

ITAC – Response Paper



Protecting Canadians' Reputation Online: *Response to the Privacy Commissioner's Report on Online Reputation*

Release Date: April 2016

ITAC

INFORMATION TECHNOLOGY
ASSOCIATION OF CANADA

ACTI

ASSOCIATION CANADIENNE
DE LA TECHNOLOGIE DE L'INFORMATION

As Canada's national ICT business association, the Information Technology Association of Canada (ITAC) champions the development of a robust and sustainable digital economy in Canada. A vital connection between business and government, we provide our members with the advocacy, networking and professional development services that help them to thrive nationally and compete globally. A prominent advocate for the expansion of Canada's innovative capacity, ITAC encourages technology adoption to capitalize on productivity and performance opportunities across all sectors. A member-driven not-for-profit, ITAC has served as the authoritative national voice of the \$170 billion ICT industry for 60 years. More than 36,000 Canadian ICT firms create and supply goods and services that contribute to a more productive, competitive, and innovative society. The ICT sector generates one million jobs directly and indirectly and invests \$4.9 billion annually in R&D, more than any other private sector performer.

The internet and social media have delivered immeasurable benefits to Canada's economy and the lives of Canadians. However, as with any communications transformation, societies must develop a balanced consensus between the rights of personal privacy and free expression. In its January 2016 white paper *Online Reputation: What are they saying about me?*, the Office of the Privacy Commissioner of Canada (OPC) invites a conversation on the reputational challenges that emerge as more social interactions take place online and content that would have historically been confined to offline archives has become easily searchable. While this is a substantive issue that will require inputs from a broad range of stakeholders, the Information Technology Association of Canada (ITAC) is pleased to provide a technology industry perspective on how the government might work with the technology industry and other stakeholders to help Canadians to protect their online reputation.

ITAC is the authoritative national voice for Canada's \$170 billion information and communications technology (ICT) industry. Canada's 36,000 ICT firms generate over 1.1 million jobs directly and indirectly. The ICT industry in Canada also creates and supplies goods and services that contribute to a more productive, competitive and innovative economy and society. As an association, we count among our membership several major Canadian and multinational companies that have been at the centre of debates on online reputation around the world. While many international conversations around online reputation have focused on search and social media companies, it's important to note that Canada is also home to a growing cadre of fast growing "web-tech" firms in fields ranging from online education to instant messaging that could be substantially impacted by any new government regulations concerning online reputation. For these reasons, ITAC is pleased to continue working with the OPC to ensure Canada creates a regulatory environment that protects the privacy of Canadians, while not hampering the ability of businesses to compete globally.

Are New Rules Necessary to Protect Online Reputation?

The OPC paper outlines a number of challenges to personal privacy and online reputation that have recently come to the fore. However, prior to considering new legislation and regulatory actions, it is important to think about whether there is a need for new rules, or if existing legal protections can be leveraged to fill any perceived gaps.

Existing Defamation, Online Crime and Cyber Bullying Protections

Where defamatory content is concerned, individuals can protect their reputation by seeking an order for the removal of the offending publication and compensatory damages. These legal remedies apply to the publication of defamatory content on the

internet. In fact, Canadian courts have consistently applied the law of defamation to libelous statements published on the internet.¹ Further, Canadian common law provinces arguably provide stronger protection against defamation than other jurisdictions. For example, unlike the law of defamation in the U.S. which requires evidence of malicious intent on the part of the publisher of the defamatory statement,² the law of defamation in Canadian common law provinces requires only evidence that the published words tend to lower a person's reputation based on untruths.³

In addition to the law of defamation, and as the OPC report notes, Canada recently amended the *Criminal Code* through the *Protecting Canadians from Online Crime Act*, 2015, criminalizing many online activities that could cause significant harm to an individuals' reputation, such as the non-consensual sharing of intimate images, online harassment and online impersonation. Several provinces have also introduced legislation to protect individuals from cyber bullying and harassment.

Beyond existing legal avenues, businesses operating in online spaces have taken independent steps to protect Canadians from malicious or defamatory content. For example, many mainstream sites that publish user comments, such as newspaper message boards, have adopted posting policies and taken steps to make it easier to report and remove inappropriate user-generated content. Social media sites, like Facebook and Twitter, also maintain posting guidelines and have created processes whereby content that infringes on community rules can be reported by users.⁴ Some of these moderating policies have been implemented in response to court rulings, but it is also in a social media platform's self-interest to maintain a positive online environment where users can express ideas free from harassment.

