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2007 MLRC PRE-DINNER FORUM

Media Going Digital:

Advising Clients on their Internet Operations

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Grand Hyatt New York, Conference Level

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INTERNET LAW: A Field Guide
Fifth Edition

This Primer is excerpted from
INTERNET LAW: A FIELD GUIDE, FIFTH EDITION
to be published fall, 2007

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Editor’s Note: This primer is excerpted from Jonathan Hart’s Internet Law: A Field Guide (Fifth Edition), which was published on November 6, 2007. The book is a practical guide to the principal legal issues relating to the Internet, with a focus on statutory, regulatory, and case law developments. Each chapter ends with a summary of the material covered, and these summaries are presented here along with the author’s Preface. The book is 862 pages in length and comes with a CD-ROM that includes the complete text of the book in searchable format, plus selected court decisions, statutes, and regulations. The book (stock # 1683) can be ordered from BNA Books at 1-800-960-1220 or on the Web at www.bnabooks.com.

Preface

The law isn’t as mysterious as it’s often made out to be (sometimes even by lawyers). The common-law system—under which judges assess the facts before them in light of prior decisions that were made by other judges based on the facts that were then before those judges—is actually remarkably logical. Although an individual judicial decision may be wacky, the body of law that evolves over time almost always makes sense, allowing lawyers to extrapolate from past results to predict how courts will treat fact patterns they haven’t yet encountered.

The common-law system is also remarkably flexible. The common law (that is, the law as it evolves through a series of judicial decisions, as opposed to law created by a legislature’s enactment of a statute) adapts gradually, over time, to meet an ever-changing world. From time to time, the pace of this evolution quickens. Over the last dozen years, the law that governs electronic publishing, marketing, and commerce has evolved rapidly, as our world has been redefined by the Internet. This volume tracks that development.

Because the law isn’t static, this volume doesn’t just present a snapshot of where Internet law stands today. It explains recent developments in light of what came before, in the hope that this background will help readers anticipate what’s to come.

Each chapter opens with an introduction to the area of law treated in that chapter. In most instances, this is law that pre-dates the Internet. These introductions can be a useful refresher for lawyers, but they are also designed to give students and those operating websites without significant legal training context in which to ground their understanding of the Internet-specific legal developments described in the chapter. By concentrating on
the facts of cases discussed, rather than dwelling on doctrine, this volume seeks to give
readers not just an understanding of where the law is today, but the background necessary
to anticipate where the law is going, and to put in context the legal challenges they may
encounter. Each chapter ends with a practical summary of the law treated in that chapter.

We’ve updated this edition to reflect developments occurring through December 31,
2006. Developments occurring during 2007 will be treated in the next edition. In the
meantime, readers can keep current by reviewing BNA’s weekly Electronic Commerce &
Law Report.

This volume is not intended to be read cover-to-cover. It is, admittedly, not a page-
turner. It is, instead, a tool designed to help readers find answers to their questions about
web publishing law. To that end, the 2007 edition of this Field Guide includes a CD-
ROM that makes the full text searchable. The CD-ROM supplements the comprehensive
index and detailed table of contents to make it easier to find information quickly. The
CD-ROM also contains the full text of key statutes, regulations, and judicial opinions
discussed in the Field Guide, so that practitioners will have ready access to important
primary-source materials and students and web publishing professionals will be better
able to understand how the law has developed and is developing to accommodate the
publishing, marketing, and commerce revolution made possible by Internet technology.

We welcome your comments. If you see anything in this volume that you believe is
inaccurate, we’d be grateful if you’d bring it to our attention. If there are subjects that
you’d like to see us cover in future editions, please let us know. We hope that this
Field Guide is useful to you and that it will help you ensure, whether as a web publishing
professional or a lawyer, that “debate on public issues [remains] uninhibited, robust, and

Jonathan D. Hart

April 2007
Chapter 1: Freedom of Speech

Summary of the Law

- The U.S. Supreme Court has held that speech on the Internet is subject to the highest level of First Amendment protection, the same level of protection afforded books, newspapers, and magazines. (The government has somewhat broader latitude to regulate broadcast speech.)

- All speech is protected by the First Amendment, except for speech that falls within several narrowly defined categories: child pornography; speech that advocates imminent lawless action; speech meeting the constitutional test for obscenity; and certain speech that is shown to be false, defamatory, and uttered, depending on the circumstances, with knowledge of its falsity, with reckless indifference to its truth or falsity, or negligently.

- The First Amendment prohibits governmental restrictions on speech. The First Amendment directly limits the power of the federal government to impose restrictions on speech. The First Amendment applies to state governments through the Fourteenth Amendment.

- The First Amendment does not prohibit private entities from prohibiting or regulating speech in places, or through media, they control.

- Restrictions that are based on the content of protected speech are generally prohibited. A restriction is considered content-based if it is aimed at the communicative impact of expression. A content-based regulation will be found constitutional only if the government can show that it is necessary to serve a compelling governmental purpose and that it is narrowly drawn to achieve that end.

- Restrictions that are content-neutral may be permissible. A restriction is deemed content-neutral if it is aimed at something other than the communicative impact of expression, even if it has the effect of burdening some expression. A content-neutral restriction may be found constitutional if it serves an important or substantial governmental interest, is crafted as narrowly as possible to address that interest, and leaves alternative channels of communication open to those whose speech the law restricts.

- A law that bans a substantial amount of protected speech along with speech that may be regulated may be found unconstitutionally "overbroad." A law may be found unconstitutionally vague if the conduct forbidden is defined so unclearly that a reasonable person would have difficulty understanding the difference between legal and illegal conduct.

- Courts have recognized that the right to speak anonymously is a component of the First Amendment right to free speech. Accordingly, courts have been reluctant to require Internet service providers to identify users who have posted messages anonymously unless the party seeking to identify the anonymous speaker can make a case for why identification is warranted. Where the plaintiff sues a "John Doe," the court will ordinarily require the plaintiff to establish a good-faith basis for bringing the suit before it will compel an ISP to identify the anonymous-speaker defendant. Where the anonymous speaker is not a party to the case, the court is likely to require the party seeking the speaker's identity to demonstrate
that identifying the speaker is essential if the party is to establish its claims or defenses.

- Nearly every state recognizes a reporter's privilege that protects journalists from being forced to reveal the identities of their confidential sources. States differ as to the extent that online journalists and bloggers receive protection under their reporter's privilege laws. Although there is currently no express reporter's privilege under federal law, there appears to be growing support for a federal shield law in both houses of Congress.

- No other country protects speech as vigorously as the United States. Speech on the Internet that is protected under U.S. law may well be illegal or unprotected in other countries.

Chapter 2: Trademarks

Summary of the Law

- A trademark is a designation that identifies the source of goods or services, and distinguishes that source from other sources. Trademark rights can be acquired through use of a mark to brand a product or service ("common law" trademark rights), through registration of a trademark, or through the "fame" of the mark. Trademarks are governed by federal and state statutes and by common law.

- The federal law that governs trademarks is the Lanham Act. Under the Lanham Act, to prevail on a trademark infringement claim, a plaintiff must demonstrate ownership of the mark and a likelihood of consumer confusion resulting from another’s use of the mark.

- Remedies for trademark infringement include injunctive relief, disgorgement of defendant’s profits from use of the trademark, damages to the plaintiff, and costs incurred in bringing the action.

- Most Internet-related trademark disputes reflect a trademark owner’s desire to establish or maintain online brand recognition and loyalty. A website operator may be liable for trademark infringement for displaying another’s trademark on a website, without permission, in a way that implies an association between the website and the trademark owner.

- An Internet service provider (ISP) may be liable for contributory trademark infringement for infringing material posted by a third party on a website that is under the ISP’s control.

- Linking from one website to another website, by itself, does not amount to trademark infringement. Linking may present trademark infringement questions if the link implies an endorsement of or association with the linked-to site. "Deep-linking" (that is, linking directly to particular pages within a website rather than the website’s home page) may also raise trademark infringement issues if the deep-link leads consumers to believe there is an association between the sites.

- Framing a website (that is, displaying another's website within the pages of one's own website) can potentially constitute trademark infringement if the frame leads website visitors to believe there is an affiliation or association between the websites when there is not.
- A metatag is a word or code embedded in a data field on a website that is not normally part of any publicly viewable web page. Search engines read a website’s metatags to determine the subject(s) addressed on the site so that the search engine can determine whether the site is responsive to a search query input by a user. Some website operators include on their sites metatags that incorporate the trademarks of their competitors so that when a user searches for a competitor the search results include the website operator’s site. Courts have found that using a competitor’s trademark in metatags may constitute trademark infringement when such use causes user confusion about the origin or affiliation of the website. In some instances, use of trademarked terms in metatags will not amount to trademark infringement if the use is not intended to deceive or confuse consumers.

- Contextual marketers monitor the Internet activity of computer users (analyzing the search terms they include in search engine queries, the URLs of web pages they visit and/or the words that appear on these pages) and target contextually relevant advertising to users based on their apparent interests as reflected in their Internet activity. Various trademark owners have brought suit against contextual marketers, claiming that their monitoring practices and/or the appearance of their pop-up ads on users’ computer screens constitute trademark infringement. To date, the courts have consistently rejected these claims.

- Search engines have been selling advertisers the right to have their ads displayed as “paid search” results when users submit search queries that include a competitor’s trademark. Courts have split on whether this practice infringes the rights of the trademark owner.

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### Chapter 3: Domain Names

#### Summary of the Law

- A domain name is not always entitled to trademark protection. A domain name is protectable, under trademark law, only if it is used to brand the website to which the domain name resolves. If the domain name is only used as a web address, it is generally not protectable as a trademark.

- Registering a domain name that incorporates another’s trademark can constitute trademark infringement if the domain name creates a likelihood that consumers will confuse the domain name and the trademark.

- Courts analyze domain name disputes between trademark owners with competing claims to a domain name under the traditional principles of trademark law.

- “Cybersquatting” is the registration of a domain name that is associated with someone else’s trademark in order to benefit from the association with that mark. “Typosquatting” is the registration of a domain name that is similar in spelling to another’s domain name to capitalize on a user’s typing error to lead the user to the squatter’s site instead of the site the user intended to visit. Prior to the 1999 enactment of the Anticybersquatting Consumer Protection Act (ACPA), cybersquatting and typosquatting cases were analyzed exclusively under traditional principles of trademark law.
A federal law enacted in 1999, the ACPA, imposes liability for registering, trafficking in, or using a domain name that is identical or confusingly similar to another’s trademark (or that dilutes a famous mark), with a bad-faith intent to profit from the domain name.

Typically, courts have found violations of the ACPA where the registrant registered a domain name that was identical or confusingly similar to someone else’s mark for the purpose of selling it or diverting consumers who are seeking the trademark owner’s site, or where the registrant was a competitor of the trademark owner.

Courts will ordinarily allow the use of a trademark in the domain name of a parody website or a “gripe site” on First Amendment grounds (described in Chapter 1), so long as neither the domain name nor the website is likely to cause consumer confusion as to the origin or sponsorship of the site.

The Internet Corporation for Assigned Names and Numbers (ICANN) manages much of the domain name registration system. ICANN approves and accredits domain name registrars. ICANN-approved registrars administer domain name registrations for the top-level domains (TLDs) “.aero,” “.biz,” “.cat,” “.com,” “.coop,” “.info,” “.jobs,” “.mobi,” “.museum,” “.name,” “.net,” “.org,” “.pro,” and “.travel.” ICANN does not oversee the “.edu,” “.gov,” or “.mil” TLDs, which may be used only by qualified entities.

ICANN adopted the Uniform Domain Name Dispute Resolution Policy (UDRP), which governs disputes over all “.aero,” “.biz,” “.cat,” “.com,” “.coop,” “.info,” “.jobs,” “.mobi,” “.museum,” “.name,” “.net,” “.org,” “.pro,” and “.travel” domain names. Under the UDRP, a complainant (a person claiming to have rights in a domain name registered to another person) can bring a claim before one of four authorized dispute resolution providers: the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), the CPR Institute for Dispute Resolution (CPR), or the Asian Domain Name Dispute Resolution Centre (ADNDRC).

A UDRP claim is an administrative procedure, separate and distinct from a claim brought in a federal court under the ACPA. The only remedy available in a UDRP claim is transfer or cancellation of the disputed domain name. To prevail in a UDRP proceeding, a complainant must establish: (1) that the domain name is identical or confusingly similar to a trademark in which the complainant has rights; (2) that the domain name registrant has no legitimate interests in the domain name; and (3) that the domain name was registered and is being used in bad faith.

In addition to hearing disputes concerning domain names that include trademarks, UDRP service providers hear disputes over domain names that incorporate personal names or geographic identifiers.

Chapter 4: Copyright
Summary of the Law

The Copyright Act of 1976 affords copyright protection to “original works of authorship fixed in any tangible medium of expression.” Copyright law does not
protect ideas, facts, procedures, or discoveries; copyright protection instead attaches to the unique manner in which ideas or facts are expressed.

- Registration with the U.S. Copyright Office is not required to achieve copyright protection. Rather, copyright attaches automatically at the moment a work is fixed in a tangible form.

- Examples of works subject to copyright protection include literature, music, motion pictures, artistic works, photographs, essays, articles, computer programs, graphic designs, and sound recordings. Under the Digital Millennium Copyright Act of 1998 (DMCA), works created in digital media are also protected, provided such works can be perceived, reproduced, or otherwise communicated for more than a transitory period.

- The duration of a copyright is usually the life of the author of the work plus 70 years. For corporate-authored works or works made for hire, the term of copyright protection is 95 years from the date of publication, or 120 years from the date of creation, whichever is shorter.

- A copyright owner has certain exclusive rights with respect to a protected work. A copyright owner has the right, or the right to authorize others: (1) to reproduce the work; (2) to prepare derivative works; (3) to distribute copies of the work; (4) to display the work publicly; (5) to perform the work; and (6) in the case of sound recordings, to transmit the work in digital format. Using a copyright-protected work in any of these manners without permission ordinarily constitutes copyright infringement.

- The doctrine of "fair use" provides a limited defense to otherwise infringing uses of a copyright-protected work. Fair use permits the use of a copyright-protected work, for such purposes as commentary, criticism, teaching, scholarship, and research, without permission of the copyright owner. Whether a use is fair under this doctrine requires a fact-based analysis, and is decided on a case-by-case basis. Courts will consider four factors in determining whether an infringing use may be excused as "fair": (1) the purpose and character of the use; (2) the nature of the original work; (3) the amount and substantiality of the portion of the original work that is used; and (4) the effect of the use on the potential market for or value of the original work. Courts have applied these factors to web publishers in essentially the same way they have applied them to traditional print media.

- There are several statutory exemptions to copyright infringement. In certain situations, entities including libraries, schools, broadcast stations, and cable systems may use copyrighted works, or parts of such works, without authorization from the copyright owner.

- Linking from one website to another generally does not constitute copyright infringement. Providing a "deep-link" to a page that is not the home page of the linked site may have copyright implications, although a number of courts have held that such practice does not infringe copyrights.

- Several courts have found that framing another's site without permission—that is, displaying the site within a frame that makes the framed content appear to be incorporated within the framing site—violates the framed site's copyrights.

- The owners of a website can be found liable for infringing content posted to the site by others. Website operators can be found liable for direct, contributory, or
vicarious copyright infringement, depending on the website operator's knowledge of and control over the activities of the infringer.

- Under the DMCA, it is unlawful to access a work in digital format that is protected by an effective anti-piracy measure, such as encryption, coding, or password protection. The DMCA includes a "safe harbor" that shields Internet service providers from liability for the copyright-infringing activities of their subscribers.

- Copying and distributing copyright-protected content (such as movies and music) without authorization from the copyright owner may constitute a violation of copyright law.

- The ease with which content in digital format can be reproduced and shared over the Internet has led to growing concern about copyright protection in the music and motion picture industries. In their efforts to combat Internet music file-sharing, record labels first sought relief from the distributors of file-sharing software. In 2002, the U.S. Court of Appeals for the Ninth Circuit found that Napster, which provided software that enabled Internet users to download digital files—typically music files—from other users, was not entitled to immunity from copyright infringement liability under the DMCA. The court found Napster vicariously and contributorily liable for infringing the copyrights of various record companies. In 2005, the Supreme Court incorporated into copyright law an "active inducement" standard, long recognized under patent law, and held that two other filing sharing services, Grokster and StreamCast, could be held liable as secondary infringers if they actively induced end-users of their services to infringe copyright-protected works. Significantly, the Supreme Court reaffirmed that one cannot be held liable for secondary copyright infringement merely because one distributes a product that can be used for infringing purposes, so long as the product is also "capable of substantial non-infringing uses."

- The Record Industry Association of America has also taken steps to curb infringing file-sharing by bringing widely publicized suits against individual Internet users who allegedly share copyright-protected music over the Internet without compensating the copyright owners. While millions of Internet users reportedly continue to download and share music over the Internet freely, and in apparent violation of copyright law, several legitimate music file-sharing services are now available on the Internet. The motion picture industry has adopted a similar approach to curb file-sharing of movies.

Chapter 5: Defamation

Summary of the Law

- A defamatory statement is one that injures the reputation of another. The common law torts of libel and slander punish the publication of statements that are both defamatory and false. Money damages may be awarded to compensate the victim of libel or slander for the reputational injury caused by publication of the false and defamatory statement.

- A libelous statement was traditionally a false and defamatory statement published in writing. A slanderous statement was a false and defamatory
statement expressed orally. False and defamatory oral statements broadcast over radio or television are now widely considered libel, rather than slander.

- To reconcile the tension between libel law, which punishes speech, and the First Amendment guarantee of freedom of speech, the Supreme Court has limited the circumstances under which a publisher may be punished for making false and defamatory statements.
- A libel plaintiff must prove that the challenged statement is false; the publisher does not have the burden of proving truth.
- A plaintiff that is a public official or a public figure can only recover for libel if he/she/it can prove that the defendant published the defamatory statement either with knowledge that the statement was false or with serious subjective doubt about the truth of the statement.
- A private figure plaintiff must prove, at a minimum, that the defendant was negligent in publishing the allegedly defamatory falsehood.
- Courts have long distinguished among those who publish or republish a defamatory statement, those who deliver or transmit material published by a third party, and those who merely provide facilities used by a third party to publish defamatory material.
- “Publishers,” such as newspapers, magazines, and broadcasters, control the content of their publications and are, accordingly, held legally responsible for any libelous material they publish.
- “Distributors,” such as bookstores, libraries, and newsstands, cannot be held liable for a statement contained in the materials they distribute unless they knew or had reason to know of the defamatory statement at issue. Distributors are under no duty to examine the publications that they offer for sale or distribution to ascertain whether they contain defamatory statements.
- Common carriers, such as telephone companies and Internet service providers, which do no more than provide facilities by which third parties may communicate, cannot be held liable for defamatory statements communicated through those facilities unless they have participated in preparing the defamatory material.
- Section 230 of the Communications Decency Act immunizes the provider of an “interactive computer service” from being held liable as the publisher or speaker of any information provided by “another information content provider.” With only a few exceptions, courts have interpreted Section 230 broadly, immunizing publishers from liability for freelance content, bulletin board postings, and other third-party content.
- In Zeran v. America Online, Inc., the leading case interpreting Section 230, the Court of Appeals for the Fourth Circuit held that “§230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.... Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” 129 F.3d 327, 330 (4th Cir. 1997). However, some courts have questioned whether such immunity extends to a distributor of content over the Internet when it knows or has reason to know of its defamatory nature.
• No other country enjoys defamation laws that are as speech-protective as those of the United States. A number of U.S. publishers have been sued for libel in foreign jurisdictions based on statements published on their websites, which are accessible worldwide.

• Many states have retraction statutes that protect writers and publishers by requiring that a potential libel plaintiff give notice before filing suit to allow the publisher and/or the writer to issue a clarification, correction, or retraction, if warranted. Depending on the state, publishing a retraction that conforms to the statutory requirements can reduce the damages available to the plaintiff or even bar a libel claim completely.

• It is not clear that all categories of online “publication” fit within the definitions of such statutes. However, courts have indicated that the closer an online publication is in form and content to a protected “traditional” printed publication, the more likely the online publisher will be protected under the retraction statute. Similarly, the more broadly the statute is written, the more likely “new” media publishers will be able to argue successfully that the statute applies to them.

• Courts have ruled that an electronic version of a print original does not constitute “republication.” Archived copies of original publications are likewise part of the original publication (and not separate “republications”).

Chapter 6: Data Collection and Privacy
Summary of the Law

• Although Congress has not passed comprehensive federal online privacy legislation, certain state laws, including a number of recent California laws, have the effect of regulating how most Internet publishers nationwide must address online privacy. Among these laws is the California Online Privacy Protection Act, which requires that all websites that collect personally identifying information about California residents conspicuously post a privacy policy statement and adhere to that policy.

• California has passed a number of other privacy measures, including its “Shine the Light” law, which allows Internet users in California to require a website to notify them of the third parties with which the website shares users’ personally identifying information.

• Unauthorized access to databases containing personally identifying information has become an increasing problem; 2006 saw a record number of reported security breaches. Other than the Department of Veterans Affairs data breach security law, no federal legislation requiring consumer notification in the event of a database security breach has yet passed; however, 35 states and the District of Columbia had enacted such legislation by the end of 2006.

• The only federal law that requires a website to post a privacy policy statement is the Children’s On-line Privacy Protection Act (COPPA). COPPA prohibits collection of personally identifying information from anyone under age 13 without prior, verifiable parental consent. Moreover, it requires any website that is targeted at children under 13, or that knowingly collects information from children under 13, to post a privacy policy statement that clearly identifies all data that the site collects, and clearly discloses how the site uses that data and with whom the site shares the data.
• If a website chooses to post a privacy policy, it must adhere to that policy. The Federal Trade Commission (FTC) considers a website’s failure to adhere to its own articulated privacy policy to be punishable under the FTC’s broad mandate to police “unfair and deceptive acts and practices.” Consumers that have provided information pursuant to a website’s posted privacy policy may also be able to sue the website for breach of contract if it violates its articulated policy.

• The FTC recommends that anyone maintaining a commercial website follow its five core privacy protection principles: (1) provide notice to consumers about how the website uses personal information; (2) offer choice as to how such information is used; (3) give consumers access to the information that is compiled on them; (4) ensure that the information is secure; and (5) provide a mechanism by which users can enforce these core principles.

• Medical information is protected from disclosure under the Health Insurance Portability and Accountability Act (HIPAA). The law establishes patient rights with respect to personal health-related information, including the right to access the information, the right to be told how the information may be shared, and the right to request correction of erroneous information.

• The Gramm-Leach-Bliley Act (GLBA) regulates the privacy practices of “financial institutions.” GLBA requires that financial institutions provide notice to consumers of their policies regarding the collection and use of personal information, and that they allow consumers to opt out of the disclosure of personal information.

• The Electronic Communications Privacy Act (ECPA) includes three sets of provisions that protect electronic communications: the Wiretap Act, the Pen Register Act, and the Stored Communications Act. The Wiretap Act prohibits the interception of transmissions containing electronic communications (including the contents of email communications). The Pen Register Act prohibits the interception of transmissions containing non-content information, such as email header data. The Stored Communications Act prohibits unauthorized access to and disclosure of data held in storage after transmission.

• The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to certain computers with the intent to cause damage. A suit for civil damages and injunctive relief can be maintained under the CFAA only if the party injured has suffered losses of at least $5,000 in any 1-year period.

• Some online privacy protections have been displaced by the USA PATRIOT Act. The Act provides law enforcement agencies with the ability to monitor some information that is transmitted by communications service providers, thereby reducing the level of anonymity that once existed for online communications.

• Many nations have enacted legislation that deals directly with the issue of online privacy. In 1998, the European Union adopted a Privacy Directive that, among other things, requires websites that collect personal information from their customers to obtain unambiguous consent from such customers. A Safe Harbor Agreement with the United States allows U.S. companies to comply in some respects with the Directive in order to insulate themselves from lawsuits for failure to comply with its requirements. The EU adopted a second Privacy Directive in 2002 to further address privacy concerns arising out of the use of electronic communications. More recently, Canada adopted an online privacy statute that requires businesses collecting personal information to obtain consent of customers, and also to name a privacy compliance officer to ensure compliance with the statute.
Chapter 7: Electronic Contracts

Summary of the Law

- Electronic contracts are the functional equivalent of traditional, paper contracts, except they are made online or using electronic media rather than on paper.

- A contract is formed when two people or entities, with knowledge of the terms of the contract, manifest their assent to those terms. Though some contracts (such as contracts for the sale of real estate, contracts to transfer copyright ownership, and contracts that can’t be fulfilled within a year from the date of formation) typically must be memorialized in writing to be enforceable, most contracts can be formed without a written document.

- An electronic contract, like a traditional paper contract, is formed when two people or entities manifest their assent to the material terms of a relationship memorialized in a written form. That assent may be express (for example, where a computer user types his or her name in the signature block of a contract presented electronically or clicks the “I Agree” button on an online brokerage agreement) or it may be implied from conduct (for example, where a user continues to access a website with the knowledge that by using the site he or she is accepting the terms of the site’s visitor agreement).

- Websites often post visitor agreements (also referred to as “user agreements,” “terms of use,” “terms of service,” and the like) to establish the ground rules for accessing the site and using the content and services provided within. Visitor agreements often include language intended to reduce the website operator’s exposure to liability, to advise users of the intellectual property rights claimed by the site operator, and to prohibit data scraping, harvesting of email addresses, framing of the site’s content, and the like.

- Much of the litigation over the enforceability of electronic contracts has been over contract formation. Did the party seeking to enforce the contract properly notify the other party of the terms of the proposed agreement, and did the party against which the contract is to be enforced understand that it was entering into a contract?

- A signature is a mark made to indicate assent. An electronic signature is an electronic indication of intent to sign a document. A digital signature is a signature executed through an encryption method that authenticates the signer’s signature.

- All 50 states and the District of Columbia have enacted legislation to require or encourage acceptance of electronic or digital signatures.

- The Uniform Electronic Transactions Act (UETA), which provides for acceptance of electronic signatures but does not require any particular type of electronic signature or method of authentication, has been adopted by 46 states, the District of Columbia, and the U.S. Virgin Islands.

- The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) was enacted to avoid wide variations in state law and to bolster public confidence in the legal validity of electronic contracts. E-SIGN makes electronic signatures legally binding, by prohibiting any rule of law that would deny legal effect to certain electronic contracts on the ground that they are not in writing (if
they are electronic records) or that they are not signed (if they have been signed electronically). E-SIGN preempts any state law addressing electronic signatures that gives greater legal effect to a particular technology.

- In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved UCITA, the Uniform Computer Information Transactions Act, an effort to standardize state laws governing computer information transactions. Support for UCITA appears to be waning. Only two states, Maryland and Virginia, have passed statutes based on UCITA, while four states—Iowa, North Carolina, West Virginia, and Vermont—have explicitly prohibited application of UCITA to residents of their states. In August 2003, NCCUSL withdrew UCITA from consideration for endorsement by the American Bar Association.

Chapter 8: Advertising, Marketing, and Spam

Summary of the Law

- Spam, as unsolicited commercial email is known, is a large global problem for users of electronic communications. Although studies indicate that more than 70% of all email is spam, a December 2005 report by the FTC indicates the volume of spam may be leveling off.

- Until the enactment of the CAN-SPAM Act of 2003, spam was regulated only at the state level. The CAN-SPAM Act preempts conflicting state laws, except to the extent that they prohibit false or deceptive content in emails. The CAN-SPAM Act requires senders of unsolicited commercial email to provide recipients with a valid and functional mechanism to opt out of receiving future email. The opt-out mechanism can be an Internet link or working reply email address, but in either case, a consumer’s request to opt out must be honored within ten business days. The statute also prohibits falsifying header information or subject lines, and creates a labeling requirement for emails with adult content. Enforcement is primarily vested in the FTC. Criminal enforcement power is also vested in the Department of Justice. State attorneys general and ISPs have the right to bring civil enforcement actions, as well. The statute does not provide individuals with a private right of action.

- The FTC has brought more than 20 cases under the CAN-SPAM Act, and a number of state attorneys general and ISPs also have brought enforcement actions under the Act. In one such suit, AOL was awarded a judgment of almost $13 million. The FTC also has obtained at least one criminal conviction under the Act. Suits to combat spam also have been brought under state laws by state attorneys general, ISPs, and individuals, with some success. The most notable is a judgment by a California court, awarding the state attorney general $2 million in damages against a spammer. In 2004, Virginia became the first state to convict spammers under its state spam law.

