention on Human Rights states: *“Everyone has a right to respect for his private and family life, his home and his correspondence”*.

What constitutes an invasion of privacy?

To determine whether an individual's privacy has been breached, the Court will apply a two stage process:

1. First, it must identify whether an individual has a reasonable expectation of privacy in the given circumstances.
2. If the answer to that question is yes, the Court must then consider and balance other Convention exceptions and rights such as public interest and the right to freedom of expression in order to reach its decision.

Can a police officer filmed on duty claim an invasion of privacy?

When an officer is on duty, he or she is a public servant who is at all times accountable to the general public. For this reason, an officer filmed in such circumstances would not normally enjoy an expectation of privacy and could not therefore claim that the subsequent publication of video footage on the internet constituted a misuse of his or her private information. The legal position might be affected if the footage is accompanied by derogatory text or commentary which may then give rise to a claim for defamation.

Can footage of a police officer filmed off duty amount to an invasion of privacy?

If footage of an officer who has been filmed while off duty is featured on a website, the situation is likely to be different. The Court will first consider whether it is reasonable for the officer to believe that the matter was private and whether there was a public interest in publishing the material on the internet. Thereafter the Court will consider whether there is anything to justify the publication, in particular, the Article 10 right to freedom of expression. Each case turns on its own facts and requires a Court to seek to balance the individual's right to privacy against the other Convention rights.

What action can be taken if a police officer believes his or her privacy has been breached by internet video footage?

A breach of privacy gives rise to a civil claim which is pursued by action through the Courts. A high profile recent example is the case successfully brought by Max Mosley against the News of the World over the material which was published in the newspaper and on its website about his S&M activities in a private Chelsea flat.

If an officer becomes aware that private material might be published before it actually appears then, depending on the evidence, there may be grounds to seek an injunction to prevent it being shown.

I hope that you will find the foregoing useful.

Yours sincerely



IAN RENNIE
General Secretary