In most cases, these existing legal and voluntary mechanisms provide significant protections for Canadians from online defamation and harassment. However, one potential gap in the current approach is the time, effort and expense required to seek legal redress through some of these avenues. We encourage the Government of

¹ *Burke v. John Doe*, 2013 BCSC 964 , *Eastview Properties Inc. v Wayne Mohamed*, 2014 CanLII 52397 (ON SCSM), *Knott Estate v. Sutherland*, [2009] A.J. No. 1539 (Alta. Q.B.), *SJF v. RMN*, 2013 BCSC 1812.

² Quebec's Civil Code is an exception to the Common Law approach in the rest of Canada. For details on Quebec's libel system (under Article 1457 of the Civil Code) see *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, [2004] 3 S.C.R. 95, 2004 SCC 53 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2168/index.do> . For details on the American libel system see, *New York Times Co. v. Sullivan* 376 U.S. 254 (1964):

<https://supreme.justia.com/cases/federal/us/376/254/case.html>

³ See *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7837/index.do>

⁴ To view Facebook's Community Standards see: <https://www.facebook.com/communitystandards>. To view Twitter's posting rules see: twitter.com/rules.

Canada to establish greater protection for individual reputations online by providing individuals with efficient means of redress through existing legal mechanisms. Further, we encourage the Government of Canada to foster a safer overall online environment by enforcing existing laws aimed at curbing malicious and defamatory online activities.

The Need for International Cooperation

As the OPC notes, another gap exists where defamatory content is posted on sites or servers outside of Canada and ostensibly beyond the reach of Canadian law. Examples like that of Lee David Clayworth, a teacher whose professional reputation was smeared by an ex-girlfriend in Malaysia, demonstrate the challenges for individuals to seek redress in international courts.⁵ Rogue actors can also take advantage of jurisdictional limitations to hide criminal activity, which the OPC argues is the case with the Global24h.com. In some cases, Canada could pursue the creation of Mutual Legal Assistance Treaties (MLATs) to expedite legal processes. However, since the challenges posed by online crime and harassment are not unique to Canada, the Government of Canada should not seek to address them in isolation. Canada should work with industry and other national governments, through organization like the Organization for Economic Cooperation and Development (OECD) to develop common and collaborative approaches to online crime. The internet is global and only through a joint public/private international approach can a consistent and reliable system of protecting online reputation across borders be effectively created.

Independently introducing new regulatory restrictions could also undermine Canadians' ability to participate in the global online community. The internet is a big place, and Canada is a small market representing less than 0.01% of the world's population. If Canada creates a challenging environment for online businesses to operate, it could result in Canadians not being able to access the same services as users in other jurisdictions. It could also make Canada a less attractive place for entrepreneurs to start a new online business.

The Need for Cyber Hygiene Education

As the OPC report notes, not all content that can damage an individual's reputation is created by others. Oftentimes it is a user's own words that come back to haunt them. Today, most mainstream social media sites allow users to delete their own content and accounts. Some online mail services have built in time-delay protections that give users the time to think twice about an email before it is delivered. However, as the OPC report

⁵ See <http://www.cbc.ca/news/canada/british-columbia/teacher-powerless-to-stop-ex-girlfriend-s-cyberstalking-1.1314610>

notes, these protections do not prevent potentially regrettable posts from being “screen captured” and exported.

Ultimately, the best way to protect a user’s reputation from their own content is education. As the report notes, the OPC has taken some initial steps in educating Canadians, especially children and youth, on the risks of posting too much personal information online, but much more needs to be done.

Online interactions are now a central part of social and economic life for virtually all Canadians. Cyber hygiene education, encompassing everything from protecting your online reputation to cyber security, needs to become a core part of Canada’s education system. The OPC, as part of its mandate to educate the public, should launch a public awareness campaign to encourage the public to “think twice” before they post, similar to the 2014 “Stop Hating Online” campaign. The technology industry will also continue to do its part in informing the Canadian public about these issues, including by developing awareness-raising and educational materials.