- Industry has undertaken some efforts to self-regulate spam. Several industry groups have announced guidelines for the sending of spam, although the most invasive spammers seem to pay little attention to these nonbinding guidelines. Other industry efforts to control spam include the establishment of private “blacklists” of known spammers made available to ISPs, which, in turn, may
block mail from those senders. The providers of these lists have faced lawsuits from companies claiming their legitimate messages were blocked. ISPs have also become more aggressive in fighting spam, introducing features such as challenge-response systems and Internet "scrubbers," as well as "whitelists" that are lists of legitimate commercial emailers whose messages are not to be blocked.

- Individual and corporate plaintiffs have traditional state law causes of action at their disposal to attempt to fight spam. Causes of action for trespass, invasion of privacy, computer fraud, unfair competition, and breach of contract have all been asserted against spammers, with varying degrees of success.

- International efforts at combating spam are also increasing. The EU Directive on Privacy and Electronic Communications is in effect and member states are adopting national laws to comply with the EU requirements. Unlike the U.S. CAN-SPAM Act, the Directive takes an opt-in approach to spam, prohibiting unsolicited commercial email without the prior affirmative consent of recipients. Australia has also been proactive in fighting spam, adopting a law in December 2003 that imposed severe penalties for sending spam and included an opt-in regime. Many countries have also signed agreements to increase international cooperation to combat the spam problem.

- Under the FTC Act, the FTC has authority to police unfair or deceptive trade practices that occur via the Internet. The FTC has used this power to take an active role in cracking down on fraudulent Internet advertising activities. In carrying out these efforts, the FTC has targeted, among others, the practices of Internet marketers of pharmaceutical products, Internet auction sites, and Internet gambling websites.

- Contextual marketers monitor the Internet activity of computer users (analyzing the search terms they include in search engine queries, the URLs of web pages they visit, and/or the words that appear on the pages they visit) and target contextually relevant advertising to users based on their apparent interests, as reflected in their Internet activity. Various website operators have sued contextual marketers on trademark and copyright theories. To date, these claims have been uniformly rejected by U.S. courts.

- Numerous states have enacted legislation designed to regulate spyware. Spyware legislation has also made significant progress in Congress, though no federal spyware law has yet been enacted. Most, though not all, of these legislative efforts attempt to distinguish between "spyware," which is generally considered to be malicious software that can collect and transmit a user's sensitive personal information, and "adware," which serves targeted advertising based on user interest often without collecting information on browsing habits. At least 16 states have enacted spyware laws, and proposals for other such laws were pending in at least 11 other states as of December 31, 2006. A number of suits have been brought under these laws; in one notable case, the New York attorney general reached a $7.5 million settlement with a spyware purveyor.

- The "right of publicity," which is the right of an individual to protect against the unauthorized exploitation of his or her persona, has been applied in the Internet context. In two notable 2006 cases, separate federal courts applied the same analysis that courts have used to evaluate right of publicity claims in traditional media to find that website operators had not violated plaintiffs' rights of publicity by posting certain information about the plaintiffs on their websites.
Chapter 9: Personal Jurisdiction
Summary of the Law

- Personal jurisdiction is the power of a court to render and enforce a judgment against a person or legal entity, such as a corporation. Limitations on when a court may properly exercise jurisdiction over a defendant that does not reside in the forum state protect a defendant from being forced to defend an action in a distant state with which the defendant has no real connection.

- Traditionally, a court had personal jurisdiction over those who lived, transacted business, or engaged in harmful conduct within the state’s borders. However, the nature of the Internet allows a person to transmit information easily across state lines, and a defendant may not even know where the transmission will be received.

- Web-based contacts between a defendant and a forum state may be enough to warrant a court’s exercise of personal jurisdiction over the defendant, even if the defendant never physically entered the forum state. The courts must determine whether exercising personal jurisdiction under the circumstances meets both the requirements of the state’s “long-arm” statute and federal constitutional fairness requirements embodied in the Due Process Clause of the Constitution.

- Personal jurisdiction may be either general or specific. Specific jurisdiction applies when the injury that is the subject of the suit arose directly out of the defendant’s contact with the forum state. General jurisdiction applies when the defendant’s contacts with the forum state are so pervasive that it is fair to require the defendant to defend in the forum state, even if the conduct out of which the suit arises occurred elsewhere. The U.S. Supreme Court has ruled that the federal Constitution requires that a defendant have sufficient “minimum contacts” with a forum state before becoming subject to the state’s jurisdiction.

- In Internet-related cases, courts will often look to the totality of the contacts a defendant has with the forum state to determine whether they are “continuous and systematic.” If so, the court may exercise general jurisdiction and determine whether the defendant is liable for a matter that occurred outside the state.

- A defendant’s actions that “target” a particular state may result in personal jurisdiction over the defendant in that state. Courts look at the facts of each case to determine whether the defendants “purposefully availed” themselves of the benefits of doing business in the state, or whether they “purposefully directed” their activities toward the forum state.

- In evaluating whether a given website is sufficiently connected with the forum state to permit the exercise of personal jurisdiction over the operator of the site, courts often apply a “sliding-scale” analysis, evaluating the nature and quality of the contacts the website has with the state. At one end of the spectrum are highly interactive websites that invite interaction by residents of the forum state. Courts often find such interactivity sufficient to permit the court to exercise jurisdiction over the website even if the website is not, in any physical sense, located within the state. At the other end of the spectrum are purely passive websites that display information but invite no real interaction. Courts often find that the ability of state residents to access such a site is insufficient to justify exercise of jurisdiction over the site by the state’s courts. Many websites fall between these two ends of the spectrum.

- Courts also may apply an “effects test” to determine whether the forum “is the focal point both of the story and the harm suffered.” Calder v. Jones, 465 U.S. 783, 788 (1984). This test
is often applied in the defamation, trademark infringement, and copyright infringement contexts.

Chapter 10: Business and Commerce on the Internet

Summary of the Law

Taxation

In December 2004, President Bush signed the Internet Tax Non-Discrimination Act, extending the Internet access tax moratorium until 2007.

- The moratorium has never prohibited states from collecting sales taxes on transactions consummated over the Internet. But such taxes are hard to collect. The courts have interpreted the Commerce Clause of the U.S. Constitution to prohibit a state from requiring an out-of-state merchant to collect sales tax on sales made to state residents, unless the merchant has a substantial physical presence in the state. Even though the buyer may owe sales tax on the purchase, few recognize this tax liability and even fewer pay the tax. The states, strapped for cash, are trying to change this. Legislators at the state and federal levels are considering legislation that would make it easier for states to collect tax revenues from online transactions.

- Forty-three states and the District of Columbia have banded together under the Streamlined Sales and Use Tax Agreement (SSUTA) to simplify their tax codes and make them more uniform in the hope that Congress will, in turn, permit the states to require out-of-state merchants to collect sales taxes on their behalf. With Michigan’s implementation in September 2004 of legislation that conforms to the SSUTA’s requirements, the SSUTA achieved the minimum threshold requirement necessary to authorize its nationwide implementation. Beginning October 1, 2005, retailers could agree to participate in the SSUTA and collect taxes for sales to residents of the 15 states that are full members of the SSUTA. In return, states will provide software that simplifies the collection of taxes and will grant retailers amnesty for past sales taxes.

Sale of Goods Online

- Sales of wine over the Internet have been hampered by state laws governing in-state distribution of alcohol. In Granholm v. Heald, the Supreme Court held that state laws regulating the sale of alcohol are limited by the nondiscrimination principle of the Commerce Clause.

- Since Granholm, many states have changed their laws to allow wine producers to ship directly to consumers. Consumers and wineries have challenged laws in many states that continue to prohibit or restrict direct shipment of wine to consumers.

- State and federal officials have taken a variety of approaches aimed at limiting and/or regulating the online sale of tobacco, prescription drugs and other goods.

Internet Gambling

- In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act prohibiting Internet businesses that engage in “unlawful Internet gambling” from
accepting wagers via credit card and other payment methods. It remains unclear, however, which forms of Internet gambling are "unlawful."

- The U.S. Department of Justice takes the position that all Internet gambling operations that accept wagers from individuals in the United States violate federal laws, including the Wire Wager Act. The DOJ has been cracking down on advertisements for Internet gambling by threatening prosecution of media companies that publish advertisements for online gaming operations.
- At least one website has challenged the DOJ's threats of prosecution, alleging that such conduct has a chilling effect on free speech in violation of the First Amendment.

Insurance

- Courts have been reluctant to find that insurance policies that cover the physical loss of property also extend to intangible harms, such as the loss of data or the temporary loss of computer functionality.

Chapter 11: Unauthorized Intrusions on Computer Systems

Summary of the Law

- Ancient principles of trespass law have been found to apply to unauthorized access to websites and databases. There is a split in judicial authority as to whether a plaintiff is required to establish that the defendant’s unauthorized access caused damage to, or imposed a substantial burden on, the plaintiff’s computer system, in order to prove an unlawful trespass. The U.S. Court of Appeals for the Second Circuit has held that damage to the computer system is a necessary element of a successful trespass case. Other courts have required only that the plaintiff establish "some tangible interference with the use or operation" of the plaintiff’s computer system. The California Supreme Court has held that sending email, even email the sender knows to be unwelcome, does not constitute a trespass on the recipient’s computer system.
- The U.S. Court of Appeals for the Ninth Circuit has found that unauthorized access to a password-protected website does not violate the federal Wiretap Act, because accessing stored files does not constitute the sort of interception of a communication proscribed under the Act.
- U.S. Court of Appeals for the First Circuit has held that a surreptitiously copied email is an electronic communication capable of interception even in the momentary interval when it resides in transient electronic storage, such as on a server, and therefore fits within the proscriptions of the Wiretap Act.

Chapter 12: The Converging Voice and Data Networks

Summary of the Law

- In *National Cable & Telecommunications Association et al. v. Brand X Internet Services*, the Supreme Court upheld the decision of the FCC that a cable modem
service is an information service that is not subject to traditional common carrier regulation. Under *Brand X*, cable modem service providers are not required to allow other ISPs to provide Internet access service over their cable networks and do not have traditional common carrier interconnection obligations.

- In 2006, the U.S. Court of Appeals for the District of Columbia Circuit upheld the FCC’s decision to extend Communications Assistance for Law Enforcement Act (CALEA) to VoIP providers. Under the FCC’s decision, facilities-based broadband service providers and interconnected VoIP companies must configure their systems to accommodate wiretap surveillance on their networks by law enforcement officials for investigatory purposes.

- Because VoIP telephone numbers are not tied to a fixed physical location, VoIP service providers have had difficulty in offering subscribers effective E911 service. In May 2005, the FCC announced that all VoIP providers automatically were to provide E911 services to all customers as a standard, mandatory feature by the end of November 2005.

Chapter 13: Other Web Issues

Summary of the Law

The Americans with Disabilities Act (ADA)

- The Americans with Disabilities Act (ADA) prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases … or operates a place of public accommodation.” Whether nonphysical environments, such as websites, qualify as places of public accommodation under the ADA is a subject of debate.

- In *National Federation of the Blind v. Target Corp.*, the U.S. District Court for the Northern District of California held that the ADA applied to the Target.com website insofar as denying the blind equal access to Target.com denies them the full enjoyment of goods and services offered in Target’s stores.

Hyperlink Patent Dispute

- In December 2000, British Telecommunications sued a U.S. Internet service provider, claiming that the ISP infringed its patent by using the hyperlinking method on the Internet. In 2002, the U.S. District Court for the Southern District of New York rejected the infringement claim on the grounds that hyperlinking on the Internet was beyond the scope of British Telecommunications’ patent.
Media Blogs: Spotting and Mitigating Their Risks

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Mainstream media organizations have begun to host blogs by their employee-journalists in large numbers. Amateur bloggers always have faced legal risks, but major publishers and broadcasters, with their professional credibility and deep pockets on the line, face these risks with much larger profiles. As one distinguished commentator on media law has said: "If I'm a lawyer advising a news organization, the idea of a Web log ... would just make me break out in hives."¹

And with good reason. The same immediate, unfiltered quality that gives blogs their tremendous appeal makes them inherently riskier than the carefully developed and vetted content that has been the stock in trade of the mainstream media. This article seeks to describe the phenomenon of media blogging, identify its legal risks and suggest some steps that media companies can take to limit those risks.

¹ Jane Kirtley, Silha Professor of Media Ethics and Law, School of Journalism and Mass Communication, University of Minnesota and previously Executive Director of The Reporters Committee for Freedom of the Press, quoted in David Gallagher, Reporters Find New Outlet, And Concerns, in Web Logs, NY TIMES, Sept. 23, 2002, at 9.
I. **Background**

Why have blogs become so big? What exactly are they? What appeal, and what risks, do they hold for mainstream media companies?

A. **The Blogging Phenomenon**

Blogs emerged on our collective radar screen seemingly just moments ago. They were independent, immediate and irreverent. Blogs quickly became a leading zeitgeist-meter – able to break, sustain and amplify trends and news stories with stunning speed. Bloggers have shown an uncanny knack for both finding big stories and becoming part of them, from the Bush/National Guard story to Katrina to the Lieberman-Lamont primary campaign in Connecticut. The sheer growth of the blogosphere almost defies description. Technorati, the authoritative tracking site for blogs, currently tracks over 50 million blogs.² Over 175,000 new blogs are created *every day.*³ Far more than the websites of the traditional media, blogs jumped into public consciousness by seeming to capture the democratic promise of the Internet. They were, above all, the special online province of citizen-authors who had no other platform.

But that was all so ten minutes ago. Now Brian Williams has a blog.⁴ So do institutions as venerable as Time Magazine, USA Today and the Washington Post, all of

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⁴ [http://dailynightly.msnbc.com/](http://dailynightly.msnbc.com/) ("the first network news anchor to blog on a daily basis").
which now host reporter-written blogs.\textsuperscript{5} CBS News recaps the blogs of others\textsuperscript{6} and has one of its own.\textsuperscript{7} NBC News’s Baghdad staff maintains a blog where backstage personnel (producers, sound engineers) as well as correspondents get to post.\textsuperscript{8} Want a fair and balanced blog? Check the directory of “Fox Blogs” at www.foxnews.com. The New York Times website now hosts a slew of blogs and, according to a formerly internal memo now posted on the Internet, is developing others.\textsuperscript{9} The Times’s public editor has weighed in on the benefits and risks of this trend, and he also has a blog of his own.\textsuperscript{10}

We are not aware of any reliable count of the number of blogs by professional journalists on the websites of their mainstream media employers. Cyberjournalist.net, a leading website dedicated to online journalism, recently counted about 275 such blogs, as well as many others that professional journalists maintain independently.\textsuperscript{11} Our own unscientific survey of major media websites suggests that events have overtaken the

\begin{itemize}
\item \textsuperscript{5} http://time.blogs.com/, http://blog.washingtonpost.com/, http://www.usatoday.com/blog-index.htm.
\item \textsuperscript{6} http://www.cbsnews.com/sections/blogophile/main500601.shtml.
\item \textsuperscript{7} http://www.cbsnews.com/sections/publiceye/main500486.shtml.
\item \textsuperscript{8} http://baghdadblog.msnbc.com/.
\item \textsuperscript{11} http://cyberjournalist.net/cyberjournalists.php.
\end{itemize}
Cyberjournalist.net count with a vengeance, and the actual number today may be well into the thousands. The numbers can be expected to continue growing exponentially.

B. What Is A Blog?

1. Citizen Blogs

A blog is a regularly updated, public, personal, idiosyncratic and interactive online commentary on current affairs and other matters of interest to the author.

This definition is distilled, appropriately enough, from online sources. The authors of the Wikipedia entry on blogs define the term this way:

A weblog, which is usually shortened to blog, is a type of website where entries are made (such as in a journal or diary), displayed in a reverse chronological order.

Blogs often provide commentary or news on a particular subject, such as food, politics, or local news; some function as more personal online diaries. A typical blog combines text, images, and links to other blogs, web pages, and other media related to its topic. Most blogs are primarily textual although many focus on photograph (photoblog), videos (vlog), or audio (podcasting).

The word blog can also be used as a verb, meaning to maintain or add content to a blog.¹²

The Wikipedia entry goes on to explain that blogs have a fairly standardized structure:

Title, the main title, or headline, of the post.
Body, main content of the post.
Permalink, the URL of the full, individual article.
Post Date, date and time the post was published.

A blog entry optionally includes the following:

**Comments**

**Categories** (or tags) - subjects that the entry discusses

**Trackback** and or **pingback** - links to other sites that refer to the entry.\(^{13}\)

The standard structure can be seen in this screen shot from one of the most famous blogs, the liberal political site Daily Kos:

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Open Thread
by openthread
Tue Aug 09, 2005 at 06:30:49 AM EDT

"[N]o matter what happens later today, Wednesday will be the worst day of press for the progressive retreads in years. If Lamont loses, we will be branded as ineffectual, irrelevant, extremist, and destructive. If Ned Lamont wins, we will be branded as powerful, relevant, extremist, and destructive."

-- Chris Bowers, MyDD

From **First Read**:

Election officials in Connecticut can begin tallying precinct results from around the state as soon as polls close at 8:00 pm. According to a Dan Tapper, spokesperson for Secretary of State Susan Bysiewicz, the first cities to submit their results tend to be smaller towns such as Litchfield and Somers, which Bush won in 2004, and Kent, which supported Kerry. Toward the end of the night, a little after 10:00 pm, Tapper says, results from the state's largest cities like Bridgeport, Hartford, New Haven, Waterbury and Stamford should begin to trickle in -- all towns that overwhelmingly voted for Kerry in 2004. While it's hard to predict what time they'll have the official results, Tapper says he hopes to have an answer just before midnight. Until then, they'll be updating results on their website.

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posted by DemFromCT

**Permalink** :: **There's more...** (251 comments)

CT-Sen: More of What This Primary Is Not

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\(^{13}\)**Id.**
Though identified by the Wikipedia article as an optional feature of blogs, comments could fairly be described as central to their character. “Comments are a way to provide discussion on blog entries. Readers can leave a comment on a post, which can correct errors or contain their opinion on the post or the post’s subject.”\textsuperscript{14} The Daily Kos entry shown above vividly illustrates the importance of blogs’ interactive quality. Posted early on the morning of Lieberman-Lamont primary day, this entry attracted over 250 comments from readers within just a few hours.

Citizen blogs typically are purely personal and subject to no editorial oversight. The emerging definitions confirm this. Webopedia, a leading glossary of online terms, defines a blog as “a Web page that serves as a publicly accessible personal journal for an individual. Typically updated daily, blogs often reflect the personality of the author.”\textsuperscript{15} Along the same lines, the Oxford Dictionary of Modern Slang refers to blogs as “Internet websites containing an eclectic and frequently updated assortment of items of interest to its author.”\textsuperscript{16} Phrases like “reflect the personality of the author” are another way of saying that bloggers blog without any supervision or restraint. No boss, editor or lawyer exists to tell them no.

\textsuperscript{14} http://en.wikipedia.org/wiki/Blog.

\textsuperscript{15} http://www.webopedia.com/TERM/b/blog.html.

2. **Mainstream Media Blogs**

To understand the risks at issue, one must first ask how much media blogs really resemble their brethren in the Wild West, a/k/a the citizen blogosphere.

In form and structure, mainstream media blogs closely resemble their user-created counterparts. That is, journalists’ blogs consist of posts that appear in reverse chronological order; reflect the authors’ special interests, or focus on a single topic within the authors’ beat or expertise; frequently quote from or link to other online sources, including multimedia content; and generally allow for reader comments and “trackback” connections to related blogs. Journalist blogs aim to be chattier and less formal – for lack of a better term, more blog-like – than what would appear in, say, a print newspaper or in the main section of a newspaper’s website.

The key differences may lie in matters of tone and editorial control. Journalist bloggers generally were journalists before they were bloggers, and it shows. They largely avoid the loose language, rumor-mongering and name-calling that characterize too many citizen blogs. One widely recognized early standout among journalist bloggers, Dan Weintraub of the Sacramento Bee, observes that a good journalist blogger sticks to a specific beat and writes with the assumption that his audience is more knowledgeable than the average newspaper reader.17 Journalists’ blogs on their employers’ websites also are subject, at least in theory, to editorial and legal review in the same way that any media content would be. The New York Times memo, for one, declared flatly that “[o]ur

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bloggers will have editors. They will observe our normal standards of fairness and

There is good reason to suspect, though, that over time media blogs will look

more and not less like citizen blogs:

- Editorial and legal staffs will be hard-pressed to pre-screen the ever-expanding amount of blog content (not to mention podcasts, original video and the like) on their companies’ websites.

- In some cases they may not even try to pre-screen blog posts. Anecdotal evidence suggests that some media companies have already decided not to pre-screen or review their bloggers’ posts. This may result from resource limitations, a deliberate desire to adopt the unrestrained style of citizen blogs, or both.

- Even where editorial and legal review is attempted, the business goal of creating “true” blogs seems likely to cause a subtle shift in standards. If the very purpose of a blog is to be chatty, immediate and personal, then things naturally will be allowed in blogs that would be disallowed in traditional settings.

- Market forces may be the most powerful factor of all. Readers can be expected to reject blogs that have the form but not the freshness of the real thing. For example, some of the “blogs” on media websites today probably should not bear that name at all. They really are just lists of links to content on the companies’ own sites, without the added commentary and attitude that characterize a true blog. One wonders if these faux blogs can attract readers or advertisers in the long term.

It is worth briefly noting some other experiments that could further blur the lines between media bloggers and citizen bloggers. Newspaper websites actually have begun to host citizen blogs. The Austin American-Statesman, for example, has started a separate website where it invites readers to put up blogs as “an unprecedented way for

you to publish your own thoughts and commentary on news and events around Austin, Central Texas and beyond.”19 This is in addition to the many blogs on the American-Statesman’s main sites that are written by newspaper staff.20 The Houston Chronicle, rather than opening up a site for any and all bloggers, invites e-mail applications from readers who want to become one of the paper’s “selected citizen journalists” with a blog on chron.com.21 Some major newspapers now subscribe to a blogging syndication service, which funnels the content of selected high-quality citizen blogs directly into the newspapers’ websites.22 Detailed analysis of ventures like these is outside the scope of this article. If these ventures succeed, though, and mainstream media bloggers find themselves surrounded even on their own websites by ever-growing amounts of “true” blog content, the pressure on professional journalist bloggers to adopt more of a citizen blogger style can only increase.

C. Blogs: The Appeal And The Legal Risks

As a business matter, it is easy to see the appeal of blogs to traditional media companies. Websites that function basically as warehouses for the same content being offered in print or on air cannot cut it anymore. In a world where consumers may rate a network newscast and youtube.com as equally plausible places to get the news, the imperative increasingly is to create media websites with fresh, unique and interactive


content. Blogs meet that imperative. They are fun to read, and thus likely to draw precious eyeballs to media companies’ websites in an era when readers might otherwise turn to citizen blogs. (A recent study shows that blogs already have an equal share of the online audience, as compared to newspaper websites, among Internet users aged 18 to 24.23) Blogs are fun to write, or at least they seem that way, and thus may improve staff morale in newsrooms.

As a legal matter, it is just as easy to see the risks of blogs. By their very nature they disregard many of the time-tested mechanisms that media companies have put in place to reduce their legal exposure: input from editors and colleagues, pre-publication legal review, the slow and patient incubation of sensitive stories, and a deliberate effort at objectivity. Blogs are subjective, loose and often emotional. Blogs are immediate – in their classic form, unhampered by any editing or review before they are posted. In the blogosphere, posting quickly to stimulate a back-and-forth among the community of online readers can be valued more highly than crafting the perfect piece.24 In short, blogs are a sharp departure from the objectivity and deliberate pace of traditional reporting.


24 See, e.g., Jeff Jarvis, “Talk of the Town”, Jul. 31, 2006, http://www.buzzmachine.com/index.php/2006/07/31/talk-of-the-town. Jarvis, a leading blogger and advocate of citizen journalism, posted on his BuzzMachine blog a critique of Nicholas Lemann’s recent New Yorker piece on blogging. Jarvis concluded: “I’m rushing off . . . to pick up my son and so I haven’t combed over this. Like a sloppy blogger, I’m putting it up anyway because I value the conversation that I hope will ensue. So I may tweak later but here it is.”
Simply put, blogs increase legal risk because even professional journalists – once freed to constantly publish their opinions and indulge their interests and biases, without the usual methods of supervision and review – are more likely to write and post material that is defamatory or infringing. This is not a criticism of any journalist blogger, but a simple observation based on human nature and common sense.

D. Other Risks

Blogs also have the potential to create risks that are not strictly legal but can diminish a news organization’s overall credibility and thus its ability to defend its practices generally. The Los Angeles Times, for example, suspended Pulitzer Prize-winning columnist, Michael Hiltzik, and pulled his blog from the paper’s website, after he admitted to using pseudonyms to post derogatory comments about his enemies on the blog. The New Republic recently suspended a senior editor on similar grounds.

Even news organizations’ corrective actions can cause headaches. The Sacramento Bee encountered problems when it changed its approach to the well-regarded Dan Weintraub blog. Weintraub posted a controversial entry about the role of race in California politics. The paper’s subsequent decision to review Weintraub’s entries before they were posted provoked angry reactions from readers and journalists who charged that the paper was engaged in censorship. The Bee pointed out correctly that it was editing
and not censoring, but the lesson of the episode may be that in the blog era this
distinction can be lost on readers.25

Independent employee blogs – those that are maintained by professional
journalists, but not published by their media employers – can cause many of the same
concerns, especially if readers interpret the messages on the blogs as coming from or
reflecting upon the company. The Hartford Courant ordered one of its reporters to stop
writing opinion columns on his personal blogs. The paper’s editor explained that readers
would be unable to disassociate the opinions on the reporter’s blog from the Courant, and
thus, the unedited blog columns could compromise the journalistic integrity of the paper.
At The Miami New Times last year, two editors posted derogatory statements about other
staffers on their personal blogs. The posts reportedly embarrassed the publication and
damaged morale within its newsroom.

25 Tony Marcano, Flogging by blogging: Sorry, editing isn’t censorship, Sep. 28, 2003,
available at http://www.sacbee.com/content/news/columns/ombudsman/story/
7499870p-8441946c.html.
II. Legal Framework

Media companies sponsoring journalist blogs face familiar liability risks from defamation and copyright plaintiffs. The basic elements of a defamation cause of action, for example, apply to blog content on the Internet just as they would apply to content in any medium. There also is the obvious risk of copyright infringement liability: bloggers are technically able to post or excerpt the work of other authors with ease, and it is part of the blogging culture to do so liberally. These liability risks may be increased to the extent that traditional internal controls are not applied to blogs. Media defendants also may have certain arguments and defenses in the blog context that are not available with respect to their traditional publishing or broadcasting activities.

A. Defamation

To date, there has been a noticeable absence of any major defamation cases involving blogs hosted by traditional news organizations. The paucity of cases, however, does not reflect an absence of legal risk. It seems like only a matter of time before bloggers provoke significant defamation cases.

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The same elements of a defamation claim that apply to traditional publications would apply when a blog post is the subject matter of a suit. Generally, a cause of action for defamation exists when there is:

(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.27

Consideration of each element in the context of blogs suggests possible risks and defenses that may arise when blog-based libel cases arise and are fully litigated.

1. Publication

Blogs, like any other medium in which statements are conveyed, can be the source of defamation actions. A defamation claim can lie as long as the defamatory statement is communicated to at least one person other than the subject matter of the statement.28

Publishers of blogs should be aware that, once they post material to the Web, the material not only will be available to millions of readers but may remain accessible indefinitely. Even after a news organization removes a post from its website, embarrassing or defamatory content may be retrievable through Internet archive sites such as the Wayback Machine, providing potential plaintiffs with evidence of its original


publication. Posts can persist on these archival sites unless or until the news organization affirmatively acts to prevent their inclusion in the archives or requests their removal. In this way, blog posts are no different from Internet content generally.

2. False Statement of Fact

A pure statement of opinion will generally not be actionable, but any statement, regardless of how it is phrased, that asserts or implies a verifiable fact can be the subject of a defamation action. In the gloves-off setting of the blogosphere, authors can easily cross the line between expressions of opinion and implied assertions of fact.

Blogs’ rhetorical context, however, may provide media defendants with a litigation advantage because the determination of whether a statement constitutes fact or opinion is normally a contextual one. Statements made in formats that are usually dedicated to the expression of opinions are usually held to be opinions. Courts have held repeatedly that statements made in a newspaper’s editorial section – including the editorial and op-ed sections as well as letters to the editor – are inherently more likely to constitute opinion as a matter of law, as compared to articles in news sections. The same principle logically ought to apply to blogs, which like op-ed columns and letters to the editor are inherently opinionated. Reasonable readers are fully aware of the nature of


30 http://www.archive.org/about/exclude.php (provides instructions for how website owners can remove and exclude their content from the Internet Archive library).


blogging; they understand that blogs are likely to be a forum for strong expressions of opinion, and less likely to be a forum in which serious facts are reported. Of course, the strength of this argument will depend largely on the nature of the particular blog at issue in a case.

3. **Defamatory Meaning**

To constitute libel, a statement must not only be false but defamatory, meaning it must be harmful to the plaintiff's reputation. Merely harsh or unkind words do not rise to the level of defamation. Like the determination as to whether a statement constitutes opinion or fact, the determination of defamatory meaning (or the lack of it) is context-driven. Allegedly defamatory statements are generally judged according to whether they would tend to injure the plaintiff's reputation in the eyes of those who are likely to receive the statements.

Here again, media defendants may have a litigation advantage with respect to their blogs. It is likely that blog readers generally understand that posts are more informal, off-the-cuff and unscreened, and they are less likely to interpret a negative statement about an individual posted in a blog as seriously as they would if that statement was published in a formal article.

This argument, however, should not be overstated. A statement posted in a blog on The New York Times’ website is likely to reach a different readership than a blog about automobile racing. When assessing the context in which a statement may be considered defamatory, courts are likely to look at blog readers not as an undifferentiated
mass but in segments based on the characteristics of the blogs and the news organizations that host them.

In addition, bloggers must be wary of inadvertently creating defamatory associations that falsely imply facts. The location of text on a blog relative to other text or graphics, such as photographs, can be the basis for defamation claims if the elements’ positions create a false impression that they relate to each other.\(^{33}\) This concern applies to all forms of publication but is especially vivid in blogging, where stock photographs and other images – easily copied and pasted from anywhere on the Web – are frequently used to illustrate text.

4. Fault

The standard of fault applied in a defamation action often means the difference between winning and losing for media defendants. Traditionally, the choice of standard has depended primarily on whether the plaintiff can be considered a public figure, and thus whether the actual malice rule applies. With media blogs, there is a reasonable argument that all plaintiffs should bear the burden of meeting heightened fault standards, regardless of their public or private status.

*Sullivan* and its progeny, of course, established that where the plaintiff is a public figure he or she must prove that the defendant published defamatory material with actual malice.\(^{34}\) That is, a plaintiff must show by clear and convincing evidence that the


defendant published the statement with knowledge of its falsity or with reckless disregard for whether or not it was false. Reckless disregard has been construed to mean “a high degree of awareness of . . . probable falsity.”

The Court addressed the fault standard for private figure plaintiffs in *Gertz v. Robert Welch, Inc.* When the plaintiff is not a public figure and the alleged defamation involves a matter of public concern, the plaintiff’s constitutional burden is lowered to showing that the defendant merely had some fault – a test that could be satisfied by use of a simple negligence standard. The Court justified this lower standard for private figures partly on the basis that private figures do not have access to media outlets, and therefore, cannot easily defend themselves through counter-speech. Public figures, in contrast, have “a more realistic opportunity to counteract false statements [than] private individuals normally enjoy.” Implicit in this analysis is the notion that counter-speech should be every libel plaintiff’s first line of defense, and that when counter-speech is a realistic option, then the First Amendment should make libel recovery more difficult.

In the blogging context, the same rationale gives media defendants a strong argument that even private-figure plaintiffs should be required to prove actual malice, at least where the content at issue addresses a matter of public concern. Unlike the helpless private figures envisioned by the *Gertz* majority, a plaintiff allegedly defamed by a blog

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37 418 U.S. at 344.
post has substantially the same access to the media as the defendant. The plaintiff can post a rebuttal directly to the offender’s blog if responses are permitted, to other blogs on the Internet, or to the plaintiff’s own blog. The last option is made easily feasible by the abundance of free blogging software.

B. Communications Decency Act

Hosting journalist blogs typically means hosting both content created by the journalist and also comments posted by readers. The legal standards for each type of content may be different. Media companies are almost certain to be deemed the publishers, for legal purposes, of any blog content generated on their websites by their employees acting in the course of their duties. But media companies are equally likely to be immune from liability for reader comments on the same blogs, thanks to Section 230 of the federal Communications Decency Act (“Section 230”).

Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and preempts the application of any inconsistent state law. Section 230 thus bars defamation suits against providers and users of interactive computer services based on materials posted by third parties.

The statute appears to provide news organizations with a powerful immunity to defamation claims based on reader-contributed posts by preempting the common law rule that news organizations are liable for their publication of others’ defamatory statements.

Although Section 230 has not yet been tested in a case involving a blog, it is likely that the Act’s protection would apply.

A plain language reading of the term “provider or user of an interactive computer service,” would appear to cover hosts of blogs that provide a means for users to read material and post responses. This understanding also comports with existing court decisions holding that Section 230 applies to Internet service providers (“ISPs”) and interactive websites such as eBay and Amazon.com.39 Likewise, a reader who posts material on a blog maintained by a media company would clearly seem to be “another information content provider” within the plain meaning of the statute. This is the same familiar principle that immunizes hosts of chat rooms, message boards and other forms of user-created Web content from liability for that content.40

Importantly, Section 230 immunity survives even when the defendant retains some editorial authority over the third party content, as might happen if reader comments on a blog are moderated or reviewed.41 The Fourth Circuit has held that ISPs and users do not lose Section 230 immunity when they “exercise . . . a publisher’s traditional

39 See Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 831 n.7 (Cal Ct. App. 2002) (interpreting “interactive computer service” language in Section 230 to cover eBay.com); Schneider v. Amazon.com, Inc., 31 P.3d 37, 40 (Wash. Ct. App. 2001) (holding Amazon.com to be a provider of an interactive computer service because “Amazon’s website enables visitors to the site to comment about authors and their work, thus providing an information service that necessarily enables access by multiple users to a server.”).

40 See, e.g., Batzel v Smith, 333 F.3d 1018, 1030-31 (9th Cir. 2003).

41 See, e.g., Landman Memo (“We’ll encourage readers to post their thoughts, but we’ll screen them first to make sure the conversation is civil.”).
editorial functions – such as deciding whether to publish, withdraw, post-pone or alter content” provided by third parties. The Ninth Circuit applied this principle in a pair of decisions involving Section 230. In one, the court held that a defendant did not become a content provider under Section 230 when it selected and made minor alterations to an e-mail sent from a third party before posting it to a website and e-mail listserv. In the other, the court held that a dating website did not become a content provider and lose Section 230 immunity when it provided multiple choice and essay questionnaires to members to generate their profiles.

Although it is not the purpose of this article to analyze citizen blogging in detail, the CDA discussion would not be complete without a reference back to the trend of newspapers beginning to host citizen blogs. These experiments should be protected by the Section 230 immunity because a citizen blogger maintaining his or her blog on a media company’s website seems to fall squarely within the statutory definition of “another information content provider,” as to whose postings the website cannot be deemed the “publisher.”

C. Copyright

News organizations should also consider the copyright implications of hosting blogs. As noted, a common feature of blogs is the use of liberal references to third-party

43 Batzel, 333 F.3d 1018, 1030-31.
44 Carafano v. Metrosplash.com, 339 F.3d 1119 (9th Cir. 2003).
45 See text at notes 18-21, supra.
content. This can take the form of links, which pose little or no copyright risk; text excerpts, which can constitute either permissible fair use or prohibited infringement, depending on the specific facts; and images, which are themselves copyrighted works and can raise complex fair use questions. The risks are substantial for bloggers and hosts.

As with libel, the very nature of blogging may in some respects enhance news organizations’ defenses to infringement actions. Most blogging involves responding to and commenting on statements or analysis made by other journalists or bloggers, and some copying of those earlier statements is intrinsic to this sort of dialogue. The Copyright Act permits such use in most cases through its express protection of the “fair use [of copyrighted materials] for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.” Still, when possible, employers may prefer to see their bloggers post hyperlinks to websites containing third-party content rather than reproducing the content itself on the employers’ own sites.

The Digital Millennium Copyright Act (the “DMCA”) gives plaintiffs an additional mechanism to assert their copyrights against Internet publishers such as bloggers. The DMCA encourages copyright holders to directly petition ISPs to de-publish web pages that contain allegedly infringing material. Section (c)(3) provides that a copyright holder can initiate the takedown process by notifying the ISP that the hosted website or page contains infringing material and requesting that the page be de-published.

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The DMCA promotes compliance with these notices by granting ISPs immunity from infringement liability if they promptly take down the allegedly infringing content.

III. Risk Reduction

In light of the risks posed by blogging, news organizations should develop reasoned approaches before they engage in the activity.

A. Monitoring The Site

In the first instance, diligence requires news organizations to be aware of what is being posted to their web sites. Simple as it seems, the step cannot be overlooked. We know of at least one organization where management only discovered the presence of blogs on its website in the context of a legal review. Editorial staff may not appreciate the range of legal risks associated with blogging, and so may not voluntarily alert management and legal personnel of blogging activities. It may make sense to designate a single individual in each of the editorial, legal and technical departments to be responsible for tracking all blogging activity. This centralizes knowledge of the company’s blogging practices and creates the opportunity to standardize policies and procedures as needed.

B. Insurance

News organizations publishing blogs should consider whether they are properly insured. Several major carriers offer media insurance policies that cover, among other
things, defamation and copyright risks associated with Internet publication.\(^{48}\) News organizations that already have such insurance should review their policies to see whether blogging is covered. News organizations may need to inform their carriers of any blogging activities and associated policies. Media companies buying new or renewal policies should check carefully for any exclusions that might limit coverage of blog posts. For the avoidance of doubt, it may be preferable to negotiate coverage up front that expressly includes blogging. This may require articulating to the carrier the news organization’s policies for editorial and legal review of employee blogs.

C. Editorial Approach

News organizations that host blogs have approached the effort in a variety of ways, with most focusing on the kind and degree of editorial oversight applied. The options fall into three general groups: no review, full-scale pre-publication review and intermediate review.

1. Hands-Off

Some news organizations have chosen to conduct little or no review of their blogs. Ken Sands, managing editor of online and new media at Washington’s Spokesman-Review, was quoted as saying about his paper’s hands-off editorial approach:

\(^{48}\) For a good discussion of cyber journalists’ need for media insurance coverage, an examination of factors to consider in selecting a carrier and links to major providers, see Michael Rotherberg, ONLINE JOURNALISM REVIEW, Feb. 20, 2004, Online Publishing Risks Create Need for Libel and Defamation Insurance, at http://www.ojr.org/ojr/law/1077150111.php.
“We’re not worried about our reporters libeling someone on the Web.”49 This approach would seem to rely exclusively on the good judgment of individual reporters, and the strength of the legal defenses discussed above, to mitigate the legal and reputational risks associated with blogging.

2. **Pre-Publication Review**

Full-scale pre-publication review goes to the other extreme and may appeal to any news organizations that have already been burned by blogging. If editors see every blog post ahead of time, they obviously have the opportunity to revise potentially defamatory or infringing material, refer it for legal review or both. This is obviously the most risk-averse approach.

On the other hand, full-scale pre-publication review may stifle the very characteristics – personal tone and spontaneity – that make blogs attractive to readers and writers alike. Such a system may also demand editorial and legal resources that some news organizations simply do not possess.

3. **Middle Ground**

Many news organizations that host blogs seem to have taken an intermediate approach that tries to balance the value of blogging – in particular, its spontaneous and unfiltered quality – with the need to protect the organization’s credibility and treasury. These news organizations place editors in the role of monitors who review some or all blog posts, primarily focusing on post-publication review but also including some pre-

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publication review. Some news organizations also employ a flagging system, whereby authors are specifically charged with triggering pre-publication review by alerting editors to potentially problematic posts that they intend to make.

The intermediate approach mitigates the risks associated with blogging. A formal editorial process, even one that operates predominantly after publication, places blogging within a disciplined environment. Authors are less likely to post inflammatory or irresponsible material when they know that editors are likely to review it, even if the review occurs after the posting. This sort of review also allows news organizations to reduce or avoid liability by quickly retracting potentially libelous or infringing material shortly after it is posted. Although there is always the Wayback Machine-type risk noted in section II(A)(1) above, as a practical matter deleting material off the site is a substantial form of protection against suit.

4. DMCA Safe Harbor Compliance

Regardless of the general editorial approach an organization chooses, it is prudent to have basic procedures to ensure compliance with the safe harbor provisions of the DMCA. To oversimplify, this entails having in place a designated agent to receive notice of the presence of infringing material posted by third parties (e.g., readers who post infringing material in their comments on an employee-journalist’s blog), as well as protocols for removing the infringing material.\textsuperscript{50} In the interest of space, the particulars

of a DMCA safe harbor program will not be set out here; they have been well-covered in numerous sources.51

D. Guidelines

News organizations have long debated the pros and cons of having written guidelines for their editorial staff. Guidelines, when followed, are a terrific way to achieve best practices and reduce risk. Guidelines, when violated, arguably can provide damaging evidence of negligence. We are agnostic on the question of whether guidelines for blogging should be put in writing and generally distributed. We do think it is prudent to have policies that govern blogging activity and to clearly communicate these policies, whether in writing or informally, to all of the employees involved in the activity.

A set of model guidelines is provided for consideration as an appendix to this article. Suggested key elements of the guidelines include:

Defining what blogs should and should not cover. Using blogs for personal observations and “reporter’s notebook”-type material is not likely to be problematic. But staff should be cautioned not to use blogs, for example, as an outlet for investigative reporting-type content that appropriately requires full-scale editorial and legal review.

Identifying who will be involved in blogging and how their roles will interact with one another. Some senior person should be in charge of blogging, and staff should know who that person is. It should be clearly communicated that blogging on the company

51 See, e.g., http://www.chillingeffects.org/dmca512/.
website is an assigned activity to be done only with the supervisor’s authorization and
direction.

Making clear that blogging, like everything else employees write, is subject to
review. News organizations may vary considerably in their selection of editorial regimes
for blogging, but in all cases, the employees subject to those regimes should understand
what they are. This understanding is especially critical when news organizations rely on
authors to flag potentially problematic posts for pre-publication review. This will also
avoid upset or misunderstanding when and if editorial restrictions are imposed on specific
bloggers or postings.

Consider including policies with respect to employees’ private blogging. News
organizations may want to restrict this activity, especially to the extent it may be difficult
to separate private blogging from employees’ professional responsibilities. So, for
example, a newspaper may justifiably not want to allow one of its sports columnists to
publish independent sports columns on her personal blog. It is important to communicate
any such restrictions to employees in advance of the need for corrective action. After-
the-fact restrictive responses can be perceived as draconian and, in the current
environment, provoke embarrassing charges of censorship.
IV. Conclusion

The convergence of blogging with traditional journalism will undoubtedly continue as more mainstream news organizations assign blogs to their reporters. Blogs offer these news organizations many attractive traits and tools. The informality of blogs can create a sense of personality for an online publication, while their immediacy can increase its relevance. News organizations may use blogs to generate interest in the primary publication among younger demographic groups, and increase the engagement of readers of all ages.

With the benefits of blogging come its risks. The very characteristics that make blogs appealing – their personality, immediacy and off-the-cuff nature – can make them dangerous. Outside of the professional norm of detachment and objectivity, and unimpeded by full legal and editorial oversight, bloggers are both more able and more likely to publish material that exposes news organizations to liability and embarrassment.

News organizations interested in or currently hosting blogs can enhance the benefits of blogging and mitigate its risks by first examining how blogging fits with their organization’s purpose and then carefully crafting policies to structure the activity. This endeavor should include a determination of how blogs will be edited or reviewed, how blogs will be managed and authored and by whom, and to what extent employees can publish their own blogs independent of their employer’s publications.

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APPENDIX: MODEL BLOGGING GUIDELINES

Blogging Guidelines For __________.com

Last updated: ____________, 200_

Contact: ________________, [telephone #], [_______@______________.com]

These guidelines apply to all blogs on __________.com.

I. SCOPE

A. Blogs on __________.com are intended primarily for the sharing of information that may not be appropriate for a full-fledged article. For example, bloggers may share anecdotal impressions of subjects that we are covering in the ordinary course.

B. Specific charges of misconduct against any individual, entity or group should not appear in blogs. Such statements are reserved for our traditional outlet(s), where they are subject to full editorial and legal review.

II. ASSIGNMENTS

A. Blogging projects must be approved by __________. Unless you have __________’s approval, you may not blog on __________.com.

B. We may change or terminate blog projects at any time. Subject matter posted to a blog must remain within the scope of the approval granted by __________.

C. We do not permit the authorship of content for blogs on our sites by anyone other than the journalists and editors assigned by __________. This means no “guest bloggers.”

III. REVIEW PROCESS

A. Your blog entries – including but not limited to text, photographs, images, and external and internal hyperlinks – are subject to revision or removal by the company at any time, before or after publication, based on our editorial or legal review.

B. Prior to posting, blog authors are required to highlight for their editors any portions of their submissions that are particularly sensitive. Bloggers and their editors also should, prior to posting, refer prospective content to the legal department where appropriate.
IV. POSTING

A. Posting of blog entries will be performed by __________. No other personnel will have the access or authority to post content to our website without prior approval from __________.

V. PERSONAL BLOGS

A. We recognize that some journalists on our staff may want to maintain blogs at Internet locations other than our website. This is acceptable provided that your personal blog:

1. Is disclosed to your editor at inception (if created in the future) or immediately after publication of these guidelines (if already in existence).

2. Does not relate or refer to matters that you cover for us in the course of your employment.

3. Does not refer to your employment with us.

4. Does not, in our judgment, cause a risk of reputational or other damage to our company.

B. Any violation of these provisions may result in our asking that you modify or terminate your personal blog. We reserve the right to take additional action up to and including termination of your employment based upon inappropriate personal blogging activity.

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This is a list of legal cases in which publishers have been held accountable for content on the Internet. The goal is to show the types of Internet content that have led to some form of liability.

The first section lists all known cases that have resulted in trial verdicts, including verdicts for both plaintiffs and defendants. The second section lists cases, mainly involving blogs, that were resolved by settlements. Since many of these settlements are confidential, whether they include any monetary settlement, and, if so, how much, is unknown. The final section lists cases and other legal developments relating to the issue of publisher liability for online content.

Note that this list does not include cases that were resolved through pre-trial proceedings such as motions to dismiss, anti-SLAPP motions to strike, and summary judgment. Thus it excludes cases dismissed on motions under section 230 of the Communications Decency Act.

Cases in each section are listed in chronological order (by verdict date for trials, by settlement date for settlements).

TRIAL VERDICTS INVOLVING INTERNET CONTENT


Status: Verdict for defendant on speech claims affirmed

Plaintiff manufactures and sells kits for an amphibious aircraft called the Seawind and has a common law trademark in that name and a registered trademark in the term “Seawind and design.” Defendants assemble these kits for customers, including installation of a turbine engine (which is discouraged by plaintiff). Defendant Horizon Unlimited calls the resulting product the Turbine Seawind. It also publishes the Seawind Builders Newsletter, maintained its web site at the domain name seawind.net, and operates the Seawind Pilots Association. Plaintiff alleged that these uses of the Seawind name infringed on plaintiff’s trademark, and that statements on the web site constituted unfair competition. Plaintiff also claimed that both defendants had breached an agreement not to make copies of parts in Seawind kits. After a bench trial, District Court Judge Marvin Katz ruled that Horizon Unlimited’s use of Seawind in its domain name and in the site’s “meta tags” constituted infringement, use of the trademark in the newsletter title was not infringement, that defendant’s calling the plane it builds “Turbine Seawind” was not infringement; and that plaintiffs had not proven that statements on Horizon Unlimited’s web site regarding plaintiff had injured plaintiff’s reputation or caused actual pecuniary loss. The court also ruled for the plaintiff on most of the non-speech claims related to the copying of Seawind kit parts, and rejected defendant Karlsen’s counterclaim that plaintiff’s patent on the Seawind design was invalid.


Status: $3 million verdict for plaintiff affirmed

Former University of North Dakota student Glenda Miskin created a website, undnews.com, that criticized the university and its professors. Miskin was suspended from the university in 1990 after an internal disciplinary committee found that she had stalked UND physics professor John L. Wagner. But the site alleged that Wagner had harassed Miskin with sexually provocative phone calls. Wagner sued, and won $2 million for libel, $500,000 for slander, and $500,000 for interference with his business relationships. The North Dakota Supreme Court upheld the award, and the U.S. Supreme Court declined to review the case.

Status: $3,700,000 jury verdict for plaintiff reversed on appeal

Oklahoma created a public sex offender registry in 1987, but by 2001 had not yet developed the software to place the information online. NewsOK.com, a website operated by the Oklahoman and KWTV-TV, placed a searchable version of the registry online, using data provided and periodically updated by the state. Plaintiff’s address was listed on the registry because a sex offender had listed it with the state when the home was owned by the offender’s sister, before the property was purchased by the plaintiff. The offender did not submit updated information to the state, so the old address remained on the registry. NewsOK.com removed the database in February 2002 because of problems with out-date addresses.


Status: $50,000 verdict for plaintiff affirmed

NOTE: This is the first case against a true blogger of which MLRC is aware that has gone to trial and resulted in a liability verdict.

Attorney Rafe Banks III sued political activist David Milum for statements made on his website on local politics in Forsyth County, Georgia, aboutforsyth.com (under new management). Several postings on the site alleged that Banks had delivered bribes from drug dealers to a now-deceased judge. After a four-day trial and six hours of deliberation, the jury awarded Banks $50,000 in compensatory damages, but no punitive damages. After the verdict, Milum said that someone else was taking over the web site. On appeal, the verdict was affirmed.


Status: $11.3 million default verdict for plaintiff

The owner of a company that consults parents of troubled teenagers won $11.3 million against the mother of such a child for her postings on various Internet bulletin boards disparaging the consultancy. The woman posted the comments after the company had helped her remove her sons from a school operated by the World Association of Specialty Programs and Schools, but had refused to put the woman in touch with other students who alleged sexual abuse at schools operated by the association. Although the defendant initially appeared in the suit, she later defaulted. After a trial on damages, the jury awarded $6.3 million in compensatory damages, but $5 million in punitive damages. The defendant subsequently challenged the default award, but it was upheld on July 25, 2007.

Omega World Travel v. Mummagraphics, Inc., Civil No. 05-122 (E.D. Va. jury verdict April 27, 2007).

Status: $2.5 million jury award for plaintiff reduced to $110,000

Mark Mumma operates a web site, www.sueasamammer.com, which tracks lawsuits against alleged spammers under the federal CAN SPAM Act (15 U.S.C. §§ 7701 et seq.). In 2005, he listed Omega World Travel, which operates the web site www.cruises.com, as a spammer after he received several unsolicited e-mails from the company, and his initial requests to be removed from the company’s e-mail lists were not honored. The travel company then sued for defamation, copyright infringement, trademark infringement, and unauthorized use of likeness. All but the defamation claim were dismissed. Mumma’s counterclaims against Omega World Travel, alleging violations of the CAN SPAM Act, were also dismissed by the trial court (51 F.Supp.2d 542, 51 F.Supp.2d 544); this ruling was upheld by the 4th Circuit Court of Appeals (469 F.3d 348 (4th Cir. 2006)). The defamation claim went to trial, resulting in a $2.5 million jury verdict ($500,000 compensatory, $2 million punitive). The court reduced this award to $10,000 compensatory damages and $100,000 punitive damages.

Kaplan v. Salahi, No. BS06288332 (Cal. Super., Small Cl. Ct., Alameda County judgment entered May 7, 2007), motion to strike denied, No. BS06288332 (Cal. Super. Ct., Alameda County June 13, 2007) (affirming small claims judgment).

Status: $7,500 award to plaintiff.

Lee Kaplan, a journalist for FrontPageMag.com, sued Yaman Salahi in small claims court for comments on his blog, “Lee Kaplan Watch” (http://kaplanwatch.blogspot.com/). Kaplan was awarded $7,500, which was affirmed on appeal to the Superior Court. The defendant does not apparently plan any further appeal.
SETTLEMENTS IN CASES INVOLVING INTERNET CONTENT

Suarez Corp. v. Meeks, Civil No. 267513 (Ct. of Common Pleas, Cuyahoga County, Ohio settled Aug. 1994).
Status: Settled for $64
Journalist Brock Meeks criticized a company promoting e-mail marketing in his e-mail newsletter (now defunct, but archived online at http://cyberwerks.com/cyberwire/). Benjamin Suarez, owner of the company Suarez Corp. Industries, sued for libel. But before the case went to trial, Suarez offered to settle for $64; Meeks accepted.

Status: Settled for undisclosed “hefty sum”
Porn actress Christy Lake sued porn-industry blog lukeford.com owner Luke Ford after he posted pictures that he described as showing her having sex with a dog. The case was settled for “a hefty sum” before trial.

Status: Confidential settlement after hung jury at trial
Northern Kentucky University professor Clinton Hewan sued over a news article on the Fox News website, Foxnews.com, titled “Kill-a-Cop Comments Prompt Outcry at College Near Cincinnati.” The article reported on statements that Hewan allegedly made at a student forum on race relations after the shooting of an unarmed black man by a police officer in Cincinnati caused civil unrest. Hewan claimed that the alleged remarks, which were first reported by the university’s student newspaper. Were not accurate, and complained that the headline and lead paragraph in the Fox News article defamed him. At trial, the jury remained deadlocked after three days of deliberations, and a mistrial was declared. The parties subsequently settled.

Miranda v. Sykes, No. ______ (Wis. Small Cl Ct., Milwaukee County settled July 28, 2005).
Status: Settled for $5,000 charitable donation
A radio talk show host who posted and responded to a listener's e-mail on his blog (http://www.620wtmj.com/_content/talk/charliesykes/index.asp) settled a lawsuit against him for $5,000. WTMJ-AM talk show host Charlie Sykes removed the e-mail within a few hours of posting it in November 2004 post, after he learned that it contained factual errors. But the posting was still available via an enterprising Internet search three months later. The suit, filed by Spanish Journal editor Robert Miranda, was settled in return for the station establishing a $5,000 scholarship for high school journalism students.

Status: Settled
The Council on American-Islamic Relations sued Virginia Beach, Va. resident Andrew Whitehead over statements on his website devoted to criticizing the organization, http://www.anti-cair-net.org/, alleging that the group was funded by and supported terrorists. The parties reached a settlement for an undisclosed sum in December 2005.

Status: Settled for $150,000
Robert Sanchez, who lost a 2005 race for the Brownsville, Tex. city commission, maintained his former campaign web site (www.robertsanchez05.com) to advertise his restaurant, with a blog on local politics (formerly at http://www.robertsanchez05.com/phpBB2/index.php?c=2). The wife of Carlos Cisneros, who defeated Sanchez in the race, sued for defamation for statements on the site. The suit eventually settled for $150,000, after the plaintiff showed that Sanchez’s computer was used to write comments to the web site. As part of the settlement, Sanchez admitted that he posted the comments under various pseudonyms; he also wrote a letter vindicating Elena Cisneros’ good name and apologizing to her children for the comments on the website.

Status: Settled (unknown terms)
Jeff Ward, who manages the careers of various entertainers including George Carlin, George Forman and Donna Summer, sued owner Luke Ford and various unnamed contributors to the lukeford.net porn-industry blog for allegedly libelous comments about Ward on the site. Ford did not respond to the suit, and was held in default on Oct. 10, 2005. After Ford filed a motion to set aside the default judgment, the parties settled and the case was dismissed in Aug. 2006.
Hargrave Military Academy v. Guyles, Civil No. 06-00283 (W.D. Va. dismissed pursuant to settlement Aug. 8, 2006).
Status: Settled.
The Hargrave Military Academy sued Jeff and Melissa Guyles over a web site they set up, www.HargraveHasProblems.com, after their son Stewart Guyles was dismissed from the school for violating its honor code. The federal judge hearing the case issued a preliminary injunction shutting down the site in early May 2006. In August, the parties reached a confidential settlement.

Status: Apparently settled; terms unknown
High school teacher Lee Waters is suing over sexual comments posted along with her photo by a North Port High School student on his MySpace profile page. The student was suspended from school, and other disciplinary action was taken. The case was dismissed, apparently due to a settlement, in January 2007.