Search Engine Results and the Potential Impacts of a “Right to Be Forgotten”

As noted above, the best way to deal with defamatory or criminal content posted online is to address it through the courts, which have a long history of balancing the rights of free expression with personal privacy. ITAC does not support the introduction of an EU-style “right to be forgotten” that would require search engines to evaluate individual requests for specific search results to be blocked based on Canadian privacy law.

There are already particular circumstances when search engines block results to comply with local laws, such as preventing online piracy and child pornography. Requiring search engines to accommodate requests in the subjective space of online reputation is much more complex and costly for search providers. For example, in the EU, since 2014, Google has received 413,611 individual requests for links to be removed or altered in search results from 1,435,771 URLs.⁶ To date approximately 60% of these requests have been rejected. Because the EU has declined to establish a state-led legal forum for arbitrating search amendment requests, each of these requests has to be investigated and adjudicated by the company. This amounts to Google having to review more cases than the entire Canadian justice system faces in a year, which is

⁶ Google Transparency Report (Accessed April 4, 2016).
<https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>

an unfair burden for any government to place on private industry.⁷ While internet businesses have shown themselves willing to work with governments to remove content or alter search results in compliance with court orders or legal requirements, no business should be forced by government into the unenviable position of having to decide where to strike the balance between the right to privacy and freedom of expression – this is a responsibility for governments which, in democratic societies, are elected to represent the will of the people.

It is also questionable how effective a “right to be forgotten” regime will be in the long-term at protecting online reputation. For instance, free speech advocates and news publications have begun cataloguing and reposting articles that have been removed from search results in the EU.⁸ The EU rule also potentially undermines the viability of search engines that try to comply with the law as the more search results are filtered, the greater incentive there is for new, non-compliant operators to enter the market offering completely unfiltered search results. The history of the internet has demonstrated its boundless ability to innovate and fill vacuums created by regulation.

Should a “Right to Be Forgotten” Be Pursued...

While we as an industry *strongly oppose* the creation of a Canadian regime similar to the EU’s “right to be forgotten,” should the Government of Canada decide to pursue such a policy, ITAC would put forward three recommendations:

1. Develop a national consensus on who and what is eligible to be “forgotten”
As the OPC paper notes, the categories for who and what are eligible for removal from search results are complex. Prior to the launch of the EU regime, Google assembled an advisory council of academics and experts who conducted extensive consultations across Europe to help determine the circumstances through which search results should be altered.⁹ Should the Government of Canada pursue the creation of a “right to be forgotten,” it should only do so after a similarly extensive consultation with Canadian citizens and businesses.
2. Any “right to be forgotten” should be overseen and impartially administered by a government appointed regulator based on clear principles articulated through legislation passed by Parliament

⁷ For comparison, the entire number of criminal court cases in Canada in 2013-14 was just over 360,000. <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226-eng.htm#a1>

⁸ For example, see the Telegraph’s listing of stories impacted by the right to be forgotten. <http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html>

⁹ For more information on the Google Advisory Council, see: <https://www.google.com/advisorycouncil/>

As stated above, private industry should not be asked to determine how the balance should be struck between the right to privacy and freedom of expression. This is a fundamental responsibility of government. Private industry should be entitled to rely on lawful orders issued by a regulatory body and should be entitled to appeal those orders to the courts where the orders are incorrect as a matter of law.

3. Restrict any domain or search restriction rulings to Canadian (.ca) variations
Any orders requiring the removal of search results must respect the differing national attitudes toward freedom of speech and personal privacy. As such, should the Government of Canada require search engines to remove or change search results, those changes should be restricted to results returned in Canada's ".ca" variant of any site. This is another area where Canadian regulators should work with international counterparts to develop a consensus on search restrictions within their own jurisdictions.

ITAC Recommendations

In summary, with regard to protecting online reputation, ITAC recommends that the OPC and the Government of Canada:

- Consider ways to leverage Canada's existing legal processes and protections against online defamation and harassment to make it easier for Canadians to access those protections.
- Work with industry and other international partners, through organizations like the OECD and UN, to develop common and collaborative approaches to removing defamatory content and disrupting criminal activity across borders.
- Work with industry and provincial colleagues to make comprehensive "cyber hygiene" education a core element of Canada's school curriculum.
- Utilize the OPC mandate for public education to launch an awareness that encourages Canadians to "think twice" before posting content online.