Status: Settled (payment, if any, unknown)
Defendants are former volunteers at God’s Child Project charitable organization’s work in Guatemala who were removed from their positions. They then sent various e-mails and letters alleging that God’s Child Project founder Patrick Atkinson was untrustworthy, and making other allegations; they repeated some of these allegations on a web site they created in 1998, www.guatemalanchildren.org. Atkinson sued in 2003. In 2006, the court dismissed some of the claims in the suit, saying that North Dakota’s two-year statute of limitations on defamation barred most of the claims over what was posted to the site prior to 2001. But the court ruled that issues about postings since 2001 could proceed to trial. On May 15, 2007, the lawsuit was dismissed pursuant to a settlement between the parties.

Status: Settled for apology and $10,000
Plaintiff Joel Bell, who serves as a manager for several professional sports players, sued a writer for the the website draftcity.com (which closed when the legal action was threatened) for items on the site disparaging Bell. Ruling on a motion to dismiss, the federal court in Connecticut held that it lacked personal jurisdiction over the defendant, a Florida resident, even though the website was set up and registered by a one-time Connecticut resident. The federal court in Connecticut (see above) moved the case to the federal court in southern Florida. The parties eventually settled.

Status: One defendant (Ishkanian) settled for undisclosed terms; other defendant (Lavandeira)’s anti-SLAPP motion pending
Hollywood disc jockey Samantha Ronson filed a libel suit against celebritybabylon.com blogger Jill Ishkanian and perezhilton.com blogger Mario Lavandeira over a posting on celebritybabylon.com, republished on perezhilton.com, alleging that cocaine found in actress Lindsay Lohan’s car after an accident was Ronson’s. On Oct. 10, Superior Court Judge Elihu M. Berle deferred decision on Lavandeira’s anti-SLAPP motion and allowed the plaintiffs to depose Lavandeira. At the hearing, Ronson and Ishkanian announced that they had settled their part of the dispute. On Nov. 1, 2007, the court granted Lavandeira’s anti-SLAPP motion, dismissing the case.

Status: Settlement pending
The owner of the Chicks Sporting Goods chain, which has stores in southern California, sued James M. Kuziw for defamation over content of his MySpace page. The parties agreed to settle the case in August 2007, but the final settlement agreement had not been signed by mid-October 2007.
OTHER LEGAL DEVELOPMENTS OF INTEREST

Status: Summary judgment granted to defendant (Oct. 22, 2007) (holding that blog fell under Lanham Act's exemption for "all forms of news reporting and news commentary.")

In March 2005, Philip Smith consigned several items to BidZirk, which places customer's items for auction on ebay.com. Smith was dissatisfied with the prices he received for some of the items, and in January 2006, began publishing entries on his "Fix Your Thinking" blog (http://jackwhispers.blogspot.com), starting with one titled "You Gotta Be Berserk To Use An eBay Listing Company!", listing his grievances with BidZirk. The postings included BizZerk's logo. BidZerk and its owners sued for trademark infringement, defamation and invasion of privacy; Smith countersued for claims based on the BidZerk's sales of his items. The trial court denied a preliminary injunction against use of the logo, which was affirmed by the 4th Circuit. (Nevertheless, Smith agreed to remove all but one of the logos.) The trial court then dismissed the counterclaims. The lawsuit continued on BidZerk's original claims against Smith, until the court granted summary judgment to the defendant in Oct. 2007, holding that the Lanham Act claim against the blogger is barred by the Act's exemption for "all forms of news reporting and news commentary."

Status: Baumgartner is appealing her conviction; Charges against DuBois dismissed (see below)
Elsebeth Baumgartner of Oak Harbor, Ohio and Bryan DuBois of Sandusky, Ohio allegedly used their site www.erievoices.com to libel and harass retired Cuyahoga County Judge Richard Markus, who had presided over a libel lawsuit against Baumgartner. That trial ended with a $175,000 verdict against Baumgartner. On trial of criminal charges of intimidation and harassment for the web site postings and other activities, Baumgartner moved to have trial judge Shirley Strickland Saffold removed from the case. Although Saffold refused to recuse herself, Baumgartner continued to argue for recusal. Saffold eventually ordered her jailed for contempt. Baumgartner then presented a note from her doctor that she was not competent to stand trial, and Saffold ordered her admitted to a psychiatric hospital for evaluation. In March 2006 DuBois pleaded guilty to separate charges against him in Ottowa County (see below). The Cuyahoga County charges were dismissed and DuBois agreed to testify against Baumgartner. On June 1, 2006, Baumgartner was again found in contempt and jailed; she was released on Oct. 5. On Oct. 31, 2006, Baumgartner was found guilty of 27 counts of contempt of court, and on Nov. 15 she was found guilty of 15 felony counts of intimidation and retaliation. On Nov. 28, 2006, Baumgartner was fined $2,700 and sentenced to 120 days in jail for the contempt counts, which she is appealing; on Dec. 18, 2006, she was sentenced to eight years in prison for the intimidation and retaliation counts, with the sentence stayed pending appeal.

CRIMINAL CASE: Ohio v. DuBois, No. ____ (Ohio C.P. Ct., Ottawa County plea bargain March 27, 2006)
Status: Dismissed pursuant to plea bargain
Besides his indictment in Cuyahoga County (see above), erievoices.com webmaster Bryan Dubois was also indicted in Ottawa County on charges of intimidation and retaliation against one of the witnesses against Baumgartner in the original libel lawsuit. On March 27, Dubois agreed to plead guilty and testify against Elsebeth Baumgartner in her criminal trial. As part of the deal, Dubois formally apologized, and was sentenced to probation in the Ottawa County case, with the charges against him in Cuyahoga County dismissed.

Texas H.B. No. 129 (Tex. Leg., 2007).
Status: Bill died in committee
A bill filed for the 2007 session of the Texas legislature would have provided that “The author of a defamatory statement expressed on an Internet website is subject to a libel suit in the same manner as if the author had published the defamatory statement in any other written or graphic form,” and allow a court to order the removal of such material. After a firestorm of criticism from various bloggers, the sponsor, state Rep. Vicki Truitt, pledged to revise the bill to limit to what she said was her real target: web sites such as DontDateHimGirl.com, which she said publishes information that could lead to identity theft.

Status: Bill withdrawn
A bill introduced in Jan. 2006 by Assembly Minority Leader Peter J. Biondi would have made operators of interactive computer services and Internet service providers that allow posting of anonymous comments liable to persons injured by false or defamatory messages posted on public forum websites. The bill was withdrawn in February 2007.
Court Applies Functional Test to Find Blogger Is a Journalist

In granting summary judgment to a blogger on libel and related claims, a federal judge in South Carolina applied a “functional analysis” test to determine that the defendant “was engaged in news reporting or news commenting,” and thus exempt from Lanham Act claims. *BidZirk, LLC v. Smith*, Civil No. 06-109 (D. S.C. opinion and order Oct. 22, 2007) (granting summary judgment to defendant).


**Background**

The case stemmed from comments that Philip Smith posted on his blog about a company named BidZirk. BidZirk places customer's items for auction on ebay.com. In March 2005, Smith consigned several items to BidZirk, but was dissatisfied with the prices he received for some of the items. In January 2006, he published complaints about BidZerk on his “Fix Your Thinking” blog. The blog postings, which began with one titled “You Gotta Be Berserk To Use An eBay Listing Company!,” criticized the company and were illustrated with BizZerk’s logo.

BidZerk and its owners sued for defamation, trademark infringement and invasion of privacy. Smith counterclaimed based on BidZerk’s sales of his items. In March 2006, Magistrate Judge William M. Catoe recommended that the court deny plaintiff’s motion for a preliminary injunction against use of the logo. The magistrate cited a section of the Lanham Act, 15 U.S.C. § 1125(c)(3) (B), which makes “all forms of news reporting and news commentary” non-actionable under the statute. “This court has reviewed the four-part article posted by the defendant on his blog, and it appears that the defendant's function was to report information to his readers.” *BidZirk, LLC v. Smith*, Civil No. 06-109 (D. S.C. report of magistrate March 21, 2006) (recommending denial of preliminary injunction).

In making this recommendation, Judge Catoe noted several articles from the Internet and news publications addressing the issue, including an article on the First Amendment Center web site advocating a functional analysis of the question. See, e.g., David Hudson, “Blogging,” at http://www.firstamendmentcenter.org/speech/internet/topic.aspx?topic=blogging2

The plaintiffs objected to this conclusion before the district court, arguing that Smith’s postings were “cyber-gripping,” not news reporting or commentary.

After noting that “these terms are not defined in the Lanham Act,” and “there is no published case deciding whether a blogger is a journalist,” Judge Henry M. Herlong, Jr. applied a “functional analysis” test to determine whether Smith’s comments were news reporting or commentary. This test, he explained, “examines the content of the material, not the format, to determine whether it is journalism.” As a result of this analysis, Judge Herlong found that the BidZirk mark was used in the context of news reporting or news commentary and denied the motion for preliminary injunction. *BidZirk, LLC v. Smith*, Civil No. 06-109 (D. S.C. opinion and order April 10, 2006), at 5.


At a Sept. 17, 2007 status conference, defendant moved once again for summary judgment. Judge Herlong requested a memorandum in support of the motion, and, *sua sponte*, also requested a memorandum from the plaintiffs as to why they should not be sanctioned for filing a lis pendens against Smith's condominium and for asking abusive discovery requests.

(Continued on page 64)
Summary Judgment Decision

After receiving the documents, the court granted summary judgment to the defendant on all claims. On the defamation claim, the Judge Hertzog held that Smith’s statement that BidZerk president Daniel G. Schmidt was a “yes man” who “over promise[d] and under deliver[ed]” were “patently not defamatory.”

The judge also found for the defendant on the plaintiff’s invasion of privacy claims. Their false light claims failed, Hertzog ruled, because South Carolina has not recognized such an action, and because even if it did recognize such a tort, none of Smith’s statements placed the plaintiffs in false light. The court also dismissed plaintiffs’ misappropriation claims, which were based on Smith’s inclusion of a hyperlink to a local newspaper website featuring a picture of the plaintiffs, since Smith did not post the photograph on his own website.

Finally, on the Lanham Act claims, the court reaffirmed that defendant used the mark for the purpose of conveying newsworthy information to the public. Thus BidZirk’s Lanham Act claim failed as a matter of law.

Finally, the court decided to sanction plaintiff’s counsel $1,000, payable to the defendant, for filing the improper lis pendens against defendant’s condo.

Plaintiffs were represented by Kevin Elwell of K. M. Elwell, P.C. in Greenville, S.C. Defendant represented himself pro se.

Ninth Circuit Grants Rehearing En Banc in Roommate.com Case

Divided Panel Had Rejected Section 230 Defense

The Ninth Circuit granted rehearing en banc this month in Fair Housing Council v. Roommate.com LLC, No. Civ. 04-56916, 2007 WL 3013891 (Oct. 12, 2007). In May 2007, a divided panel, reinstated a housing discrimination lawsuit against a roommate matching website, holding that it was not entitled to immunity under ’230 for user profiles created through online questions and prompts. See 2007 WL 1412650 (9th Cir. May 15, 2007) (Kozinski, Reinhardt, Ikuta, JJ).

Judge Kozinski found that Roommate.com was not entitled to sec. 230 immunity for its user profiles because it created “new information” by categorizing and presenting user created information. Judge Reinhardt agreed and would have further treated Roommate.com as the creator of all portions of the user-created profiles, including personal essays written by users. Judge Ikuta wrote a separate opinion, curiously labeled as a concurrence, in which she dissented from the Court’s holding, stating that Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir.2003) was binding precedent.

In Carafano, another panel applied Section 230 to dismiss defamation claims over a false profile posted on dating website. Judge Kozinski found that Carafano could be limited to unique facts where a “prankster” provided false information that was not solicited by the operator of the website.
NEW CHALLENGES AND FAMILIAR THEMES
IN THE RECENT CASE LAW CONSIDERING SECTION 230

Samir Jain and C. Colin Rushing

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NEW CHALLENGES AND FAMILIAR THEMES
IN THE RECENT CASE LAW CONSIDERING SECTION 230

Introduction

The question whether interactive service providers may be held liable for third-party content that is
disseminated through their services continues to be governed in large measure by 47 U.S.C. § 230 (“Section
230”).1 Section 230, one of the few provisions of the Communications Decency Act (“CDA”) that survived the
Supreme Court’s decision in Reno v. ACLU,2 was intended to clarify existing confusion in the case law
concerning if and when providers of interactive computer services could be civilly liable for tortious or other
harmful third-party content. In the first appellate decision construing Section 230, Zeran v. America Online, Inc.,
the United States Court of Appeals for the Fourth Circuit held that “Section 230 . . . plainly immunizes computer
service providers like AOL from liability for information that originates with third parties.”3 The United States
Courts of Appeals for the Third,4 Ninth,5 and Tenth6 Circuits have all agreed with the reasoning and holding of
Zeran, as have numerous federal district courts,7 the Supreme Court of Florida,8 and intermediate state appellate

1  Section 230(c) provides as follows:
(c) Protection for “good samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker
• No provider or user of an interactive computer service shall be treated as the publisher or speaker of any
information provided by another information content provider.
(2) Civil liability
• No provider or user of an interactive computer service shall be held liable on account of—
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user
considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether
or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to
restrict access to material described in paragraph (1).

5  Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003); Batzel v. Smith, 333 F.3d 1018 (9th Cir.),
reh’g denied, 351 F.3d 904 (9th Cir. 2003), cert. denied, 124 S. Ct. 2812 (U.S. 2004).
7  See, e.g., Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F. Supp. 2d 1037 (N.D. Cal. 2004); Novak v. Overture
courts throughout the country. Most recently, the California Supreme Court overturned a lower court decision and embraced the prevailing interpretation of Section 230 in the closely watched case, Barrett v. Rosenthal.

This body of case law has been virtually unanimous. However, there have been a few dissenting voices: a three-justice dissent in the decision of the Florida Supreme Court; two California Court of Appeal decisions in 2003, including the Barrett decision overturned by the California Supreme Court; dicta in decisions by the Seventh and Eleventh Circuits, and a recent district court decision in Illinois. These cases have suggested to varying degrees that Section 230’s immunity may be more limited than the large bulk of the courts have recognized. Nonetheless, and despite the best efforts of plaintiffs, the overwhelming weight of the case law still confirms the broad immunity conferred by Section 230.

This article addresses the developments in the law in this area over the last two years. As set forth below, Section 230 remains a broad immunity for interactive service providers from liability for third-party content, and to most courts, the only operative question in a given case is whether the service provider itself played a role in creating or developing the allegedly harmful content at issue.

There are, however, two strains of dissent. The first, embraced by the dissenters in the Florida Supreme Court and the two California appellate courts mentioned above, is based on the theory that Section 230 does not

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11 Doe, 783 So. 2d at 1018-28 (Lewis, J., dissenting).
apply to a claim based on a theory of so-called “distributor” liability, in which the service provider “knew” or “should have known” about the allegedly harmful content and therefore had the state of mind for which an information distributor (such as a bookstore or newsstand) could be held liable. The second originated with dicta in a Seventh Circuit decision, in which Judge Easterbrook suggested that Section 230(c)(1) — the language that contains the prohibition against treating online intermediaries as “publishers or speakers” of other people’s content — is in fact not a source of immunity at all but merely a definitional provision or that it, at most, immunized providers against liability for claims for which publication was an explicit element. Until recently, no court had agreed with Judge Easterbrook’s suggestion. But the Eleventh Circuit recently appeared to suggest in a footnote — again in dicta — that it may find some merit in Judge Easterbrook’s suggestion that Section 230(c)(1) is not a source of substantive immunity. And a recent district court decision involving the service provider craigslist adopted the view that Section 230(c)(1) operates only to bar claims with publication as an element.

Finally, several cases in recent years have explored the limits of the express exceptions contained in Section 230. In particular, courts have considered the extent of the intellectual property and federal criminal law exceptions to the statute. And litigants continue to seek a federal civil claim exception to the statute even though no such exception appears in its language.

I. The Basic Elements of the Immunity Considered in Recent Years

Section 230 immunity has three basic elements. First, the defendant asserting the immunity must be a “provider or user of an interactive computer service.” Second, the claim must be based on “information provided by another information content provider.” Third, the claim must treat the defendant as the “publisher or speaker” of the information at issue. Courts have historically interpreted these elements so as to provide service providers with broad immunity from liability for third-party content. In the past two years, that trend has continued essentially unabated. The few cases that arguably have deviated from the broad construction of these terms seem to have done so principally when the defendant asserting the immunity appeared to the court to itself be a bad actor.
A. Provider or User of an Interactive Computer Service

Although this is the least controversial element, litigants continue to raise the question whether a defendant is a “provider or user of an interactive computer service” within the meaning of Section 230. There are two categories of disputes that come up: First, whether the service at issue is an “interactive computer service.” And second, whether the defendant is a “provider or user” of such a service.

In general, courts have had little difficulty concluding that any online service qualifies as an interactive computer service. There is never any dispute that internet service providers (such as AOL or Earthlink) qualify as interactive computer services. Indeed, the statute specifically contemplates that a service that provides access to the Internet is an interactive computer service.

Occasionally, litigants have suggested that online services that are not traditional ISPs, such as those provided by eBay, Amazon, Yahoo!, and Google, do not qualify as interactive computer services. Under the plain language of the statute, however, such services easily qualify, because they enable “multiple users” to gain access to a computer server. Courts have had no trouble agreeing with this conclusion and, with only a couple of outlier decisions, that remains the case today. In the past two years, courts have continued to confirm that website operators — including individuals who handle a relatively low volume of third-party content as well as corporations that handle a massive volume of third-party content — enjoy the protections of Section 230. In Donato v. Moldow, for example, a New Jersey appellate court confirmed that the individual operator of a website could be entitled to the protections of Section 230. In that case, Stephen Moldow operated a website, 1865 A.1d 711 (N.J. App. Div. 2005).

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14 See, e.g., Zeran, 129 F.3d at 330 n.2 (“The parties do not dispute that AOL falls with the CDA’s ‘interactive computer service’ definition . . . .”).
15 See 47 U.S.C. § 230(f)(2) (term “interactive computer service” explicitly includes “a service or system that provides access to the Internet”).
16 See id. (“‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server”).
17 See, e.g., 800-JR Cigar, Inc. v. GoTo.com, 437 F. Supp. 2d 273 (D.N.J. 2006); Carafano v. Metrosplash.com, 207 F. Supp. 2d 1055, 1066 n.3 (C.D. Cal. 2002) (referring to, and rejecting the district court’s initial determination that Matchmaker.com was not an interactive computer service because it was not an internet service provider), aff’d on other grounds, 339 F.3d 1119 (9th Cir. 2003); Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, 29 Cal. Rptr. 3d 521, 544 n.9 (Ct. App. 2005) (suggesting that a website operator was not an “interactive computer service”).
“Eye on Emerson,” on which he “posted information about local government activities,” conducted polls, and allowed users to post their own comments, either anonymously or with attribution. 19 The plaintiffs, elected members of the Emerson Borough Council, sued Moldow for defamation and other claims based on “negative messages” posted on the website, many of which allegedly “were vile and derogatory.” 20 The court held that Moldow’s website was an interactive computer service under the plain language of the statute. 21

Likewise, in Roskowski v. Corvallis Police Officers’ Association, a federal district court in Oregon held that a police officer’s association enjoyed Section 230 immunity to claims arising from third-party content that appeared on its website. 22 As in Donato, the plaintiff in that case was a public official — in this case, the former police chief — upset about (among other content) third-party, anonymous emails posted to a website sponsored by the Corvallis Police Officer Association’s website. And as in Donato, the court held that the Association was “acting as an ‘interactive computer service’ in providing and maintaining the website.” 23 Likewise, in Dimeo v. Max, 24 the court considered whether www.tuckermx.com, the website operated by Tucker Max, a self-described “celebrity ‘drunk’ and ‘asshole’ who uses his Web site, www.tuckermx.com, to ‘share [his] adventures with the world,’” was an interactive computer service. 25 The court held that it was and Max thus enjoyed immunity from claims based on third-party comments posted to the site. 26

Another issue that has arisen in the case law is whether the defendant qualifies as a “provider or user” of the service. This language is extremely broad: Virtually anyone who deals in any way with an interactive computer service is either a “provider” or “user” of an interactive computer service — and often both. For example, in Donato, the court explained that Moldow was both a provider and a user of an interactive computer

20 Id.
21 Id. at 719.
23 Id. at *11.
25 Id. at 524.
26 Id.
service: he both provided the Eye on Emerson website, “an information service or system that provides or enables computer access by multiple users to a computer service,” and was also a “user” of the hosting service and the Internet service provider he used to make the website available.\textsuperscript{27} Moreover, the plain language of the statute suggests that protection can even extend to individual users who select information created by others and then disseminate it online using an interactive computer service.\textsuperscript{28} For example, in \textit{D’Alonzo v. Truscello},\textsuperscript{29} the defendant operated a website on which he posted, verbatim, a news article that appeared in a print newspaper. The newspaper then retracted the article, after which the website operator posted a retraction on his site as well. The plaintiff, a subject of the erroneous news story, sued the website operator for defamation but the court dismissed the claim on the basis of Section 230, concluding that “Section 230 immunity is not limited to information or material created in cyberspace.”\textsuperscript{30}

The California Supreme Court also rejected the suggestion in \textit{Barrett} that immunity should be restricted only to circumstances in which a user’s role with respect to tortious third-party content is “passive” -- that is, when the user does not play an “active” role in the selection of that content. As the court explained, nothing in the language of the statute indicates that Section 230 protects only users who engage in “passive” conduct. In fact, distinguishing between active and passive users would have a perverse effect: a user who engaged in “active” deletion of content may find herself deemed to have also “active[ly]” selected the remaining, non-blocked content for dissemination, while a “passive” intermediary who screened and reviewed nothing could find itself immune.\textsuperscript{31} Accordingly, the court concluded that Section 230’s protection extends to users — whether or not their role in disseminating someone else’s content was “active” or “passive.”

As these cases reveal, courts continue to be comfortable extending Section 230 immunity to a wide range of defendants in addition to traditional internet service providers.

\textsuperscript{27} 865 A.2d at 718.  
\textsuperscript{28} \textit{See Batzel}, 333 F.3d at 1031 (“the exclusion of ‘publisher’ liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message”).  
\textsuperscript{30} 2006 WL 1768091, at *5.  
\textsuperscript{31} \textit{Barrett}, 51 Cal.Rptr.3d at 77.
B. Information Provided by Another Information Content Provider

Courts have generally concluded that this element of Section 230 immunity is satisfied as long as the specific content at issue in the case originated with a third party — even if the defendant is an “information content provider” with respect to some other content.

Thus, courts continue to agree that a defendant retains the protection of Section 230 even if it provides technical assistance in the form of automated tools or other means to help shape the form in which the third-party content appears. For example, in Corbis Corp. v. Amazon.com, Inc., the plaintiff sued Amazon.com for publishing certain images that had been supplied by a third party. Specifically, the plaintiff alleged that Amazon was liable for certain images advertised and sold through Amazon’s zShops service — a “platform [that] allows individuals and retailers . . . to showcase their products and sell them directly to online customers.” In addition to federal copyright claims, the plaintiff alleged state law consumer protection and tortious interference claims. Because the images at issue were all provided by third parties, the court held that Amazon was immune from the state law claims under Section 230. Importantly, the court rejected the suggestion that Amazon was an information content provider based on allegations that “Amazon may have encouraged third parties to use the zShops platform and provided tools to assist them.” Because the third party “ultimately decided what information to put on its site,” Section 230 immunity barred the state law claims.

Likewise, in Prickett v. InfoUSA, Inc., the court held that the defendant, the operator of an online database service that collected and published directory information about businesses and households, was immune from defamation claims based on its dissemination of erroneous information submitted by third parties. Even though the defendant “facilitated the creation of the database entries through a special form and prompts,” it could

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33 Id. at 1094.
34 Id. at 1117-18.
35 Id. at 1118.
36 Id.
37 Id.
not be deemed an “information content provider” with respect to the specific information at issue — all of which was submitted directly by third parties. And in Donato v. Moldow, discussed above, the court held that the individual operator of a website oriented toward community issues was entitled to the protection of Section 230 for allegedly defamatory comments posted to the site by third parties, even assuming he had a role in “shaping” the content that third parties would post by editing postings, allowing people to post anonymously, commenting on third party messages, and banning users deemed disruptive.

Anthony v. Yahoo!, a case in which the court rejected the defendant’s assertion of Section 230 immunity, illustrates this principle as well. The plaintiff in Anthony alleged that Yahoo! had fraudulently attempted to retain subscribers to its online dating service by creating false profiles and sending users the profiles of former members while representing that they were in fact current. The court refused to dismiss the case on the basis of Section 230 immunity as a matter of law: Because the claim was based on “Yahoo!’s manner of presenting the profiles” rather than the content of the profiles themselves, and because the complaint alleged that Yahoo! itself had created some of the content at issue, the court held that it could not determine, at least from the face of the complaint, that Section 230 barred the claims based on the allegations of the complaint.

There are, however, two recent cases in which courts have concluded that a service provider endorsed or ratified the content at issue and, on that basis, held that Section 230 was not available. In Teva Pharmaceuticals USA Inc. v. Stop Huntingdon Animal Cruelty USA, for example, the court held that a website that posted the achievements of radical animal rights activists, submitted by the activists themselves, could be held liable for the contents of those postings. Because the website operator selected and revised postings to its site, and actively

39 Id. *5.
40 865 A.2d at 719-20.
41 421 F. Supp. 2d 1257 (N.D. Cal. 2006).
42 Id. at 1263.
43 Id.
promoted the goals of the activists, the court held that the operator “ratifies the illegal activity every time it publicizes, and implicitly encourages, the activities on the website after the fact.”45

Likewise, in *Hy Cite Corporation v. Badbusinessbureau.com*,46 the court suggested that it, too, was adopting a ratification theory. In that case, the defendants operated a website, called the “Rip Off Report,” that allowed consumers who were purportedly dissatisfied with any company’s product or service to post a complaint.47 If a company that was the target of such a complaint wanted to have it removed from the site, the company could go through a “mediation” program sponsored by the defendants — a program that required the payment of thousands of dollars to the defendant.48 When the plaintiff, one of the companies that was the subject of a complaint, sued the operators of the website, the operators asserted Section 230 as a defense.49 The court rejected that defense. For the most part, the rejection was not on controversial grounds: The court noted that much of the content, such as editorial comments and titles, actually was originated by the defendants.50 However, the court also held that the defendants were potentially liable because they “solicit individuals to submit reports with the promise that individuals may ultimately be compensated for their reports.”51 These factors suggested to the court that the defendants were arguably “responsible . . . for the creation or development of information” submitted by the third parties.52

In both *Hy Cite* and *Teva Pharmaceuticals*, the courts seemed to reach the conclusion that they did because of their view of the defendants and the peculiar circumstances of the case. But the language of Section

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45 Id. at *11.
47 Id. at .1144-45.
48 Id.
49 Id. at 1147.
50 Id. at 1149.
51 Id.
52 Id. The Eleventh Circuit, in an unpublished decision, addressed another case related to the Rip Off Report. See *Whitney Information Network, Inc. v. Xcentric Ventures, LLC*, No. 06-11888, 2006 WL 2243041 (11th Cir. Aug. 1, 2006). The district court had dismissed the case on the basis of Section 230, but the Eleventh Circuit reversed, in part because the defendants relied on conclusory declarations and in part because the defendants had not “controvert[ed] Whitney’s allegations that Defendants tailored complaints submitted by other individuals, adding words such as “ripoff,” “dishonest,” or “scam.” Id. at *4.
230, and in particular the definition of an “information content provider,” which requires participation in the
creation or development of the content, does not suggest that Section 230 immunity should be unavailable
whenever the defendant service provider has arguably endorsed the third-party content at issue. If a ratification
exception were to take root, it could represent a serious incursion on the otherwise broad immunity of Section
230.

C. “Treat” as a Publisher or Speaker

Courts continue to broadly construe this element of the defense, concluding that any cause of action that
would hold a person legally responsible for the distribution of third-party content necessarily “treats” that person
as a “publisher or speaker” of that content. This includes traditional speech-based claims such as defamation\(^{53}\)
and invasion of privacy.\(^ {54}\) But courts have also held that other torts that are based on third-party content, even if
not cast as traditional speech-based torts, are also barred. The wide range of claims held to be barred by Section
230 in recent cases illustrates this point:

- In *Barnes v. Yahoo!*\(^ {55}\), the United States District Court for the District of Oregon rejected a negligence
claim that was based on Yahoo! ’s alleged failure to follow through on a purported promise to remove
and block harmful content. Specifically, the plaintiff alleged that Yahoo! had promised to remove
profiles that falsely purported to have been created by the plaintiff and that included nude
photographs of her. In an effort to avoid Section 230’s bar, the plaintiff cast her claim as a one for the
negligent failure to perform a gratuitous undertaking — namely, the alleged promise to remove the
content — but the court held that Yahoo! was nonetheless immune.

- In *Doe v. Bates*,\(^ {56}\) now pending in the United States District Court for the Eastern District of Texas,
the plaintiff alleged that Yahoo! was liable under state and federal law for the alleged distribution of

\(^{53}\) Parker v. Google, 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006); Prickett, 2006 WL 887431, at *2; D’Alonzo, 2006 WL
1768091, at *1.

\(^{54}\) Roskowski, 2005 WL 555398, at *11; Parker, 422 F. Supp. 2d at 500-01; Prickett, 2006 WL 887431, at *2.

\(^{55}\) No. Civ. 05-926-AA, 2005 WL 3005602 (D. Or. Nov. 8, 2005), appeal pending, No. 05-36189 (9th Cir.).

child pornography by users of the Yahoo! Groups service. The magistrate judge issued a report and recommendation recommending dismissal of those claims on the basis of Section 230.

- In *Associated Bank-Corp. v. Earthlink, Inc.*,\(^{57}\) Earthlink, an ISP, was sued for tortious interference and other claims after a third-party vendor that Earthlink used to block harmful websites (allegedly erroneously) blocked the plaintiff’s website as potentially fraudulent. When an Earthlink user tried to visit the plaintiff’s site, the user instead received a page stating that the website was potentially fraudulent. Because the claim was based on the third party’s content, the court held that Earthlink was immune.

- In *Beyond Systems, Inc. v. Keynetics, Inc.*,\(^{58}\) the plaintiff sued a number of companies under Maryland’s anti-spam statute, including Rackspace, the ISP whose role was to provide hosting services for the companies that sent the alleged spam. Dismissing the plaintiff’s claims against Rackspace, the court held that Section 230 barred the claims because they were based on third-party content, and in doing so, specifically rejected the contention that Section 230 was limited to defamation claims.

- In *Faegre & Benson, LLP v. Purdy*,\(^{59}\) the court suggested that Section 230 could bar a claim for contempt. In this case, the defendant was enjoined from using the names and trademarks of the plaintiffs. Among the numerous alleged violations of the injunction was the claim that “statements falsely attributed to [one of the plaintiffs] appeared on a discussion board on a web site controlled by Purdy.” In the initial proceedings, the court concluded that there was no evidence that the defendant in fact posted the comments, and in light of Section 230, the court held that a contempt sanction for those comments was inappropriate: the defendant was “immune from defamation or appropriation

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\(^{57}\) No. 05-C-0233-S2005 WL 2240952 (W.D. Wis. 2005).


\(^{59}\) 367 F. Supp. 2d 1238 (D. Minn. 2005).
claims based on content posted by someone else.”60 In later proceedings, the court concluded that, in fact, the defendant had posted the comments, and reversed its initial determination.61

Importantly, courts also continue to recognize that a claim “treats” a defendant as a “publisher or speaker” even if the defendant disseminated the content at issue after allegedly having notice of the content’s tortious or unlawful nature. As courts have recognized, dissemination after notice is at the very core of “publisher” liability: as the Fourth Circuit explained in Zeran, the decision to block, edit, or remove content is part of a publisher’s quintessential duties.62 Courts have continued to affirm this principle. Thus, in Donato, the court expressly held that “[n]otice from the offended party that the material is false or otherwise improper does not defeat the immunity.”63 Citing Zeran, the court explained that notice-based liability “would undermine the dual purposes of § 230,” namely, to encourage robust speech on the Internet and to encourage service providers to engage in self-regulation.64 Likewise, in Austin v. CrystalTech Web Hosting,65 and Beyond Systems,66 the courts rejected the argument that notice could be the basis for avoiding liability.

In short, courts have generally recognized that the only operative inquiry is whether the claim is based on the dissemination of third-party content. If it is, then imposing liability on the service provider would impermissibly “treat” it as a “publisher or speaker” of the content in violation of Section 230.67

Finally, at least one court has concluded that Section 230’s prohibition on publisher liability actually creates an affirmative right that may be asserted in a civil rights claim against a state. In Voicenet Communications v. Corbett, the plaintiffs were online intermediaries who brought a Section 1983 action, based in part on Section 230, against several state and local law enforcement officials based on the execution of an

60 367 F. Supp. 2d at 1248-49.
62 129 F.3d at 330-31.
63 865 A.2d at 726.
64 Id.
66 422 F. Supp. 2d at 536-37.
67 See Parker, 422 F. Supp. 2d at 500-01 (“each claim [is barred because it] revolves around the tortious acts of a third party for which [the plaintiff] holds Google accountable”).
allegedly unlawful warrant.68 Allowing their claim under Section 230 to proceed, the court explained that Section 230 “created a ‘free zone’ protecting providers and users of interactive computer services from state action that would hold them accountable for information posted by others,” and that it therefore “confers a right that presumably can be enforced through § 1983.”69 Importantly, the court also held that Section 230 immunizes eligible defendants from “inconsistent state criminal laws” — including state criminal prosecutions — that would treat them as a “publisher or speaker” of third-party content (although the court in that case did not decide whether the execution of a search warrant would treat an ISP as a publisher or speaker).70

II. THE TWO MAIN STRANDS OF DISSENT

Over the years, two theories of dissent to the otherwise established interpretation of Section 230 have emerged. The first theory was articulated (and rejected) in the first decision to consider Section 230, and it has been overwhelmingly rejected since. The second — which has appeared only in brief dicta — consists of recent and unconvincing skepticism that Section 230(c)(1) has any operative effect at all.

A. Barrett v. Rosenthal and the So-Called “Distributor Liability” Exception

Since the first case to address Section 230, plaintiffs have argued that because the statute uses the term “publisher,” but not “distributor,” the statute does not immunize service providers from the types of liability to which mere distributors may be subject. This argument purports to draw upon the discussion of the categories of “publisher” and “distributor” in the pre-Section 230 case law. Under those cases, exemplified by Cubby, Inc. v. CompuServe, Inc.,71 so-called “distributors” of information — such as bookstores, newsstands, and libraries — may be held liable for harmful information originated by third parties only if they had specific knowledge of the content and its harmful nature.72 Thus, distributors of information transmitted by third parties enjoy an extra level

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69 Id. at *3.
70 Id. at *3-4.
72 Id. at 139-41.
of protection, grounded in the First Amendment,\textsuperscript{73} that requires a special threshold showing before they can legally be treated as the publisher of such information.

A small number of state court jurists — namely, the minority of the Florida Supreme Court who dissented in the early case of \textit{Doe v. America Online}\textsuperscript{74} and two panels of the California Court of Appeal — have seized upon this extra protection as a supposed rationale to limit the scope of Section 230. In the Court of Appeal’s decision \textit{Barrett v. Rosenthal}, the defendant was an individual user who asserted Section 230 immunity for third-party content contained in an e-mail that she had received from someone she did not know and that she thereafter intentionally posted on open Internet forums.\textsuperscript{75} Contrary to the established case law, the Court of Appeal in \textit{Barrett} rejected the previously well-settled proposition that § 230(c)(1) protects defendants from liability even if they had knowledge or “notice” of allegedly tortious content.\textsuperscript{76} According to that court, whenever a defendant can be said to have been “on notice” of the unlawful material, a claim for defamation ceases to treat the defendant as a “publisher or speaker” of the content at issue and instead subjects the defendant to so-called “distributor” liability.\textsuperscript{77} According to \textit{Barrett}, by enacting Section 230, Congress intended to ensure that providers and users of interactive computer services would be subject to liability only under the heightened standards normally afforded to distributors.\textsuperscript{78}

The California Supreme Court rejected the Court of Appeal’s narrow reading of Section 230 on numerous grounds.\textsuperscript{79} In particular, the court acknowledged that so-called “distributor liability” still requires treating the

\textsuperscript{73} As a matter of First Amendment doctrine, an entity that serves as an intermediary for large quantities of third-party content — whether it be a bookstore, a library, a newsstand, or the provider of an online forum — cannot be held liable for unlawful content that may be interspersed among the overall body of information being disseminated absent evidence that it knew or should have known of that content. \textit{See, e.g.}, \textit{Smith v. California}, 361 U.S. 147, 152-53 (1959).

\textsuperscript{74} 783 So. 2d at 1013-17.

\textsuperscript{75} 9 Cal. Rptr. 3d at 144-46.

\textsuperscript{76} \textit{Id.} at 153.

\textsuperscript{77} \textit{Id.} at 151-67.

\textsuperscript{78} In \textit{Grace v. eBay}, 16 Cal. Rptr. 3d 192, the intermediate appellate court based in Los Angeles essentially adopted the \textit{Barrett} court’s reasoning.

defendant as a publisher. To take the most obvious example, one of the elements of a defamation claim is publication of the allegedly harmful content — as a result, holding a distributor liable for defamation (on the theory it was on notice of the content but nevertheless distributed it) still requires finding that it published the content. Moreover, the California Supreme Court agreed with Zeran that a claim based on alleged “notice” of harmful content puts the defendant squarely in the role of a “publisher,” because such a defendant would have to carry out a quintessential duty of a publisher: deciding what to do with the content (e.g., whether to retract it).  

As the Fourth Circuit had explained in Zeran:

Zeran contends that the term “distributor” carries a legally distinct meaning from the term “publisher.” Accordingly, he asserts that Congress’ use of only the term “publisher” in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, that his suit should be permitted to proceed against AOL. We disagree. Assuming arguendo that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

Numerous other courts have reached the same conclusion.  

As these courts have understood, contrary to the assumption that underlies the lower court’s decision in Barrett, the common law does not recognize a distinct cause of action for “distributor liability.” Instead, as the

80 55 Cal.Rptr.3d at 66-73.

81 Zeran, 129 F.3d at 331-32 (emphasis added).

82 See, e.g., Ben Ezra, Weinstein & Co., 206 F.3d at 986 (following Zeran in case where AOL was alleged to have had notice of allegedly defamatory material and affirming district court decision holding that immunity applies to “traditional publisher or distributor liability for defamatory statements on computer services,” 1999 WL 727402, at *2 (D.N.M. March 1, 1999)); Doe, 783 So. 2d at 1013-17 (explicitly adopting Zeran’s rejection of distinction between “distributor” and “publisher” liability); Gentry, 121 Cal. Rptr. 2d at 716 n.10 (rejecting proposition that Section 230 “does not immunize interactive computer service providers that act as distributors, that is, who publish information that they know to be false, fraudulent, defamatory, obscene, unlawful or otherwise objectionable”); Kathleen R., 121 Cal. Rptr. 2d at 779 n.3 (agreeing with Zeran that “section 230(c)(1) immunity extends to distributor, as well as publisher, liability for defamation, and thus that an interactive computer service cannot be held liable merely because it has notice of a potentially defamatory statement on its service”); Barrett, 799 N.E.2d at 924-26 (“Every federal case to decide the issue has held that section 230 immunizes distributors as well as publishers. We defer to these decisions . . . .”); Schneider, 31 P.3d at 38-42 (applying Section 230 to claim based on allegation that Amazon.com was told about an allegedly tortious posting and tortiously failed to remove it); PatentWizard, Inc., 163 F. Supp. 2d at 1071 (“In enacting § 230, Congress meant to insulate distributors as well as publishers from liability for defamation.”); Blumenthal, 992 F. Supp. at 52 (in enacting Section 230, “Congress made no distinction between publishers and distributors in providing immunity from liability”); Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1111 (C.D. Cal. 2004) (“[E]ven if the Defendants are considered distributors rather than publishers, the CDA immunities would still apply . . . .”).
Zeran court explained, so-called “distributor” liability is simply a subset of “publisher” liability. To be sure, the general rule is that distributors (such as newsstands and bookstores) cannot be held liable for defamation “in the absence of proof that they knew or had reason to know of the existence of defamatory matter” in the material they distribute. But this is a form of protection for distributors that requires a special threshold showing before they can be treated as the publisher or speaker of third-party information. Like any other entity, a distributor still may be held liable for defamation or a similar tort only if it is deemed to be a publisher of the allegedly tortious material.

Although plaintiffs likely will continue to assert that Section 230 has a so-called distributor liability exception, especially after Barrett, both the case law and the underlying common law demonstrate that no such exception should be deemed to exist.

B. Doe v. GTE Corp.: Does Section 230(c)(1) Provide Any Immunity at All?

Nearly three years ago, a panel of the Seventh Circuit suggested, in dicta, that Section 230(c)(1) is not a source of immunity at all. Since that time, no court has followed the panel’s lead and, even after the GTE Corp. decision, at least one district court in the Seventh Circuit followed the prevailing case law and concluded that Section 230(c)(1) is a broad source of immunity. Although a panel of the Eleventh Circuit recently seemed to suggest in its own dicta in a footnote that there might be some merit to the suggestion in Doe v. GTE Corp., this undeveloped suggestion is demonstrably wrong.

In Doe v. GTE Corp., the district court for the Northern District of Illinois had dismissed all of the state law claims against GTE based on § 230(c)(1) because the plaintiff sought to hold GTE liable for its role in hosting

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83 Id. at 331.
84 Id.
85 See Restatement (Second) of Torts § 558 (1977) (any defamation claim includes both “an unprivileged publication to a third party” and “fault amounting at least to negligence on the part of the publisher” (emphasis added)); see also W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 113, at 802 (5th ed. 1984) (“[I]t has always been necessary for the plaintiff [in a defamation case] to prove as a part of his prima facie case that the defendant (1) published a statement . . . .” (emphasis added)). Section 581(1) of the Restatement does not, as the Barrett and Grace courts suggested, support a contrary conclusion. The illustrations following Section 581 demonstrate that that section merely describes the circumstances in which a person who is not the original publisher of defamatory content may nonetheless be “treat[ed]” as the publisher for purposes of defamation law. See Restatement (Second) of Torts § 581 illus. 1-4 (each describing the operative tort as “publishing a libel”).
86 Doe v. GTE Corp., 347 F.3d 655.
a third party’s web site. Although the Seventh Circuit affirmed the dismissal, it did so on the ground that the plaintiffs had failed to identify any source of state law for their claims. Because the Seventh Circuit affirmed on this alternative ground, there was no need for the court even to reach the question whether Section 230 might provide an independent basis for dismissal. Nonetheless, the court mused about the applicability of § 230(c)(1), offering two alternative constructions that bear no resemblance to any prior judicial treatment of the statute. First, the court hypothesized that § 230(c)(1) might not provide any immunity at all, but instead might be a “definitional clause” that somehow clarifies § 230(c)(2). Section 230(c)(2) provides that a provider or user of an interactive computer service may not be held liable “on account of” certain actions to block or remove “objectionable content,” and thus protects an entity, like a web host, “that does filter out offensive material.” Under the Seventh Circuit’s proposed “definitional” reading of § 230(c)(1), “an entity would remain ‘a provider or user’ — and thus be eligible for the immunity under § 230(c)(2) — as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.”

This “definitional” reading of § 230(c)(1) is not a logical reading of the statute. As an initial matter, Section 230 has its own, separately designated “definitions” section that explicitly defines terms used elsewhere in the statute, including terms used in Section 230(c). See 47 U.S.C. § 230(f). From a structural standpoint, therefore, it makes little sense to suggest that Section 230(c)(1) is also intended to be just a definition. Further, by its terms, Section 230(c)(1) does not purport to be a “definition” of anything: it states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). While the GTE dictum hypothesizes that Section

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88 GTE Corp., 347 F.3d at 660-61 (rejecting the plaintiffs’ “negligent entrustment of chattels” theory, and noting that “[p]laintiffs do not cite any case in any jurisdiction holding that a service provider must take reasonable care to prevent injury to third parties”).

89 Id. at 660.

90 Id.
230(c)(1) might define the term “provider or user,” that section clearly functions not to attribute a particular meaning to that term, but rather as a substantive prohibition on how “providers and users” may be “treated.”

Moreover, the GTE definitional dictum lacks coherence. According to that dictum, a provider or user may become a “publisher or speaker” if it creates the objectionable information and thereby “lose the benefit of § 230(c)(2).” 347 F.3d at 660. But nothing in Section 230(c)(2) suggests that its applicability depends on whether the defendant is or is not a “publisher or speaker.” Indeed, Section 230(c)(2) does not even use those terms. The plain meaning of Section 230(c)(2) is that a defendant is immune for removing or restricting content as long as it believes in “good faith” that the content is unlawful or objectionable — nothing in Section 230(c)(2) even begins to imply that being the publisher or speaker of the content in question makes any difference.

Finally, the meaning that the GTE dictum would attribute to section 230(c)(1) would serve no purpose. The immunity under Section 230(c)(2) is intended to ensure that, if a provider or user removes particular content, it is not liable to the party whose content has been removed. The GTE court’s hypothesis presumes that the purpose of Section 230(c)(1) is to make clear that Section 230(c)(2) immunity does not apply where the provider itself created the content in question — that is, where the provider itself would be the “censored” party. But a provider is not going to sue itself for removing its own content, and thus the elimination of the immunity in that context would be meaningless.

The Seventh Circuit dicta alternatively suggested, in a single sentence, that perhaps “§ 230(c)(1) forecloses liability that depends on deeming the ISP a ‘publisher’ — defamation law would be a good example of such liability — while permitting the states to regulate ISPs in their capacity as intermediaries.”91 In addition to being contrary to the overwhelming case law, this approach also ignores that the purposes of Section 230 are not tied in any logical manner to concerns relating only to defamation liability rather than other forms of liability. Nor can it be squared with the fact that Section 230 expressly carves out a number of categories of laws — such as intellectual property laws, criminal federal statutes, and privacy statutes similar to the Electronic Communications Privacy Act. If Section 230(c)(1)’s operation were narrowly confined only to defamation and similar torts, these exceptions from the immunity scheme would be wholly unnecessary. Ultimately, the Seventh

91 Id.
Circuit abandoned its discussion of Section 230, and the court concluded that “[w]e need not decide which understanding of § 230(c) is superior,” thus underscoring that this entire detour was purely dicta.

Until recently, Doe v. GTE Corp. had not been cited by single court. A recent decision of the Eleventh Circuit, however, included in a footnote yet another piece of dicta that entertained the possibility that the Doe v. GTE dicta is correct. In Almeida v. Amazon.com, Inc., the plaintiff had alleged that Amazon should be liable on a theory of misappropriation of the right of publicity for posting the cover of a book that it was selling that featured a photograph of the plaintiff when she was ten years old. Because Amazon did not originate the book cover, the court dismissed the claim on the grounds of Section 230, apparently recognizing the immunity defense sua sponte.

On appeal, Almeida raised the question whether her right of publicity claim fell within the express Section 230 exception for intellectual property claims. Although the decision includes a discussion of the plaintiff’s question presented, the court declined to decide the question and, like the Seventh Circuit in Doe v. GTE, instead affirmed dismissal on the ground that state law did not afford the plaintiff any relief.

Nonetheless, just like the decision in Doe, the Eleventh Circuit decision includes dicta concerning Section 230. In a footnote, the opinion asserts without explanation that Section 230(c)(1) is “phrased as a definition” and suggests that the Third, Fourth, Ninth and Tenth Circuits reached their conclusions in spite of this fact. At the same time, the decision cites the Seventh Circuit dicta favorably, indicating that the Doe v. GTE dicta suggests that Section 230 “is not necessarily inconsistent with state laws that create liability for interactive service providers that refrain from filtering or censoring content.” Then, the Eleventh Circuit “note[s]” that the Doe v. GTE rationale may be consistent with Congress’s approach in the Digital Millennium Copyright Act, in which it granted copyright infringement immunity to ‘innocent’ service providers who can prove that they do not have actual or constructive knowledge of the copyright infringement. After making this point, the court observed that “there is no issue of actual or constructive knowledge” in Almeida, because “the Florida right of publicity

92 456 F.3d 1316.
93 Id. at 1322 n.3
94 Id.
95 Id.
does not impose upon interactive service providers an obligation to filter or censor content,” “there is no indication that Amazon had knowledge of the allegedly misappropriated image,” and Amazon “responded promptly to Almeida’s notice by removing [the book in question] from its websites."

Ultimately, it is difficult to ascertain what is meant by this Eleventh Circuit dicta. It appears to suggest that Section 230 may provide protection for so-called “innocent” actors similar to the notice-and-takedown regime Congress created for copyright claims in the DMCA. See 17 U.S.C. § 512. Section 230, however, clearly does not impose anything like the DMCA’s notice-and-takedown regime, as a comparison of the statutes plainly reveals. Section 230 has nothing like the elaborate safe-harbor procedures that are in place in the DMCA. If anything, the clear difference between the text of the statutes demonstrates that Congress knows full well how to create a notice-and-takedown regime and did not do so in Section 230. Indeed, although the Eleventh Circuit dicta cites the Seventh Circuit dicta, the Seventh Circuit did not suggest that Section 230(c)(1) would protect online intermediaries who did not have “actual or constructive knowledge” of the content at issue. Rather, the Seventh Circuit dicta argued that Section 230(c)(1) may not provide any immunity at all. Thus, it is not even clear that the two courts are suggesting the same interpretation of Section 230.

More recently, a district court in Illinois adopted the second strand of dicta in Doe v. GTE — namely, that Section 230(c)(1) provides immunity only against causes of action for which publication is a specific element. In Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. craigslist, Inc., (“CLC”), the defendant was craigslist -- an entity that offers a bulletin board service, with different categories and subcategories (such as personals, for sale, and housing) on which individual users can post various types of advertisements or other content. The CLC case concerned notices posted by users in the housing category of craigslist’s Chicago page. According to the plaintiff, a group that advocates for fair housing rights (among other things), a small fraction of craigslist users had posted notices for housing that expressed preferences “on the basis of race, color, national origin, sex, religion and familial status” in violation of the federal Fair Housing Act. CLC, 2006 WL at **4-5. Rather than sue the individual users, however, CLC alleged that craigslist was liable under 42 U.S.C. § 3604(c), a provision of the Fair Housing Act that prohibits a person from “mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a
dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

In its threshold motion for judgment on the pleadings, craigslist asserted that Section 230 barred this claim, and the district court agreed. In doing so, the court rejected a number of the plaintiff’s assertions about the scope of Section 230, including its argument that the statute does not provide any protection against federal statutory claims. See CLC, 2006 WL at *13. But the court did not completely agree with craigslist’s view of the scope of Section 230. It “decline[d] to follow Zeran’s lead” and concluded that Section 230 applies only to claims in which “publishing” is an explicit, technical element. CLC, 2006 WL at *11. The district court recognized that Congress passed Section 230 “to address the problem of holding liable for defamation ICSs that reviewed third-party content . . . while leaving free from liability ICSs that did not review content.” Id. But it seems to have concluded that Congress was principally interested in providing immunity only from defamation claims or from other claims for which “publishing” is an explicit, technical element, even while acknowledging that its narrow interpretation of Section 230(c)(1) was contrary to the holdings of numerous other courts. Id. Ultimately, the district court concluded that craigslist enjoyed protection from the FHA claim because the language of the FHA provision on which CLC based its suit prohibited craigslist from “publishing” the discriminatory advertisements.

The need for such close analysis of the specific legal elements of the claim being asserted by a plaintiff contrasts sharply with the approach followed in Zeran and its progeny. The virtually uniform approach of all those courts has been to examine whether the plaintiffs’ claims turn on an allegation that the online intermediary disseminated content that originated with a third-party. In this regard, the district court seems not to have heeded the warning of other courts, including the Fourth Circuit in Zeran, that determining whether immunity is available based on fine distinctions in how plaintiff couches her claims would simply encourage artful pleading by plaintiffs and disserve Congress’s key policy objectives. Under the CLC court’s unprecedented approach, however, the protection would not be based on the nature of the online intermediary’s role but rather on whether a statutory or a common law definition of any given cause of action fortuitously includes or omits the words “publisher” (or “speaker”) or some variation thereof.
Ultimately, although neither of the interpretations articulated in the *dicta* in the Seventh or Eleventh Circuits finds any support in the text or purposes of the statute, it remains to be seen whether courts join the CLC court in relying on those interpretations as part of their holdings.

### III. SCOPE OF EXCEPTIONS

Section 230 includes several explicit exceptions. *See 47 U.S.C. § 230(e).* In recent years, two of the exceptions have received the attention of the courts: one for the enforcement of federal criminal statutes, *id.* § 230(e)(1), and the other for laws pertaining to intellectual property, *id.* § 230(e)(2). In addition, litigants have also suggested that Section 230 contains an implicit exception for federal civil claims even though no such exception exists on the face of the statute.

#### A. The Exception for Enforcement of Federal Criminal Statutes

Section 230(e)(1) states: “Nothing in this section shall be construed to *impair the enforcement of* section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or *any other Federal criminal statute.*”

96 47 U.S.C. § 230(e)(1) (emphasis added). Section 223(d) prohibits sending or displaying offensive material to persons under 18. Section 231 is intended to restrict minors’ access to commercially distributed materials that would be harmful to them.
enforcement of a federal criminal statute. Second, in very narrow circumstances that involve issues of “uniquely federal concern,” federal courts can fashion private civil actions as matters of federal common law, and use a criminal statute as a standard for liability.97 Again, interactive service providers have strong arguments that in such cases, the federal criminal statute is not being “enforced.” Third and finally, Congress can expressly or by implication create a civil cause of action in the context of a statute that also provides for criminal penalties.98

A case brought against Yahoo! in the Eastern District of Texas,99 which is still pending, squarely presents this third type of cause of action. In that case, the plaintiff seeks to hold Yahoo! liable for operating a “Groups” service that allegedly was used by third parties to exchange child pornography. The plaintiff is a minor child who was allegedly the subject of some of the child pornography traded on Yahoo!’s service. The plaintiff asserts a number of state law claims and one federal claim. The federal claim alleges violation of 18 U.S.C. § 2252A, a statute that criminalizes certain activities related to child pornography, but which, in a single subsection, also creates an express private right of action. See 18 U.S.C. § 2252A(f). The plaintiff in Bates has argued that application of Section 230 to a civil claim under this statute would “impair” the “enforcement” of § 2252A and therefore the exception in § 230(e)(1) applies.

The magistrate judge in Doe v. Bates issued a report and recommendation recommending dismissal of each of the claims against Yahoo! — including the claim under § 2252A(f) — on the basis of Section 230.100 First, the Magistrate Judge noted that the Section 230(e)(1) exception clearly applies only to criminal laws. This is apparent from the face of the statute: The heading of the exception is “no effect on criminal law,” and the concluding phrase of the list of exempted statutes, “any other Federal criminal statute,” makes clear that the

97 See generally Northwest Airlines, Inc. v. Transp. Workers Union of America, 451 U.S. 77, 90-91 (1981) (a cause of action may become a part of federal common law “through the exercise of judicial power to fashion appropriate remedies for unlawful conduct”); Note, Impling Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 286 (1963) (this theory “regards the statute as declaring wrongful certain behavior, from which the court itself then creates a new cause of action”).

98 See, e.g., Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970) (implying a private civil action from a federal statute with a criminal penalty); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) (private right of action implied from a prohibition that was only expressly enforceable by administrative proceeding or criminal action); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947) (private right of action implied from a prohibition against intercepting and divulging telephone messages, even though the act was expressly enforceable only by criminal penalty).


preceding enumerated statutes are part of the same class and therefore that the exception applies only to those provisions within Chapter 110 of Title 18 that constitute a “criminal statute.” Based on the common sense and legal definitions of the operative terms, the magistrate judge concluded that the use of the word “criminal” in the exception “specifically excludes and is distinguished from civil claims.”\footnote{Id. at 29.} Second, the magistrate judge emphasized that the statute provides an exception for only the “enforcement” of the criminal laws. That term “confirm[ed] that the exception refers to governmental action,” as it is the government that enforces the law.\footnote{Id. at 30.}

Addressing the policy reasons underlying the statute, the magistrate judge in Doe v. Bates noted that federal prosecutors could “bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws,” but Congress did not want to empower civil litigants “to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws.”\footnote{Id. at 31.} Instead, recognizing the potential damage that could be caused by litigants suing deep-pocket defendants, Congress specifically intended “to treat civil and criminal claims differently” and “carefully crafted Section 230(e)(1) to achieve exactly that result.”\footnote{Id.} As of early September 2006, the district court has not yet acted on the magistrate’s report and recommendation.

\textbf{B. The Intellectual Property Exception}

Section 230’s intellectual property exception — which provides that Section 230 “shall [not] be construed to limit or expand any law pertaining to intellectual property” — has been rarely litigated. When courts do address the issue, however, the answer is usually fairly straightforward, because there is often no question that the claim pertains to intellectual property (such as the law of copyright). However, one recent case reveals that drawing the line between claims that “pertain” to intellectual property and those that do not can sometimes be difficult.\footnote{Perfect 10, Inc., 340 F. Supp. 2d 1077.}
In *Perfect 10 v. CCBill, LLC*, the plaintiff, the owner of an adult entertainment magazine and website, sued defendants who were allegedly the financial and other intermediaries in transactions involving the sale of images belonging to Perfect 10. In addition to the copyright issues in the case, the plaintiff alleged a number of state law claims, several of which the defendants asserted were barred by Section 230. Thus, among the issues confronting the court was whether certain types of state law claims “pertain[ed]” to intellectual property: wrongful use of a registered trademark, unfair competition, right of publicity, and false advertising.

The court concluded that two of these claims, for wrongful use of a trademark and for violation of the right of publicity, were within the scope of the exception:

*Wrongful use of a trademark:* Based on the language of the statute and the existing case law, the court concluded that the claim for the wrongful use of a trademark “pertain[ed]” to intellectual property and thus fell within the scope of the exception.\(^{106}\) Although it has roots in the law of misrepresentation and consumer protection, trademark law is now widely considered to be a type of intellectual property law, and courts that have considered the question have thus concluded that Section 230 does not provide immunity from claims of trademark infringement.\(^{107}\)

*Right of Publicity:* The *Perfect 10* court noted that other courts have characterized the right of publicity as a form of intellectual property.\(^{108}\) At the same time, however, the right of publicity has its roots in the law of invasion of privacy — a body of law that courts have consistently found to be squarely within the scope of Section 230 — and it is not at all clear that a person’s likeness is even similar in kind to the type of rights created by trademark, copyright, or patent law. Nonetheless, the *Perfect 10* court did not seem to view this to be a difficult question and concluded that the right of publicity claim was within the scope of the exception.\(^{109}\)

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\(^{106}\) *Perfect 10*, 340 F. Supp. 2d at 1108.


\(^{108}\) *Perfect 10*, 340 F. Supp. 2d at 1108-09.

\(^{109}\) In *Almeida v. Amazon.com, Inc.*, discussed above, the plaintiff’s claim was based on the right of publicity. While the Eleventh Circuit noted that the dispute focused on whether the intellectual property exception of Section 230 applied to such claims, the court ultimately did not reach the issue, finding instead that the plaintiff had, in any event, failed to state a claim as a matter of state law. 456 F.3d at 1322-23.
By contrast, the court found that the unfair competition and false advertising claims did not fall within the scope of the intellectual property exception and therefore could be subject to Section 230 immunity:

Unfair Competition: The plaintiff in Perfect 10 explicitly based its unfair competition claim, brought pursuant to Section 17200 of California’s Business and Professions Code, on the allegations of trademark infringement. 340 F. Supp. 2d at 1108. Nonetheless, the court concluded that the claim did not fall within the exception because the unfair competition law itself did not “pertain[]” to intellectual property. Even though trademark infringement “is an unlawful business practice which may establish a violation” of Section 17200, “a violation of [that statute] includes any business practice which may be unlawful, unfair, or fraudulent.” Id. (emphasis added). Because the statute could be used in contexts other than the intellectual property, the court held that it was not a law “pertaining” to intellectual property.110

False Advertising: The court concluded that the false advertising claim, which was based on allegations that the defendants had “misrepresent[ed] the nature and source of the content on their websites,” was within the scope of Section 230.111 The court quickly concluded, without much discussion or analysis, that such claims did not pertain to intellectual property rights, and that the plaintiffs had failed to present any evidence or case law to that effect.112

It remains an open question whether trademark law and other traditional commercial torts should be considered laws “pertaining” to intellectual property at all. Indeed, in the famous Trade-Mark cases, the Supreme Court held that trademark law could not be based on the Constitution’s intellectual property clause, on the grounds that a trademark, unlike a writing or invention, does not “depend upon novelty, invention, discovery, or any work of the brain.”113 Although it may be difficult in light of the widely held belief that trademark law is a form of intellectual property, it may still be possible to argue that, for purposes of Section 230(e)(2), trademark infringement, as well as misappropriation of the right of publicity, are commercial torts and do not pertain to intellectual property at all.

110 Perfect 10, 340 F. Supp. 2d at 1108-09.
111 Id. at 1109.
112 Id.
113 100 U.S. 82, 94 (1879).
C. Application to Federal Civil Claims

Litigants continue to argue that Section 230 does not immunize online intermediaries from federal civil claims, although the face of the statute does not support this view. The fact that Section 230 includes explicit exceptions for some specific federal civil claims, such as claims pertaining to intellectual property and under the Electronic Communications Privacy Act, indicates that Congress did intend for the immunity to apply to other federal civil claims. Under the doctrine of expressio unius est exclusio alterius, courts generally should assume that a list of exceptions implies that that which is not excepted is within the statute’s scope. Thus, as the Eastern District of Virginia concluded over three years ago, by creating these particular and limited statutory carve-outs, Congress plainly demonstrated that Section 230 immunity reaches all other types of federal statutory (and non-statutory) civil claims.

At least three courts have recently confirmed that Section 230 generally applies to federal claims as well as state claims. First, in Bates, discussed above, a magistrate judge in the Eastern District of Texas concluded that Section 230 shields Yahoo! from a civil claim asserted under a federal statute. Second, both the court in CLC, discussed above, and in 2004, the Central District of California held that Section 230 barred a suit brought against a web site operator under the federal Fair Housing Act. In the California case, the plaintiffs alleged that Roommate.com, a Roommate locating service, was liable for violations of the Fair Housing Act because its online form facilitated the expression of preferences in rental advertising. Because the allegedly unlawful content was provided entirely by the users of the service, and the claim was based on the dissemination of that content, the court held that Section 230 barred the claim. The court rejected the plaintiffs’ argument that Section 230 did not apply to its federal claim: “The FHA is not among the types of laws which are specifically exempted from the CDA. As such, and without evidence of contrary legislative intent, a court may not create an exemption for the

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115 See, e.g. Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 539 (E.D. Va. 2003) (“Congress’s decision to exclude certain claims but not federal civil rights claims as a group, or Title II specifically, must be respected.”).

116 See Fair Housing Council v. Roommate.com, LLC, No. CV 03-09386PA (RZX), 2004 WL 3799488 at *1, *3-4 (C.D. Cal. Sept. 30, 2004), appeal pending, Nos. 04-56916, 04-57173 (9th Cir.).

117 See id.
fair housing laws without violating the maxim *expressio unius est exclusio alterius.*\(^{118}\) This case is now on appeal to the Ninth Circuit.

**CONCLUSION**

In the last two years, courts have addressed Section 230 in a number of different factual and legal contexts. In general, courts continue to confirm that Section 230 provides robust immunity. To the extent that courts have expressed disagreement, the disagreement generally stems from a court’s reluctance to apply Section 230 in circumstances in which the defendant deliberately selected the content at issue or the defendant is explicitly and deliberately profiting on the proliferation of harmful content. It is clear, however, that courts overwhelmingly find that Congress intended Section 230’s immunity to be robust and broad, subject only to the explicit exceptions in the statute itself.

\(^{118}\) *Id.*
FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY, et al.,
Plaintiffs, Appellants, and Appellees,

vs.

ROOMMATE.COM, LLC,
Defendant, Appellee, and Appellant.

Appeals from an Order of the
United States District Court for the Central District of California
No. CV-03-09386-PA (RZX), Hon. Percy Anderson

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(continued from previous page)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(c) and 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae provide the following disclosures of corporate identity: ¹

THE ALLIED DAILY NEWSPAPERS OF WASHINGTON

The Allied Daily Newspapers of Washington is a non-profit trade association representing 24 daily newspapers in Washington.

THE ARIZONA NEWSPAPERS ASSOCIATION

The Arizona Newspapers Association is a nonprofit association that serves more than 125 daily and weekly newspapers in Arizona.

THE ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES

The Association of Alternative Newsweeklies is a nonprofit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice, San Francisco Bay Guardian and SF Weekly.

THE BAKERSFIELD CALIFORNIAN

The Bakersfield Californian has no parent company, and no publicly held corporation owns 10% or more of its stock.

CABLE NEWS NETWORK, INC.

Cable News Network, Inc. is a wholly-owned subsidiary of Turner Broadcasting

¹ A more detailed description of the Amici and their interests in the issues raised by the underlying lawsuit is contained in the attached Appendix A.
System, Inc., which itself is a wholly-owned subsidiary of Time Warner Inc., a publicly traded corporation.

CALIFORNIA NEWSPAPER PUBLISHERS’ ASSOCIATION
The California Newspaper Publishers Association is a nonprofit trade association representing about 500 daily and weekly newspapers in California.

CBS BROADCASTING INC.
CBS Broadcasting Inc. is a subsidiary of CBS Corporation. No other publicly held company owns 10% or more of CBS Broadcasting Inc.

FREEDOM COMMUNICATIONS, INC.
Freedom Communications, Inc. is a privately owned media company. It does not have a parent company, and no publicly held corporation owns more than 10% of the company.

HEARST CORPORATION
Hearst Corporation is a privately held company.

THE IDAHO NEWSPAPER ASSOCIATION
The Idaho Newspaper Association is a non-profit trade organization with 54 weekly and daily newspapers participating.

LOS ANGELES TIMES COMMUNICATIONS LLC
The Los Angeles Times Communications LLC is a wholly owned subsidiary of the Tribune Company. The Tribune Company is publicly owned, has no parent
corporations, and no publicly held corporation owns 10% or more of its stock.

THE MCCLATCHY COMPANY

The McClatchy Company is a publicly traded company. It does not have a parent company, and no publicly held corporation owns 10% or more of its stock. It publishes the Anchorage Daily News, the Bellingham Herald, the News Tribune of Tacoma, the Tri-City Herald, the Fresno Bee, the Modesto Bee, the Sacramento Bee, the Merced Sun-Star, The Olympian, and the Tribune of San Luis Obispo.

THE MONTANA NEWSPAPER ASSOCIATION

The Montana Newspaper Association is a non-profit trade organization representing 86 daily and weekly newspapers.

NATIONAL NEWSPAPER ASSOCIATION

The National Newspaper Association (NNA), the largest newspaper association in the United States, is a non-profit trade association representing owners, publishers, and editors of America's community newspapers.

NBC UNIVERSAL, INC.

NBC Universal, Inc. is 80% owned by General Electric Company, with 20% controlled by Vivendi Universal S.A., both of which are publicly held corporations.
THE NEVADA PRESS ASSOCIATION

The Nevada Press Association is a nonprofit trade organization representing 41 daily and weekly newspapers in Nevada.

NEWSPAPER ASSOCIATION OF AMERICA

Newspaper Association of America is a non-profit trade association whose members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers.

THE NEW YORK PRESS ASSOCIATION

The New York Press Association is a nonprofit trade association representing more than 750 community newspapers in New York.

THE OREGON NEWSPAPER PUBLISHERS ASSOCIATION

The Oregon Newspaper Publishers Association is a non-profit trade organization representing more than 19 daily and 51 weekly newspapers in Oregon.

PR NEWSWIRE ASSOCIATION LLC

The PR Newswire Association LLC is a wholly owned subsidiary of United Business Media Plc.

THE SUBURBAN NEWSPAPERS OF AMERICA

The Suburban Newspapers of America is a nonprofit trade association representing more than 2,100 daily and weekly newspapers in the United States and Canada.
TIME INC.

Time Inc. is indirectly wholly-owned by Time Warner Inc., a publicly traded company. No publicly held corporation owns 10% or more of Time Warner Inc.’s stock.

THE WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

The Washington Newspaper Publishers Association is a non-profit trade organization representing 135 community newspaper members.
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I. INTEREST OF AMICI CURIAE

Amici Curiae are journalists, publishers, and trade associations whose members regularly gather and disseminate news and information on matters of public interest, using both traditional methods of distribution and the internet. Amici routinely rely on the protections provided by the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c) ("Section 230"), which enables the free flow of information over the internet by protecting web site operators like Amici from liability for user-generated content. Consequently, these Amici have a strong interest in this Court’s evaluation and interpretation of the scope of protection offered to web publishers and distributors under Section 230.

Amici also understand and fully support the important public policies served by the Fair Housing Act, 42 U.S.C. § 3604(c) ("FHA"), and do not countenance any violations of the FHA by anyone. Amici take their responsibilities with respect to the FHA seriously, strive to comply with its provisions, and do not seek in any way to avoid their obligations under the FHA. But the panel’s decision went far beyond an application of the FHA to the specific facts of the underlying case, and could be interpreted as severely restricting the rights of any web-based publisher to use third-party content within the necessary and legitimate protections of Section 230. For this reason, Amici urge this Court to reject the panel’s decision.
A description of the individual Amici is attached as Appendix A.

II. PARTIES' CONSENT TO FILING OF AMICI BRIEF

All parties to this appeal have consented to the filing of this brief.

III. SUMMARY OF ARGUMENT

Newsgatherers and publishers increasingly operate in an online world. Newspapers, magazines, broadcasters, and other members of the press no longer are confined to traditional mediums; instead, virtually every news organization now includes the dissemination of information on the internet. Web-based news publications include a wide variety of third-party content, ranging from online letters to the editor to reader-submitted news stories, video, and commentary. The use of third-party content has become a critical feature of online reporting, greatly broadening the scope of information and diversity of opinions available to the public on such critical topics as election coverage, natural disasters, and crime reporting. It also has enabled media organizations to substantially expand their coverage of local and community news, providing a forum for disseminating everything from city council meeting notes to Little League box scores.

But the ability of publishers to provide a forum for third parties was placed in serious jeopardy by the panel decision in the underlying case, and would continue to be compromised if this en banc Court adopted the broad legal reasoning and language contained in that opinion. As discussed in more detail
below, the panel decision is irreconcilable with existing case law, and could be interpreted as severely restricting the broad protections that Congress intended, and other courts have recognized, for web publishers who gather and disseminate third-party information on the internet.

This Court will be the first federal circuit to conduct an en banc review of the scope of immunities provided by Section 230. As a result, this Court has a unique opportunity to provide clear guidance to the lower courts by reaffirming Congress’ intent to provide broad immunity to interactive computer services, and its desire to widely protect the free exchange of ideas and information on the internet. In particular, this Court should reiterate that Section 230 protects the reposting of third-party content, and its protections do not evaporate merely because the web operator acts responsibly in selecting or editing posted material. In addition, this Court should reject the language from the original panel opinion that suggested that a media website could be held legally responsible for “searching” or “re-organizing” content – conduct that falls within the specific provisions of Section 230.

Finally, this Court should make clear that Section 230 immunity is not eviscerated when the media engages in its traditional core function of soliciting information, even if the answers provided by those responding could be unlawful and may subject the responder to legal liability. In short, this Court should act in
accordance with the clearly expressed intent of Congress, and the overwhelming authority from other courts, in recognizing the broad scope of protections provided by Section 230.

IV. THIS COURT SHOULD REAFFIRM THAT SECTION 230 PROTECTS INTERNET PUBLISHERS WHO SELECT, POST, ORGANIZE, AND EDIT THIRD-PARTY CONTENT

Section 230 was designed to “preserve the vibrant and competitive free market that presently exists for the Internet,” and to “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.” Id. §§ 230(b)(2)(3). The method chosen by Congress to achieve these important goals was by protecting websites from liability based on the posting of third-party content – content that is not created by the website operator, but by a vast array of authors, commentators, photographers, and videographers that provide a diversity of expression that extends far beyond the resources of any one web publisher.

Critically, Congress did not restrict Section 230’s protections to those who act as mere conduits of information – to the contrary, as discussed below, the statute specifically was crafted to protect not only websites that serve as passive receptacles, but also those that select, post, search, organize, and even edit content from third parties. Through the broad protections in Section 230, Congress chose
to impose liability solely on the creators of potentially tortious content, and to prohibit liability from being imposed on web-based "distributors."

This may seem counterintuitive to those who grew up with the common law notions of liability for every "publisher" or "republisher." However, this deliberate and carefully calculated decision was based on the legislative judgment that the substantial benefits of protecting free speech in the internet environment, and the desire to protect this burgeoning marketplace of ideas and expression, outweighed the minimal benefits that result from allowing plaintiffs to pursue claims against distributors, in addition to creators, of tortious publications. Because the panel decision was contrary to Congress' legislative judgment, and included language that would contravene Congress' purpose and intent to protect internet publishers from liability for disseminating third-party content, it should be rejected.

A. The History Of Section 230 Reflects Congress' Intention To Protect Online Publishers Who Select, Post, Organize, And Edit Third Party Content.

The genesis of Section 230 came from early case law that attempted to adapt common law tort liability principles to internet publishers. In 1991, a federal district court found that a subscription internet service, CompuServe, could not be found liable for an allegedly defamatory statement that had been published by a third party on a forum available to CompuServe subscribers. *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991). In reaching its
conclusion, the court relied on a common law distinction between distributors and other publishers, holding that distributors generally were not held liable unless they knew, or should have known, about the unlawful content that was distributed. Id. But a few years later, another New York court distinguished the CompuServe case, holding that an entity that operated online bulletin boards could be liable as a publisher of third-party content. According to the court, defendant Prodigy was more than a mere conduit, as in Cubby and the common law “distributor” cases, because it used an automatic screening program for offensive language, and promulgated guidelines for posting content. Stratton Oakmont, Inc. v. Prodigy Servs. Co. 1995 WL 323710, at *4 (N.Y. Sup. 1995).

Not surprisingly, this new development in the law served to chill website operators from editing any unlawful or objectionable third-party content that might be posted on their sites, because they feared that any such conduct would be enough to transform them from “distributors,” who were not legally responsible for the content, to “publishers,” who potentially could be held liable for defamatory or other tortious content. Recognizing this perverse result, and recognizing both the need to protect the free flow of information on the internet and to encourage responsible conduct by web publishers in removing offensive language and other improper material, Congress enacted Section 230 immediately on the heels of the Stratton Oakmont decision in 1996.
Section 230 states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The statute defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server,” id. § 230(f)(2); and “Internet content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service,” id. § 230(f)(3). An “access software provider” is “a provider of … enabling tools that … pick, choose, analyze or digest content; or transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.” Id. § 230(f)(4) (emphasis added). In a direct response to Stratton Oakmont, Section 230 also immunizes website owners who “in good faith [] restrict access to or availability of material” they consider “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” Id. § 230(c)(2)(A).

In enacting Section 230, Congress left few doubts about its intentions. In addition to the language cited above that reiterated the importance of protecting and promoting free expression in the internet world, the legislative history expressly stated that Congress intended to overrule Stratton Oakmont “and any
other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.” S. Conf. Rep. No. 104-230 (1996) (emphasis added). Thus, this Court should find that both the history of Section 230, and the express language enacted by Congress, make clear that the statute protects publishers from liability for distributing third-party content.

B. Courts Consistently And Appropriately Have Applied Section 230 To Internet Publishers Who Are More Than Mere Conduits For Third-Party Content.

Courts reviewing the clear legislative history of Section 230 have found that it has two primary goals. First, “Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.” Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997). Second, Congress designed Section 230 to “encourage service providers to self-regulate the dissemination of offensive material over their services…. In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” Id. (emphasis added); accord Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122-23 (9th Cir. 2003); Batzel v. Smith, 333 F.3d 1018, 1027-28 (9th Cir. 2003).
To further these two complimentary policy goals, as this Court has noted, “courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of ‘interactive computer service’ and a relatively restrictive definition of ‘information content provider.’” Carafano, 339 F.3d at 1123 (emphasis added). And in applying these appropriately protective definitions, five federal appellate courts, including this Court, have refused to hold defendants responsible for posting third-party content on their websites. See, e.g., Roskowski v. Corvallis Police Officers’ Ass’n, 2007 WL 2963633, at *1 (9th Cir. Oct. 10, 2007); Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007); Green v. America Online, Inc., 318 F.3d 465, 470-72 (3d Cir. 2003) (finding immunity for anonymous postings in a chat room); Carafano, 339 F.3d at 1125; Batzel, 333 F.3d at 1031-32; Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000) (rejecting defamation and negligence claims predicated on inaccurate publication of stock information that originated with third parties); Zeran, 129 F.3d at 330-32.²

In each of these decisions, the appellate court properly focused the liability inquiry on the author of the content, rather than the distributor – no matter how

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² Indeed, even the panel decision in the underlying case acknowledged this level of protection under Section 230. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 489 F.3d 921, 925, 929, vacated, – F.3d –, 2007 WL 3013891 (9th Cir. 2007) (“Roommate is immune so long as it merely publishes information provided by its members”; finding defendant was immune from liability for third-party content posted in response to open-ended questions).
offensive or how objectionable the content might be. As the Fourth Circuit explained, "Congress made a policy choice ... not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." Zeran, 129 F.3d at 330 (emphasis added); accord Batzel, 333 F.3d at 1031. The First Circuit concurred: "It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." Universal Comm'n Sys., 478 F.3d at 420; see also Zeran, 129 F.3d at 328 (finding immune a defendant who delayed in removing defamatory messages, refused to retract them, and failed to screen for similar postings thereafter); accord Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006). Without such immunity, "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect," given the "sheer number of postings" and the risk of providing a "no-cost means" to engender lawsuits. Zeran, 129 F.3d at 331-33.

Thus, as discussed below, courts properly have found that Section 230 immunity applies to third-party content, regardless of the involvement of the website operator or publisher in selecting, posting, or editing that material.
1. **Online Publishers Cannot And Should Not Be Found Liable For Disseminating Edited Third-Party Content.**

This Court, and other federal appellate courts, appropriately have held that a publisher’s immunity under Section 230 is not eliminated merely because the website publisher edits third-party material, even if the third party material includes allegedly unlawful content. *Batzel*, 333 F.3d at 1031; *Zeran*, 129 F.3d at 330 (“lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.”) (emphasis added); *Ben Ezra*, 206 F.3d at 986.³ Indeed, Section 230 expressly contemplates and even encourages such participatory activity. 47 U.S.C. § 230(c)(2)(A); see also *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (finding Section 230 immunity for Google’s decision not to publish plaintiff’s advertisements because the statute allowed such restrictions where content was “otherwise objectionable”).

In *Batzel*, for example, an individual who received an email in his capacity as head of a museum security network selected, edited, and published the email to a listserv. *Batzel*, 333 F.3d at 1031. As a panel of this Court cogently stated, in explaining why the defendant could not be held liable for the publication:

³ This is not intended to suggest that Section 230 would protect a publisher whose editing of original third-party content actually creates a defamatory statement or inference that did not exist in the original.
As we have seen, a central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted. Also, the exclusion of "publisher" liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.

_Id._ (emphasis added).

Similarly, the Tenth Circuit rejected a plaintiff's defamation and negligence claims where the defendant previously had contacted content providers to correct errors in their materials, and where the defendant previously had corrected errors in the third-party materials. _Ben Ezra_, 206 F.3d at 986. Nor can the fact that a service retains the right to edit subject it to liability. _Corbis Corp. v. Amazon.com, Inc._, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (rejecting claims under Section 230 where defendant had reserved right to terminate third party's account if it violated intellectual property laws); _Blumenthal v. Drudge_, 992 F. Supp. 44, 51-53 (D.D.C. 1998) (finding AOL immune for the content of gossip columnist Matt Drudge, despite its contractual authority to edit or remove content and statements that the two had "teamed up").

In a case that is particularly instructive for news organizations like Amici, the court in _Donato v. Moldano_, 865 A.2d 711 (N.J. App. 2005), considered the applicability of Section 230 to an online news website. In _Donato_, the defendant published a website where he posted information about local government activities,
including meeting minutes for the borough council, planning board, and board of education, and where he allowed users to post messages, sometimes anonymously. \textit{Id.} at 713. Two elected members of the borough council sued for defamation, harassment and intentional infliction of emotional distress arising out of third-party statements published on the website. \textit{Id.} The plaintiffs alleged that the defendant was a content provider, and therefore not subject to immunity under Section 230, because he selectively edited some postings, selectively deleted others, rewrote others, and selectively banned some users that he found to be disruptive. \textit{Id.} at 716, 720-21. But just as in the cases discussed above, the New Jersey court found that the defendant’s conduct could not strip him from the immunity offered by Section 230. As the court explained:

These activities ... are \textit{nothing more than the exercise of a publisher's traditional editorial functions}, namely, whether to publish, withdraw, postpone or alter content \textit{provided by others}. \textit{This is the very conduct Congress chose to immunize by § 230}. Granting immunity furthers the legislative purpose of encouraging self-regulation to eliminate access to obscene or otherwise offensive materials while at the same time advancing the purpose of promoting free speech on the Internet, without fear of liability.... \textit{[T]he immunity continues to apply even if the self-policing effort is unsuccessful or not even attempted.}

\textit{Id.} at 725-26 (citations omitted) (emphasis added).

It would be incongruous for publishers to be protected from liability if third parties are allowed to post any kind of material with impunity, but to hold
publishers liable if they act responsibly in taking steps to screen or edit material that may be posted online. It was Congress’ clear intent to eliminate this incongruity, and protect publishers for exercising their “traditional editorial functions.”

2. **Online Publishers Must Be Deemed To Be Immune Under Section 230 From Claims Based On The Dissemination Of Third-Party Content That Has Been Searched, Organized, Or Re-Organized.**

In addition to protecting web publishers who select, post, and edit third party content, Section 230 expressly protects publishers from liability merely for organizing or re-organizing third-party content – whether that occurs by allowing users to search the content, or whether it results in the presentation of third-party content in a different format than originally submitted.

By definition, under Section 230, an “interactive computer service” – which is given protection from liability for third-party content – includes an “access software provider.” 47 U.S.C. § 230(f)(2). An “access software provider,” in turn, is defined as including “a provider of … enabling tools that … pick, choose, analyze or digest content; or transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.” Id. § 230(f)(4) (emphasis added). Thus, by its terms, Section 230 immunizes an online publisher from liability if it facilitates searches that allow users to select third-party content, or if it organizes or re-organizes third-party content itself. See id.
In applying these provisions, other courts appropriately have found that liability cannot be imposed merely because the defendant has provided the tools that permitted the posting of allegedly actionable material online, or even converted the information provided by a third party into a searchable or usable form. See, e.g., Corbis, 351 F. Supp. 2d at 1118 (defendant that provided the tools allowing a third party to post its content on an online shop did not lose Section 230 immunity, because the third party “ultimately decided what information to put on its site”); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 834 (2002) (eBay’s transformation of third-party feedback on consumers and dealers into symbols did not make it the “information content provider” because it “did not create or develop the underlying information”).

This Court similarly recognized the breadth of these protections in Carafano, where a panel found an online matchmaking service to be immune from liability based on a claim that someone had posted a fake profile of actress Christianne Carafano on the site. See 339 F.3d at 1123. The service, Matchmaker, required participants to complete a detailed questionnaire with pre-prepared multiple-choice and free-response essay questions. Id. at 1121. Matchmaker classified user characteristics into categories, and facilitated searches based on the questionnaire responses. But in light of the specific language of Section 230, the Carafano court found that Matchmaker could not be held liable, since the “selection of the content
was left exclusively to the user,” and the other functions of the site were consistent with Congressional policy “to promote the continued development of the Internet and other interactive computer services.”  Id. at 1123-25.

In contrast, the vacated panel opinion in this case found Roommate.com was an information content provider simply because it “categoriz[ed], channel[ed], and limit[ed] distribution of users’ profiles.” 489 F.3d at 929. This holding ignores the statutory definition of “access software provider,” as well as the definition of content provider as someone who “creates” content – not someone who “categorizes” or organizes it. It also improperly imposes a risk of liability for news media that lawfully perform an essential social function by transforming voluminous amounts of information into readable content. Given the vast amount of information that may be available from a given web publisher, its accessibility and social utility depends on the ability of website users to find the information about which they are particularly interested. Web sites inevitably have search functions to assist in this endeavor, and even unsophisticated sites provide a means of organizing information to make it user-friendly. Discouraging this kind of functionality takes away one of the key benefits of the internet. This Court should reject the panel’s restrictive language, which is unsupported by the statutory language, inconsistent with Carafano, and contrary to public policy.
V. THIS COURT SHOULD REJECT EFFORTS TO LIMIT THE SCOPE OF SECTION 230 IMMUNITY WHERE THIRD-PARTY INFORMATION WAS OBTAINED THROUGH CORE NEWSGATHERING ACTIVITIES.

Despite Congress’ clear intent to limit liability to those who create allegedly tortious content, rather than those who disseminate it, the panel’s decision professed to eliminate Section 230 immunity where the defendant requested or solicited information from third parties. Notwithstanding the concerns that may be raised in the context of the FHA, or in the parade of horribles offered by the panel’s hypotheticals, the panel erred in suggesting that liability could be imposed on an internet publisher merely because the publisher purportedly “solicited” content that was actionable. This broad exemption for “solicited” content not only is inconsistent with the statutory scheme, but would have extremely detrimental effects on internet news providers, whose traditional newsgathering tools require them to question, inquire, and otherwise solicit information from third parties. The panel’s decision, by threatening to impose liability on the questioner, if the response is potentially tortious, would hamstring Amici’s ability to obtain information from third parties about issues of enormous public importance. For this additional reason, the panel’s decision should be reversed.
A. The Online News Media Increasingly Rely On Content Supplied By Third Parties.

Section 230 has been used to protect online news media from a wide variety of claims, ranging from defamation to cyberstalking. These protections are critical, as traditional news media increasingly have moved to develop and use the internet as a core component of their newsgathering and reporting functions. Some traditional newsgathering tools have moved online directly from the print world. For example, online news sites regularly publish letters to the editor, reader surveys, and other feedback from their readers. These sites also publish third-party materials such as local government agency meeting minutes, streaming audio of city council meetings, or reports about local elections. Many online news sites also have created forums and bulletin boards where readers can discuss news stories, or provide personal anecdotes and insights that relate to a particular story.

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4 See Universal Comm’n Sys., 478 F.3d at 416 (fraudulent securities transactions, cyberstalking, and dilution of a trade name); Carafano, 339 F.3d at 1121-22 (invasion of privacy, misappropriation of the right of publicity, defamation, and negligence); Ben Ezra, 206 F.3d at 983 (defamation and negligence); Zeran, 129 F.3d at 328 (negligence); Langdon, 474 F. Supp. 2d 622 (constitutional violations, fraud, breach of contract, deceptive business practices, and doctrine of public calling); Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007) (negligence and gross negligence); Corbis, 351 F. Supp. 2d at 1117-18 (consumer protection and tortious interference with business relationships); Delfino v. Agilent Techs., Inc., 145 Cal. App. 4th 790, 795 (2006) (intentional and negligent infliction of emotional distress); Schneider v. Amazon.com, Inc., 31 P.3d 37, 41-42 (Wn. App. 2001) (negligent misrepresentation, tortious interference, and breach of contract); Donato, 865 A.2d at 713 (defamation, harassment, and intentional infliction of emotional distress).
For example, the Bakersfield Californian has a website called “Tell Your Story” where local citizens can submit articles, photos, and events on topics ranging from schools to a community member’s service in the Peace Corps. See http://people.bakersfield.com/home/DynamicPage/26; http://people.bakersfield.com/home/ViewPost/35300 (reader story describing Red Ribbon Day at a local school);
http://people.bakersfield.com/home/ViewPost/36202 (profiling a Bakersfield resident who joined the peace corps in Mozambique);
http://people.bakersfield.com/home/ViewPost/28905 (describing an award given to a local teacher).

Larger cities also have been able to utilize third-party web content as a means of expanding coverage of local events and issues, and to share readers’ points of view. For example, San Francisco’s largest daily has a website where readers can post news. See http://www.sfgate.com/community/blogs/. The Seattle Post-Intelligencer and the Tacoma News-Tribune have websites devoted exclusively to blog posts submitted by readers. See http://blog.seattlepi.nwsource.com/solicit.asp;

But the revolution in online news goes much further. Given the increasing availability of personal technology, including the ubiquitous cell phone camera,
individuals in today’s modern society often are able to “scoop” professional news outlets, and thus are increasingly likely to provide content. In the words of one expert, these “citizen journalists” have become leading content providers for the news media “simply because, like ants, there are a lot of them all over the place, and a lot of them have personal media devices with them.” See Jon Marshall, “Citizen Journalism Continues to Surge,” The Quill, October 2005, at 14-16 (quoting Vincent Maher, a new media lecturer at Rhodes University in South Africa). Citizen journalists also are increasingly involved in more in-depth reporting, as evidenced by Reuters’ recent $100 million pledge to a website at New York University designed to increase public participation in investigative journalism. See “Reuters Funds Groundbreaking NYU Journalism Program to Promote Increased Public Role in Investigative Reporting,” PR Newswire, Sept. 20, 2007. The site will invite citizens to suggest assignments, donate money, and help gather facts. Id. And many major news outlets, including the Dallas Morning News, Denver Post, Greensboro News & Record, Rocky Mountain News, Columbia Missourian, CNN, and the BBC have web pages that promote citizen reporters. See Marshall, supra, at 14-16; see also http://www.cnn.com/exchange/ireports/topics/forms/breaking.news.html; www.mymissourian.com> ; BBC Action Network, http://www.bbc.co.uk/dna/actionnetwork/. Indeed, many journalists readily admit

Examples abound from recent years. Countless individuals provided photographs, videos, and stories to the New Orleans Times-Picayune and other websites in the immediate aftermath of Hurricane Katrina, providing immediate insights and widespread perspectives on the human tragedy as it unfolded. See Marshall, supra, at 14-16. A similar surge of citizen reporting occurred on a worldwide basis following the tsunami that same year. Id. In 2005, London residents armed with cell phone cameras and in-person web reports were the first to alert the BBC to the London bombings. Richard Sambrook, “Citizen Journalism and the BBC,” Nieman Reports, 2005, at 13-16, 13, available at <http://www.nieman.harvard.edu/reports/05-4NRwinter/Sambrook.pdf> (visited Oct. 28, 2007). Within six hours the network received more than 1,000 photographs, 20 videos, 4,000 text messages, and 20,000 emails. Id. The BBC posted many of these images on its web site, where it also solicited additional videos and photographs. Id.

And in this Circuit, during the recent surge of wildfires in California, news organizations relied heavily on the overwhelming amount of information coming
from individuals all over Southern California, with home video, photographs, and detailed in-person descriptions that brought home the devastating impact of the fires. Examples include CNN’s website featuring third-party videos of the fires (http://www.cnn.com/2007/US/10/22/irpt.california.fires/index.html); the Los Angeles Times website featuring readers’ photographs, as well as sites for sharing videos and personal anecdotes (see http://www.latimes.com/news/local/la-me-fires-users22oct22-pg,0,4637161.photogallery?coll=la-home-center); a San Diego Union Tribune website for readers to share news and express appreciation for fire rescue efforts (http://www.signonsandiego.com/news/metro/20071029-0820-1bo29thankyou.html; http://forum.signonsandiego.com/forumdisplay.php?f=156); and an Orange County Register website feature called “Talk About It,” where readers can share their experiences, ask questions, and offer or request help. See http://www.ocregister.com/news/school-evacuation-area-1763650.

Yet if web publishers had to face possible tort liability for the third-party content, they would have no choice but to severely limit its use, and limit their websites to information that their own employees or contractors can gather and verify. Sheer economics would dictate that vast quantities of valuable information be eliminated from websites, because the cost and difficulty of verifying it would be too great.
This Court’s evaluation of the scope of protection provided by Section 230 should take into account the real-world experience of news publishers, whose online content is increasingly (and appropriately) coming from third-party “citizen journalists,” who can provide a depth and breadth of information about events that no news organization — no matter how substantial — can possibly cover in such detail. Against this background, this Court should find that Section 230 immunity applies to the reposting of any third-party content, whether a website operator has solicited it or not.

B. **This Court Should Reiterate The Broad Protections Provided By Section 230, Regardless Of Whether Third Party Content Has Been “Solicited” Or Not.**

Section 230 sets forth a straightforward principle: If someone authors injurious content, a plaintiff can pursue the author of that content, but not the entity that distributes it on the internet. See generally 47 U.S.C. § 230(c)(1). The Carafano panel recognized this basic principle, noting:

> The fact that some of the content was formulated in response to Matchmaker’s questionnaire does not alter this conclusion. Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. The actual profile ‘information’ consisted of the particular options chosen and the additional essay answers provided.

339 F.3d at 1124; see also Corbis, 351 F. Supp. at 1117-18 (holding that Amazon.com did not lose immunity merely by encouraging third parties to post
content that allegedly caused tortious interference or violated consumer protection laws).

The panel decision, at least in dicta, was inconsistent with this basic premise. See 489 F.3d at 928. Indeed, the panel decision purported to distinguish Carafano on the stated ground that the defendant there, Matchmaker, sought information about a poster, not “unwitting” third parties, and concluded: “We are not convinced that Carafano would control in a situation where defamatory, private or otherwise tortious or unlawful information was provided by users in direct response to questions and prompts from the operator of the website.” Id. (emphasis added).

This approach not only contravenes the express statutory purpose and language, as well as prior case law, it also creates a substantial risk of chilling protected newsgathering and news reporting efforts. See, e.g., Fed. Election Comm’n v. Wisconsin Right to Life, Inc., ___ U.S. ___, 127 S.Ct. 2652, 2674 (June 25, 2007). Internet news reporters routinely solicit information from readers about stories they are researching, or ask open-ended questions about events that might lead to a story. More specific questions are likely to lead to more useful information; yet a request for specific information of almost any kind could elicit defamatory postings. For example, a web reporter interested in a story about how women are faring in the workplace might ask open-ended questions from female
readers – but the responses may well elicit negative, personal, and possibly defamatory answers about some workplaces. A community news site may ask for anecdotes about local athletes – and receive hair-raising stories about substance abuse or academic scandals, or receive posted photographs taken surreptitiously in the high school boys’ locker room. According to the panel’s decision, the court should focus on the site’s potential to elicit defamatory comments from third parties. 489 F.3d at 929 (harrassthem.com example). But this approach is inconsistent with Section 230’s statutory scheme, and would place courts – and publishers – in the awkward and unpredictable position of determining in advance what type of questions are likely to elicit defamatory or other unlawful speech. Such guesswork inevitably will lead to inconsistent results, and self-censorship.

VI. CONCLUSION

The panel decision was inconsistent with prior decisions by this and other federal appellate courts, as well as decisions from lower federal courts that have recognized broad Section 230 immunity. This Court should reaffirm the statutory immunity that applies to the posting of edited and unedited third-party content, and make clear that Section 230 protects the reorganization of user-submitted content through searches and the like, as well as shielding interactive services from liability for answers readers supply to questions. Such a finding would be
consistent with other precedent, conform to Congressionally-stated policy, and protect speech at the core of the First Amendment.

RESPECTFULLY SUBMITTED this 1st day of November, 2007.

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California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

By Patrick Carome and Colin Rushing

The Supreme Court of California and the Northern District of Illinois have each recently issued decisions examining the limits of 47 U.S.C. § 230 (“Section 230”), the federal statute that has been construed by courts throughout the country to provide broad immunity for online intermediaries from most claims based on third-party content. In the closely watched case of Barrett v. Rosenthal, S122953 (Cal. Nov. 20, 1996), the court reaffirmed the broad immunity that has been recognized by a broad range of federal and state courts.

In Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. craigslist, Inc., No. 06-C-0657 (N.D. Ill. Nov. 14, 2006) (hereafter “CLC”), however, while the court ruled in favor of craigslist – the online intermediary asserting the defense – it nonetheless articulated a narrower vision of Section 230 than has prevailed in the courts. Thus, while Barrett and CLC each upheld the respective defendant’s claim of immunity, the CLC decision does suggest that there are still quarters in which the widely accepted, broad reading of Section 230 may meet with skepticism.

Broad Immunity for Nearly Ten Years

Section 230(c)(1), the statutory provision that was at issue in Barrett, CLC, and the other leading cases governing online intermediary liability for third party content, broadly provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added).

Beginning with Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), and including decisions from the United States Courts of Appeals for the Third, Ninth, and Tenth Circuits, as well as the Supreme Court of Florida and numerous federal district courts and intermediate state appellate courts throughout the country, courts have concluded that this language broadly immunizes online intermediaries from claims based on third-party content.


Reaffirming Zeran and its Progeny

In 2003, in the Barrett v. Rosenthal case, the California Court of Appeal (an intermediate appellate court) rejected Zeran and adopted a construction of Section 230 that, if followed in California, would have substantially transformed the landscape for online intermediaries subject to jurisdiction in that state by generally eliminating immunity whenever the intermediary allegedly had notice of the purportedly tortious content.

But on November 20, 2006, the Supreme Court of California reversed the Court of Appeal and confirmed that Zeran had accurately gauged Congress’s intent. In particular, the California Supreme Court explicitly agreed in concluding that Section 230 immunity applies even where the defendant allegedly knew or should have known of the allegedly tortious content.

The California Supreme Court explicitly agreed with Zeran in concluding that Section 230 immunity applies even where the defendant allegedly knew or should have known of the allegedly tortious content.

Background

In Barrett, the defendant asserting Section 230 immunity was not the typical defendant in a Section 230 case, such as AOL or Google, who provides a service through which third-party content from millions of different sources flows every day.
Instead, the defendant in Barrett was an individual, Ilena Rosenthal, who operated and participated in an Internet discussion group concerning non-traditional forms of health care. The Plaintiffs in the case, two doctors, alleged that Rosenthal committed libel by distributing defamatory statements in e-mails and Internet postings, and that she continued to do so even after being warned that the statements in question were false and defamatory.

Rosenthal was not the originator of the statements at issue; rather, she had received them from others and then selected them for electronic redistribution to others in her discussion group. The doctors brought suit, and Ms. Rosenthal responded with an Anti-SLAPP motion in which she asserted, among other defenses, that she was immune from liability under Section 230.

Although she prevailed at the trial court, Ms. Rosenthal lost in the intermediate appellate court. See Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004), rev’d, S122953 (Cal. Nov. 20, 2006). In a lengthy opinion, the Court of Appeal attacked the entire body of law construing Section 230, including case law from the Ninth Circuit and other California Courts of Appeal, and concluded that those courts had all interpreted Section 230 incorrectly.

The Supreme Court of California then granted Ms. Rosenthal’s petition for review to consider three issues: whether the Court of Appeal’s narrow reading of Section 230 was correct; the definition of the term “user” in Section 230(c)(1); and whether the protection afforded a “user” depends on whether the user engaged in “active” or “passive” conduct.

§230 and Liability on “Notice”

Making the same argument advanced by the plaintiff in Zeran and the dissenters in Doe v. AOL in the Florida Supreme Court, 783 So. 2d at 1018-28 (Lewis, J., dissenting), the Court of Appeal in Barrett had held that Section 230 does not apply to claims in which the defendant allegedly had “notice” of the harmful nature of the content.

Purporting to rely on pre-Section 230 case law, the Court of Appeal concluded that such a notice-based claim did not “treat” a defendant as a “publisher,” because it instead was based on the defendant’s status as a “distributor” of content. According to this view, so-called “distributor” liability can be imposed on those whose sole role is to disseminate content published by someone else, such as bookstores and newsvendors.

Under the common law of many if not most states, as well as the First Amendment, such “distributors” enjoy protection from liability unless it can be shown that they knew (or, perhaps, should have known) about the harmful nature of the content at issue -- that is, that they had “notice” of the content.

The Court of Appeal in Barrett sought to transform this form of heightened protection for information clearing-houses into a theory of “distributor liability” under which a claim would not “treat” a defendant as a “publisher” if it is alleged that the defendant “knew or should have known” about the content. According to this view, holding the defendant liable in such a case would “treat” it not as a “publisher or speaker” (the relevant words of the statute) but instead as a “distributor” (a word not used in Section 230).

In a lengthy opinion, the California Supreme Court rejected the Court of Appeal’s narrow reading of Section 230 on numerous grounds. In particular, the court acknowledged that so-called “distributor liability” still requires treating the defendant as a publisher. To take the most obvious example, one of the elements of a defamation claim is publication of the allegedly harmful content — as a result, holding a distributor liable for defamation (on the theory it was on notice of the content but nevertheless distributed it) still requires finding that it published the content.

Moreover, the California Supreme Court agreed with Zeran that a claim based on alleged “notice” of harmful content puts the defendant squarely in the role of a “publisher,” because such a defendant would have to carry out a quintessential duty of a publisher: deciding what to do with the content (e.g., whether to retract it). Slip Op. at 13-16.

The California Supreme Court also recognized that a regime of notice-based liability would fundamentally undermine Congress’s main goals in passing Section 230. As
numerous courts (including the Fourth Circuit in Zeran) have recognized, one of those main goals is to encourage service providers to engage in active self-regulation. Congress recognized that a regime that permits notice-based liability punishes those service providers who take the most robust steps to identify and screen out, block, or remove harmful content, because those very steps are likely to put service providers in the position of having “notice” of harmful content.

As the California Supreme Court explained: “Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability.” Slip Op. at 21. In other words, by eliminating the risk of liability based on “notice” of harmful content, Section 230(c)(1) gives service providers freedom to engage in robust self-regulation of their own services.

Finally, the California Supreme Court also recognized that a regime of “notice-based” liability would necessarily chill online speech and harm the development of new electronic media, contrary to Congress’s second key purpose. In particular, the court observed that it would be nearly impossible for service providers to determine which content is tortious and which is not and thus service providers would face powerful incentives to remove content once anyone complained about it, stifling robust speech and possibly causing service providers to scale back or even stop offering the types of services that could expose them to claims.

Protection for “Users”

As noted above, Barrett was one of the few cases in which the defendant asserting immunity was an individual “user” of an interactive computer service. The Barrett court, like other courts to consider the issue, however, easily determined that the term “user” in Section 230(c)(1) necessarily included individual users of interactive computer services such as Ms. Rosenthal. This flows logically and naturally from the text of the statute and is a difficult conclusion to avoid.

Next, the state Supreme Court considered whether the immunity should be restricted only to circumstances in which a user’s role with respect to tortious third-party content is “passive” -- that is, when the user does not play an “active” role in the selection of that content. Basing its decision on the language of the statute and Congress’s intent, the court rejected the view that this distinction was relevant to the analysis.

As the court explained, there is nothing in the language of the statute suggesting that Section 230 protects only users who engage in “passive” conduct. In fact, the court reasoned, distinguishing between active and passive users would have a perverse effect: a user who engaged in “active” deletion of content may find herself deemed to have also “active[ly]” selected the remaining, non-blocked content for dissemination, while a “passive” intermediary who screened and reviewed nothing could find itself immune. Id.

Accordingly, the court concluded that Section 230’s protection extends to users -- whether or not their role in disseminating someone else’s content was “active” or “passive.”

CLC v. Craigslist

In CLC, the defendant was craigslist – an entity that, unlike Ms. Rosenthal, has the characteristics of the more common sort of Section 230 defendant, namely, an online service provider that serves as a platform for the communications of many thousands, if not millions, of individual users.

craigslist offers different sites for different geographic regions, each accessible through www.craigslist.org or directly by its own URL (such as chicago.craigslist.org). On each site, craigslist offers a bulletin board service, with different categories and subcategories (such as personals, for sale, and housing) on which individual users can post various types of or other content.

While craigslist does not engage in pre-screening of user posts, it does have a robust form of self-policing on the part of its user community: users have a mechanism to flag what
California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

(Continued from page 135)

they perceive to be inappropriate or off-topic content, and such content is automatically removed if it is flagged by a sufficient number (pre-set by craigslist) of users.

The CLC case concerned notices posted by users in the housing category of craigslist’s Chicago page. According to the plaintiff, a group that advocates for fair housing rights (among other things), a small fraction of craigslist users had posted notices for housing that expressed preferences “on the basis of race, color, national origin, sex, religion and familial status” in violation of the federal Fair Housing Act. Slip Op. at 7-9.

Rather than sue the individual users, however, CLC alleged that craigslist was liable under 42 U.S.C. § 3604 (c), a provision of the Fair Housing Act that prohibits a person from “mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

In its threshold motion for judgment on the pleadings, craigslist asserted that Section 230 barred this claim, because the cause of action was based entirely on third-party content – namely, ads posted by users – and craigslist’s sole alleged role was in providing an electronic forum for that content.

The district court agreed with craigslist that Section 230 applied only to claims in which “publishing” is an explicit, technical element.

Rather than providing immunity from all claims, the Illinois court concluded that Section 230 applies only to claims in which “publishing” is an explicit, technical element.

A New and Confusing Standard?

But the court did not completely agree with craigslist’s view of the scope of Section 230. Perceiving shortfalls in the widely accepted analysis of the Zeran court, the district court “decline[d] to follow Zeran’s lead” and took a different tack. Rather than providing immunity from all claims, the Illinois court concluded that Section 230 applies only to claims in which “publishing” is an explicit, technical element.

The district court’s approach seemed to be based on dicta in a previous decision of the Seventh Circuit, Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003), in which Judge Easterbrook ruminated about two alternative approaches to Section 230. (Ultimately, the Section 230 issue was not reached or decided in that case, because the panel affirmed the lower court’s order of dismissal, which had been based on Section 230, on alternative state law grounds.)

One of Judge Easterbrook’s hypotheses in that dicta seemed to suggest that Section 230’s prohibition on treating an online intermediary as a “publisher or speaker” of someone else’s content might apply only to claims, for example defamation, for which “publishing” is an explicit element.

The district court in the CLC case acknowledged that Congress passed Section 230 (at least in part) to overrule a state trial court decision in which Prodigy, the provider of an early online service, was held potentially liable for defamation based on the third-party content one of its electronic bulletin boards specifically because had general practices and policies regarding the self-regulation of content on its service.

Thus, as the district court in CLC recognized, Congress passed Section 230 “to address the problem of holding liable for defamation ICSs that reviewed third-party content . . . while leaving free from liability ICSs that did not review content.” Slip Op. at 24. The CLC court seems to have concluded, however, that Congress was principally interested in providing immunity only from defamation claims or from other claims for which “publishing” is an explicit, technical element. Id.

The CLC court readily acknowledged that its narrow interpretation of Section 230(c)(1) is contrary to the holdings of numerous other courts, and its opinion did not cite any precedent (other than the Doe v. GTE dicta) for that interpretation.

(Continued on page 137)
In explaining its holding, the district court observed that it would have been unusual for Congress to grant absolute immunity for service providers “that do not screen any third-party content whatsoever,” given the heading of Section 230(c) (“Protection for “Good Samaritan” Blocking and Screening of Offensive Material”) and Congress’s apparent intent to protect those who did remove content. Id. at 24-25.

At the same time, however, the court did recognize that service providers enjoy absolute immunity from certain types of claims -- under the CLC court’s approach, service providers enjoy protection from all claims in which publishing is an element, but enjoy no protection from claims in which it is not.

Ultimately, the district court concluded that craigslist enjoyed protection from the FHA claim because the language of the FHA provision on which CLC based its suit prohibited craigslist from “publishing” the discriminatory advertisements. But a tension in the court’s narrow (some might say hyper-technical) reading of Section 230 is revealed in the final footnote of its opinion, in which the court acknowledged that the same provision also prohibits “mak[ing]” and “print[ing]” allegedly discriminatory advertisements.

The court concluded that craigslist did not “make” the allegedly discriminatory notices at issue in the case because they originated, as the complaint alleged, from third parties. Slip Op. at 27 n.18. The court also concluded that craigslist did not “print” the ads because the role it plays with respect to third-party postings does not fall within “any reasonable interpretation of that word.”

The need for such close analysis of the specific legal elements of the claim being asserted by a plaintiff contrasts sharply with the approach followed in Zeran and its progeny. The virtually uniform approach of all those courts has been to examine whether the plaintiffs’ claims turn on an allegation that the online intermediary disseminated content that originated with a third-party.

In this regard, the district court seems not to have heeded the warning of other courts, including the Fourth Circuit in Zeran, that determining whether immunity is available based on fine distinctions in how plaintiff couches her claims would simply encourage artful pleading by plaintiffs and disserve Congress’s key policy objectives. Under the CLC court’s unprecedented approach, however, the protection would not be based on the nature of the online intermediary’s role but rather on whether a statutory or a common law definition of any given cause of action fortuitously includes or omits the words “publisher” (or “speaker”) or some variation thereof.

**Upshot?**

The decision in Barrett continues and reinforces the trajectory of the Section 230 case law. The vast majority of courts continue to conclude that Congress deliberately chose language that would encompass all types of online intermediaries, all types of content, and all forms of online services and media.

At the same time, however, the decision in CLC reveals that some courts remain uncomfortable with this broad immunity. In fact, given the Seventh Circuit dicta in Doe, district courts in that jurisdiction (such as the CLC court) may be encouraged (or feel compelled) to challenge Zeran and its progeny. Such decisions are, at least for now, still outliers and the law is becoming increasing settled in favor of broad immunity.

Patrick Carome is a partner and Colin Rushing a counsel at WilmerHale in Washington, D.C. WilmerHale represented a wide range of Internet companies and trade associations as amici in Barrett and serves as co-counsel for craigslist in the CLC case. The views expressed in this article are those of the authors, and do not necessarily reflect the views of their firm or clients.
Ninth Circuit Applies Single Publication Rule to Internet Posting

Rule Applies to Privacy Act Claims

In an interesting non-media case, the Ninth Circuit held that the single publication rule applies to a Privacy Act claim over content on a government website. *Oja v. U.S. Army Corps of Engineers*, No. 03-35877, 2006 WL 618915 (9th Cir. March 14, 2006) (Hug, Jr., Berzon, Bybee, JJ.).

**Background**

Plaintiff was a former official with the U.S. Army Corps of Engineers (“USACE”). The Washington Post published an article criticizing the USACE, including discussing plaintiff’s role as a regulatory manager. The USACE posted on its website a rebuttal to the Post article which included the statement that:

“Removal from Job. Mr. Oja stopped coming to work on October 23, 1997, and failed to provide information about the likelihood of returning to work. Effective September 5, 1998, Mr. Oja was removed from his position for excessive absence due to illness.

 Plaintiff sued, arguing the statement disclosed personal information in violation of the Privacy Act, 5 U.S.C. § 552(a)). The Act bars the government from disclosing without authorization certain employee information.

**Single Publication Rule**

The district court dismissed the complaint for being untimely under the single publication rule. The court analogized the website posting to the publication of a magazine or office manual. The Ninth Circuit, in an opinion by Judge Bybee, agreed that the mass media publication analogy provided the correct framework when considering claims under the Privacy Act.

The Privacy Act, according to the court, implies the concept of publication to a third party and therefore:

“it is appropriate to import publication considerations into our analysis of the Privacy Act. In so doing, we also consider legal doctrines generally associated with the realm of defamation law, namely the single publication rule. We also note that the fact that both the Privacy Act and defamation law are driven by similar policy concerns – personal integrity and reputational interests – makes the application all the more apt.”

After adopting this framework, the Court cited and relied on the large body of case law applying the single publication rule to the Internet. These cases, the court noted, are based on the premise that “web content is functionally identical to published traditional print media and, accordingly, Internet publication should be considered ‘published’ in the same manner as is a print edition.” While noting differences in Internet and print media, such as the ability to make corrections, it concluded that the analogy between Internet and print publication is sufficiently apt to apply the single publication rule.

Plaintiff was represented by Marianne Dugan, Facaros & Dugan, Eugene, OR. U.S. Attorneys Karin J. Immergut and James L. Sutherland represented the USACE.

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Texas Federal Court Applies Single Publication Rule to the Internet

Issue of First Impression in the State

This month a Texas federal district court, on an issue of first impression in the state, held that the single publication rule applies to online publications. *Nationwide Bi-Weekly Administration, Inc. v. Belo Corp.*, No. 3:06-CV-0600-N (N.D. Tex. October 16, 2006) (Godbey, J.). Texas joins a growing list of states that have applied the single publication rule in the internet context, including Arizona, California, Georgia, Kentucky, Massachusetts, Mississippi, New Jersey and New York.

**Background**

At issue was an article published in the *Dallas Morning News* on July 29, 2003 and re-published on the newspaper’s website. Plaintiff filed a complaint for defamation, tortious interference and disparagement on July 28, 2004, within the state’s one year limitations period. But plaintiff failed to serve the complaint on the newspaper until June of 2005.

The newspaper moved to dismiss for failure to serve the complaint in time. Plaintiff argued that because the newspaper article was available online there was a “continuous publication” for statute of limitations purposes.

**Single Publication Rule**

Texas state courts had not yet addressed the issue of the single publication rule in the internet context. But the federal court determined that the state would follow the reasoning of *Firth v. State*, 775 N.E. 463, 465-66 (N.Y. 2002) and *McCandliss v. Cox Enterprises, Inc.*, 593 S.E.2d 856, 858 (Ga. App. 2004). In *Firth*, New York’s highest court reasoned that the single publication rule applied with even greater force to internet publications to prevent the “endless retriggering of the statute of limitations.”

The one year statute of limitations for plaintiff’s action also barred the related claims for business disparagement and tortious interference claims, since Texas courts have consistently held that when defamatory statements form the gist of a complaint the libel statute of limitations applies.

Belo was represented by Paul C Watler, Jenkens & Gilchrist, Dallas. Plaintiff was represented by Brent W. Bailey, Dallas; and Martha Hardwick Hofmeister and Derek D Rollins, Shackelford Melton & McKinley, Dallas.

**Cases applying the single publication rule to Internet publications.**


*Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 89-90 (2d Cir.2003)


*Mitan v. Davis*, 243 F.Supp.2d 719, 721-724 (W.D.Ky.2003);


By Susan Tillotson Bunch

In a case of first impression for a Florida appellate court, the Second District Court of Appeal will hear arguments on April 17, 2007 about the applicability of the single publication rule and the state’s retraction statute to online speech. *Holt v. Tampa Bay Television, Inc. et al.*, No. 03-11189 (March 17, 2006), appeal pending, Case No. 2D06-1815 (Fla. 2d DCA) (Little, J).

Background

Alice Holt sued WFTS-TV of Tampa, Florida and its reporter, claiming that they had defamed her in stories broadcast by the television station and posted to its website. According to the amended pleadings, WFTS published statements to the effect that Ms. Holt was violating a judge’s order and boarding dogs illegally, that she had no business being at a boarding kennel, that she was running a boarding kennel in violation of a judge’s order, and that she had been ordered to stay away from animals and never to work with animals again. The broadcasts were contemporaneous with two website stories recapping the information in the broadcasts.

Because Florida requires plaintiffs in defamation cases to serve a timely demand for retraction on a media defendant as a condition precedent to bringing suit, Ms. Holt sent a letter to the television station threatening to bring suit. WFTS moved for summary judgment, arguing that the letter failed to meet the specificity requirements of the retraction statute, because it did not identify any of the allegedly false statements in the television broadcasts or how they were false.

Ms. Holt contended that the retraction statute did not require specificity with regard to identifying allegedly false statements in television broadcasts. In addition, her letter made no reference to the stories on the station’s website and she took the position that the retraction statute did not apply to stories posted online.

On March 17, 2006, Hillsborough County Circuit Judge Perry Little granted the motion for summary judgment, declaring in an unpublished opinion that both the single publication rule and Florida’s retraction statute applied to news stories published on media-hosted Internet sites.

The trial judge held that plaintiff’s presuit letter failed to identify the allegedly false and defamatory statements in such a way as to allow the station an opportunity to retract any errors. In addition, Judge Little disagreed with the plaintiff’s argument that the retraction statute did not apply to online news stories, finding that the Internet fell within the statutory reference to “other medium.” Finally, because the statute of limitations had expired without the plaintiff satisfying the jurisdictional prerequisites in the retraction statute, the defamation claims were barred.

The Pending Appeal

On appeal, Ms. Holt argues that her presuit notice letter was adequate with respect to the television broadcasts, contending that she is not required to specify the allegedly false statements in her presuit notice. Ms. Holt further argues on appeal that no retraction demand was necessary as to the stories posted on the station’s online website because the Internet did not fall within the statutory phrase “other medium.”

Finally, Ms. Holt argues that the statute of limitations had not expired as to the online stories. Although she contends that the single publication rule did not apply to stories posted on the Internet, she concedes that this is inconsistent with the majority of published opinions but argues that further discovery was necessary to determine whether the website stories had been changed since their original publication.

Defense Arguments

The station contends that Ms. Holt’s presuit letter, even under the most liberal scrutiny, failed to give the station enough information to ascertain whether a retraction was warranted because it did not identify the false statements or the broadcast in which they allegedly occurred (almost two years before the letter was sent). The station argues...
Florida Appeals Court to Hear Online Libel Case

(Continued from page 143)

that Florida’s retraction statute should apply equally to news stories posted online by media entities.

To date, only one court has authored an opinion on this issue; the Georgia Supreme Court has interpreted its retraction statute as applying to Internet publications. See Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

The station also argues that Florida should follow the majority view and apply the single publication rule to online speech; to do otherwise would allow the endless tolling of the applicable statutes of limitation each time an Internet user viewed the story online. Although Ms. Holt contends that additional discovery is necessary, the station contends that it would make no difference to the outcome because of Ms. Holt’s failure to comply with the presuit notice requirements prior to filing suit and prior to the expiration of the statute of limitations.

Gregg D. Thomas and Susan Tillotson Bunch, of Thomas & LoCicero PL in Tampa, Florida, represent the defendants in this case.

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Newspaper’s Online Version a “Separate Edition” for Purposes of Single Publication Rule

Website Targets Separate Internet Audience, According to Court

In an interesting decision, a New York trial court ruled last month that a newspaper’s online edition is a separate publication for purposes of applying the single publication rule – even where the online edition is identical to the hard copy publication. *Rivera v. NYP Holdings, Inc.*, 16 Misc.3d 1121(A), 2007 WL 2284607 (N.Y. Sup. Aug. 2, 2007) (Acosta, J.). A newspaper’s website edition, the court said, is “a separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the internet.”

**Background**

Plaintiff in this case is New York Supreme Court Judge Francois Rivera. Judge Rivera was the subject of a *New York Post* article discussing a corruption scandal in the city involving the alleged sale of judgeships. Under the headline “JUDGE SINGS: Explosive new testimony on court scandal,” the newspaper reported that Judge Rivera was granted immunity to testify before a criminal grand jury about allegations he had paid a Brooklyn Democratic Party boss $50,000 for his seat on the bench. The article appeared in morning and afternoon editions of the paper, as well as on the paper’s website www.nypost.com.

The article was discussed that same day on NY1, a local cable news channel owned by Time Warner. In a segment entitled “In the Papers,” the host displayed and summarized the contents of the *Post* article.

Judge Rivera sued Time Warner, NYP Holdings, two *Post* reporters and their unidentified sources over the separate hard copy and online editions of the “JUDGE SINGS” article, as well as another *Post* article on the scandal that did not specifically mention Judge Rivera.

**Trial Court Decision**

The trial court granted the *New York Post’s* motion to dismiss the counts of the complaint over the article that did not mention plaintiff. It also granted Time Warner’s motion to dismiss because of plaintiff’s failure to plead actual malice against the cable company. Plaintiff’s complaint stated that Time Warner “acted in a grossly irresponsible manner and had, or should have had, substantial reason to question the accuracy of the articles conveyed in the broadcasts and that [Time Warner] made no effort or attempt to verify the accuracy of the information.” “These allegations,” the court ruled, “do not spell out actual malice with sufficient specificity.”

The court also noted that the very nature of the “In The Papers” segment alerted the audience that is was a report about the content of newspaper article – and not an endorsement of the truth of the article. Moreover, plaintiff failed to identify any substantial reason for Time Warner to have questioned the accuracy of the articles or the bona fides of the *Post* reporters. The court dismissed plaintiff’s argument that Time Warner had reason to doubt the accuracy of the articles because all grand jury witnesses in New York receive automatic immunity. A lay person would not know that different rules apply in testifying before a grand jury and before a jury trial (or the procedures involved that would prohibit a judge from continuing to hear cases while a probe is pending).

**Single Publication Rule**

The court denied the *Post’s* motion that plaintiff had only one claim for the hard copy and website publications of the identical article. “Separate editions are separate publications,” the court stated, “even if the article is identical.”

Notwithstanding the *Post’s* invitation for this Court to create a new rule in New York, the existing rule works fine, inter alia, because separate editions of a publication are geared to reach different audiences. *Firth v. State*, 98 N.Y.2d 365, 371 (2002). That other states may take a different approach, see, e.g *Belli v. Robert Bros. Furs*, 49 Cal.Rptr. 625 (Cal App.1966) (decided under the Uniform Single Publication Act, which is not part of New York law), is of no moment. Similarly, the website publication is also a separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the internet.

FAIR USE OF ENTIRE COPYRIGHTED WORKS: WHAT’S FAIR NOW?

Ronald C. Wheeler and Benjamin S. Sheffner
Fox Entertainment Group

In 1984, the Supreme Court held for the first time that making copies of entire copyrighted works could constitute fair use under the Copyright Act. Specifically, in the movie studios’ case against Sony over the legality of the Betamax video recorder, the Court held that the practice of “time-shifting”—which it defined narrowly as “the practice of recording a [free over-the-air television] program to view it once at a later time, and thereafter erasing it”—was not actionable copyright infringement.2

Twenty-one years later, in MGM v. Grokster3, the Supreme Court again took up a major copyright case that generated widespread public interest. But while Grokster was heralded as “the Betamax case for the digital age,” the Court only addressed one half of the Betamax ruling: its pronouncements regarding the contours of secondary liability. Left unanswered were large questions regarding the scope of fair use of entire digital copyrighted works.

As the Internet and other digital technologies have made the copying and distribution of copyrighted works infinitely easier, cheaper, and more efficient, some have taken the position that much unauthorized copying of digital media qualifies (or should qualify) as fair use. In essence, their argument seems to be: “If technology makes a use possible, and if the use is ‘non-commercial,’ ‘personal,’ or both, then it must be a permitted fair use under copyright law.” But while such arguments are common,4 the courts have, so far at least, failed to embrace them. Admittedly, there have been few cases resulting in published opinions in which courts have considered fair-uses defenses where the defendant has used entire works without significant transformation. But from the small number of cases that have been decided in the twenty-two years after Betamax, one can conclude that the state of the law remains that making or distributing entire copies of others’ works without authorization is actionable copyright infringement, not subject to a fair use defense, in virtually all circumstances.

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1 Mr. Wheeler is Senior Vice President, Content Protection, and Mr. Sheffner is Counsel, Content Protection Litigation, in the Fox Entertainment Group (“Fox”) Legal Department. The views expressed herein are entirely their own and may or may not coincide with the views of Fox and/or its affiliates.

2 Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 424 (1984) (“Betamax”). It is worth noting that the device at issue in Betamax—an analog videocassette recorder—made only poor-quality analog videotape copies of the free over-the-air television programming at issue in the case. Such analog copies were (and are) ill-suited to further (serial) copying or redistribution. By contrast, the digital copies of free, subscription, and on-demand television programming that are created using modern-day descendants of the Betamax—e.g., digital video recorders—are of far higher visual quality themselves, and are also far easier to further copy and redistribute.


4 See, e.g., Electronic Frontier Foundation, “Copyright and Fair Use FAQ,” available at <http://www.eff.org/cafe/drmgame/copyright-faq.html> (“[M]any lawyers believe that making a CD-R back-up copy of a CD you already own for your personal use is ‘fair use’. They also believe that conversion of music on CD to MP3 format or ‘space-shifting’, for personal, noncommercial use, is analogous to ‘time-shifting’, (using a VCR to record copyrighted TV programs for later viewing).”).
The Internet and new digital technologies have generated tremendous benefits for copyright owners, consumer electronics manufacturers, and consumers alike. Content owners have new distribution channels for their content. Consumer electronics manufacturers have sold millions of new devices to enjoy that content. And consumers have worldwide access and innumerable new choices for information and entertainment. Notwithstanding the revolutionary changes brought by the advent of the web and digital technologies, however, the courts have correctly found that the traditional rules of fair use remain solidly in place.

When users make limited use of small portions of copyrighted works for the purposes set forth in section 107 of the Copyright Act—"purposes such as criticism, comment, news reporting, teaching..., scholarship, or research"—they can comfortably invoke the fair-use defense to any claim of infringement. On the other hand, courts have consistently rejected attempts by individuals, or the businesses that seek to step into their shoes, to invoke fair use when they copy or distribute entire works untransformed by creative or artistic spark. As the Nimmer treatise states, "In general, it does not constitute fair use if the entire work is reproduced."\(^5\) Defendants often seek to dress up their infringements in the language of Betamax, hoping to stretch the Supreme Court’s sanctioning of limited "time-shifting" of free broadcast television into new "shifting" rights to "place-shift," "space-shift," and "format shift" all forms of media. But courts have been unwilling thus far to expand the Supreme Court’s fair-use ruling in Betamax into such novel realms. Instead, courts continue to faithfully apply the four factors enumerated in Section 107 and to conclude that, where a defendant copies or distributes an entire work to the actual or potential financial detriment of the copyright owner, the fair-use defense fails. For example:

- In *Infinity Broadcast Corp. v. Kirkwood*,\(^6\) the defendant operated a service through which subscribers could pay a fee and listen to the plaintiff’s radio broadcasts outside their normal broadcast area on a telephone. Defendant claimed its service was transformative because it was used by advertisers to verify their ads were being played and by talent scouts to learn about distant DJs, not for the traditional entertainment purpose. The Second Circuit rejected defendant’s assertion that such use was transformative: "Kirkwood’s retransmissions leave the character of the original broadcasts unchanged. There is neither new expression, new meaning nor [a] new message."\(^7\)

- A company called MP3.com operated a service where individuals could access over the Internet a large collection of songs that they claimed they already owned on CD. MP3.com argued that its customers were engaged in fair-use "place-shifting," *i.e.*, listening remotely to songs embodied on CDs they already owned. The district court, however, held that MP3.com was not entitled to a fair-use


\(^{6}\) 150 F.3d 104 (2d Cir. 1998).

defense because it was usurping the plaintiff’s legitimate right to the licensing fees it could have charged for such a service.  

- A service called “TV News Clips” taped local news broadcasts off the air and sold the tapes to the subjects of those reports. The Eleventh Circuit rejected the defendant’s fair-use defense, holding that the use “is neither productive nor creative in any way,” and that “[b]ecause TV News Clips uses virtually all of a copyrighted work, the fair use defense drifts even further out of its reach.”  

- Napster, which popularized peer-to-peer music piracy, asserted a fair-use defense on behalf of its users. Napster contended that its users were engaged in fair use by “space-shifting” and “sampling” music. The Ninth Circuit rejected Napster’s fair-use defense, reasoning that the unauthorized distribution of songs diminished the market for CD purchases and raised barriers to plaintiffs’ entry into the legitimate digital download market.  

While the cases cited above suggest the answer, no court has directly addressed the issue whether practices such as “space-shifting,” “format-shifting,” or making “back-up” copies, performed solely by an individual, without the assistance of a commercial enterprise, are defensible as fair use under the Copyright Act. While many may view such activities as lawful, they do not have case law on their side. Indeed, the Register of Copyrights, in her recent statement regarding exemptions to the anti-circumvention provisions of the Digital Millennium Copyright Act, derided as “without foundation” the assertion that “fair use gives [users] a right to make ‘backup copies’” of recorded media. 

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11 Proponents of a right to format-shifting cite RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999), in which the court rejected a challenge to an early MP3 player. This case, however, solely concerned interpretation of the Audio Home Recording Act—not the fair-use provisions of the Copyright Act. The court did not evaluate format-shifting under Section 107’s four fair-use factors. Certain language in the opinion does state that the court viewed format-shifting as noncommercial, which would weigh in favor of a finding of fair use under the first of the four statutory factors. See id. at 1079 (referring to format-shifting as a “paradigmatic noncommercial personal use entirely consistent with the purposes of the [AHRA].”).

Even if it is relatively clear that courts have not yet extended the fair-use doctrine to these novel uses, the question remains as to whether the doctrine should extend to such uses as a matter of public policy. Many have argued that it should, claiming that consumers would “obviously” benefit from additional flexibility regarding copying of legitimately acquired media, and that content owners would not be harmed if consumers were given such flexibility. But both premises are open to question. The premise that content owners would not be harmed from expansion of the fair-use doctrine is the most doubtful, given that it depends on the highly dubious economic assumption that allowing consumers to make “free” copies of purchased media will not affect the overall demand for purchasing such works.

And the “consumer benefit” premise is open to question as well. In fact, a good argument can be made that consumers themselves would be harmed by expanding the definition of fair use. For one thing, they would be deprived of the innovative new business models that are enabled by the ability to charge for additional copies—business models that would not exist if fair-use copying made them “compete with free.” For another, forcing content providers to take account of expansive “fair use” copying by consumers will tend to push prices for the initial copy higher, so as to compensate content providers for the lost sales of subsequent copies. As such, consumers who do not desire additional copies are obviously benefited by a rule that requires those that do to pay more for the right to make those additional copies; users who want only one copy should not be forced to subsidize those who want more. For example, Wal-Mart recently announced a new service under which someone who buys a physical DVD (which is protected by digital rights management technology) can pay an additional $1.97 for the ability to play it on portable devices, $2.97 to play it on a PC, or $3.97 to play it on either portable devices or a PC. Perhaps consumers will embrace such a model, or perhaps they will not; the market will decide. But attacking this model as “Stealing fair use, selling it back to you,” as some have done, rests on a false premise: that consumers already possess the “right” to make these additional copies. In fact, the courts have consistently held that fair use remains only an affirmative defense to a specific allegation of copyright infringement; fair use is not a free-floating “right.”

From a law-and-economics perspective, fair use (including the specific “time shifting” use found to be fair in Betamax) can be viewed as a response to the failure of the market to make copyrighted works available to users, because of onerous transaction costs, inherent conflicts of interest (e.g., in the case of criticism), or other market imperfections. In the absence of a specific market failure such as that found in Betamax, a view of fair use that confines the defense to “criticism, comment, news reporting, teaching…, scholarship, or research” as enumerated in


15 In Betamax, the salient market imperfection at the time the facts of the case were determined (the late 1970’s) was that studios and broadcasters did not then offer consumers who were unable to watch movies at the time they were broadcast on free over-the-air TV with an authorized means of watching such movies at a later time. It is interesting to speculate how the Court would rule given the current state of affairs, in which a variety of authorized means exist for such consumers to watch broadcast movies at a later time (e.g., operator-provided pay-per-view, video-on-demand, iTunes downloads, etc.).
Section 107 would seem to well serve copyright's constitutional goal of “promot[ing] the progress of science and useful arts.” 16 Stanford Law Professor Paul Goldstein aptly expressed the concept in arguing against an unduly broad fair-use defense:

[T]he fact remains that no one has yet designed a system better than pay-per-use to ensure that consumers get the quality and quantity of the entertainment and information they desire, and at the lowest possible price. To press for free use of copyrighted expression as a legal norm is to overlook that fair use is the exception to copyright and not its rule. Unlike copyright law’s originality requirement and idea-expression distinction, which respond directly to information’s nature as a public good, fair use is a response to market failure—no more and no less. It approximates market results in cases where the market itself fails to do so, but yields to exclusive rights where the market is able to reach these results unaided and on its own. 17

With increasing numbers of new technologies that enable “shifting” of copyright works, the courts will no doubt soon need to confront directly the scope of the fair-use defense for both individuals who want to “shift” without paying, and business that seek to charge to do the “shifting” for them. While the outcome of such cases is hard to predict, it seems unlikely that a faithful application of the four statutory fair-use factors would result in the vast expansion of fair-use “rights” that advocates of a weaker copyright law favor.


California’s Shield Law Covers Websites

Court Quashes Subpoenas in Trade Secrets Litigation

A California appeals court this month ruled that websites that publish news and information are clearly covered by the state’s reporter’s shield law, as well as a First Amendment-based privilege to protect confidential sources. *O’Grady v. Superior Court*, No. H028579, 2006 WL 1452685 (Cal. App. May 26, 2006) (Rushing, Premo, Elia, JJ.).

In a lengthy decision, the Court reasoned that there is no basis to distinguish such web publications from traditional hard copy publications for purposes of protecting confidential sources. Instead, the key factor for both the statutory and First Amendment privilege is simply whether websites engage in the gathering and dissemination of news, broadly defined.

The Court also gave a ringing endorsement to the primacy of free press rights over statutory trade secret rights, the issue in the underlying litigation.

Background

Apple filed suit in December 2004 against numerous John Doe defendants for misappropriation of trade secrets after information about a new Apple digital music recording device was published on several websites that report and discuss Apple’s computer and software developments. In an effort to identify the source of the disclosures, Apple issued subpoenas to the publishers of the websites where the information appeared. These included “O’Grady’s PowerPage,” “Apple Insider” and “Mac News Network.” Apple also issued a subpoena to the e-mail service provider of one of the websites to determine the source of the leak.

The web publishers moved for a protective order to prevent discovery on two separate grounds. First, they argued that they were covered by California’s shield law, as well as a First Amendment-based privilege to protect the identity of confidential news sources. Second, they argued that the subpoena to the Internet service provider violated the Stored Communications Act, 18 U.S.C. § 2702(a) (1).

Last year a California trial court denied the web publishers’ motion. *See Apple v. Doe*, No. 1-04-CV-032178, 2005 WL 578641 (Cal. Super. Mar. 11, 2005) (Kleinberg, J.). The court did not directly address whether the web publishers were “journalists” for purposes of the privilege, finding the issue not ripe for adjudication. Instead, the court essentially concluded that no privilege applies in trade secrets litigation because there is no public interest in publishing stolen information. And even assuming the publishers were journalists, the trial court stated “this is not the equivalent of a free pass.”

Appeals Court Decision

The Court of Appeals reversed on every point, handing a complete victory to the web publishers. The Court first explained why it granted the web publishers’ motion for an extraordinary interlocutory appeal. While noting that interlocutory review of discovery decisions should be rare, the court noted that:

This case raises several novel and important issues affecting the rights of web publishers to resist discovery of unpublished material, and the showing required of an employer who seeks to compel a newsgatherer to identify employees alleged by the employer to have wrongfully disclosed its trade secrets. In part because of these issues and their implications for the privacy of

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California’s Shield Law Covers Websites

(Continued from page 153)

internet communications, the First Amendment status of internet news sites, and the protection of trade secrets, the case has generated widespread interest within the technology sector, the digital information industry, internet content providers, and web and email users. The case also involves an attempt to undermine a claimed constitutional privilege, threatening a harm for which petitioners, if entitled to the privilege, have no adequate remedy at law.

Stored Communications Act

On the merits, the appellate court first considered the more arcane question of whether the Stored Communications Act (“SCA”) prohibited the subpoena to the Internet service provider. The SCA provides in relevant part that except under certain circumstances:

a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service ....


Among the circumstances where disclosure is authorized are those that are incidental to the provision of the intended service; incidental to the protection of the rights or property of the service provider; made with the consent of a party to the communication or, in some cases, the consent of the subscriber; related to child abuse; made to public agents or entities under certain conditions; related to authorized wiretaps; or made in compliance with certain criminal or administrative subpoenas issued in compliance with federal procedures.

Apple argued that a civil discovery subpoena was within the SCA’s exception for disclosures that “may be necessarily incidental ... to the protection of the rights or property of the provider of that service” because if the ISP refused to comply it could be subject to contempt. The appeals court dismissed this argument as entirely circular.

Apple also argued that the SCA includes an implicit exception for civil discovery subpoenas. The appeals court, after a lengthy review of the statute, declined to create such an exception. Congress, the court reasoned, could reasonably have concluded that civil discovery of stored messages from ISPs without the consent of subscribers would harm “digital media and their users.”

Prohibiting such discovery imposes no new burden on litigants, but shields these modes of communication from encroachments that threaten to impair their utility and discourage their development. The denial of discovery here makes Apple no worse off than it would be if an employee had printed the presentation file onto paper, placed it in an envelope, and handed it to petitioners.

Finally, on this issue, the court distinguished the instant case from John Doe lawsuits in which civil litigants have successfully subpoenaed ISPs to learn the identities of subscribers who posted anonymous defamatory messages on the Internet. Here the subpoenas do not concern an anonymous poster, “but the stored private communications of known persons who openly posted news reports based on information from confidential sources.”

We can think of no workable test or principle that would distinguish “legitimate” from “illegitimate” news.

Shield Law

Addressing the reporters privilege issue, the court began by “declin[ing] the implicit invitation to embroil ourselves in questions of what constitutes legitimate journalism.”

The shield law is intended to protect the gathering and dissemination of news, and that is what petitioners did here. We can think of no workable test or principle that would distinguish “legitimate” from “illegitimate” news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment ....

Apple had argued that the websites merely republished “verbatim copies” of internal information and exercised “no editorial oversight at all.” But the court welcomed the publication of source material.

Courts ought not to cling too fiercely to traditional preconceptions, especially when they may operate to discourage the seemingly salutary practice of provid-
ing readers with source materials rather than subjecting them to the editors’ own “spin” on a story.

The Court also dismissed Apple’s argument that “anyone with a computer and Internet access could claim protection under the California Shield and conceal his own misconduct.” This argument, the Court noted, rests on the “dismissive characterization” of the web publishers as simply “posting information on a website.” The web publishers’ conduct, the Court reasoned, was substantially different from that of a person who might occasionally “post” a comment to a website – activity that would not constitute newsgathering or reporting.

The Court next examined whether the web publishers fell within the scope of the shield law as “a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication.”

The Court found “no reason to doubt” that the operators of the website were “publishers” for purposes of the statute. And after a lengthy examination of the history and language of the statute, the Court held the web publishers fit within the definitions of “newspaper, magazine, or other periodical publication.” The Court found the web publishers’ sites “highly analogous” to printed publications, the only difference being that they are read on a screen, rather than from a hard copy.

Finally, to the extent there are any ambiguities in the definitions of newspaper, magazines or periodical publications within the statute, the Court was guided by the “core purpose” of the shield law – to protect the gathering and dissemination of news to the public. Thus the web publishers were covered by the statute, notwithstanding the format of their publications.

**Constitutional Privilege**

The web publishers were similarly protected under a First Amendment-based privilege.

[W]e can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media. It is established without contra-

diction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.

Apple failed to overcome this separate constitutional privilege because it did not adequately pursue other means to identify the source who leaked Apple’s trade secrets. Among other things, the Court noted that Apple did not fully exploit “internal computer forensics” to investigate the source of the leak.

Finally, the Court addressed the issue of First Amendment protections in the context of trade secret litigation.

Apple first contends that there is and can be no public interest in the disclosures here because “the public has no right to know a company's trade secrets.” Surely this statement cannot stand as a categorical proposition. As recent history illustrates, business entities may adopt secret practices that threaten not only their own survival and the investments of their shareholders but the welfare of a whole industry, sector, or community. Labeling such matters “confidential” and “proprietary” cannot drain them of compelling public interest. Timely disclosure might avert the infliction of unmeasured harm on many thousands of individuals, following in the noblest traditions, and serving the highest functions, of a free and vigilant press. It therefore cannot be declared that publication of “trade secrets” is ipso facto outside the sphere of matters appropriately deemed of “great public importance.”

“In the abstract,” the Court concluded, “it seems plain that where both [interests] cannot be accommodated, it is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information.”

Petitioners were represented by Richard R. Wiebe, Berman DeValerio, Tomlinson Zisko, Thomas E. Moore, III, and Kurt B. Opsahl and Kevin S. Bankston of the Electronic Frontier Foundation. Apple Computer was represented by George A. Riley, David R. Eberhart, Dhaivat H. Shah, James A. Bowman, Ian N. Ramage of O’Melveny & Myers.
Texas Federal Court Dismisses Internet Libel Suit

“Single Publication” Rule Applies to Websites

By Pete Kennedy

In a case of first impression in Texas, on June 26, 2006, U.S. District Judge Sam Sparks held that Texas would apply the “single publication” rule to bar libel suits against Internet publications brought more than a year after an article was first posted, even when the article remains available in online archives. *Hamad v. Center for the Study of Popular Culture, et al.*, No. A-06-CA-285-SS.

**Background**

Plaintiff Riad Elsolh Hamad filed a *pro se* lawsuit on April 13, 2006, in the Western District of Texas complaining of an article published on the Center for the Study of Popular Culture’s Front Page Magazine website. The article discussed, among other things, a federal investigation of Hamad and his association with an organization called the Palestine Children’s Welfare Fund. Although Hamad did not identify the date the Front Page article was published, he did not dispute that the article was first posted to the Front Page website on June 16, 2003, more than two years before suit was filed.

The Center, and its founder David Horowitz, moved to dismiss under Texas’ one-year statute of limitations for libel and slander, arguing that limitations began to run when the article was first placed on the website and therefore expired June 16, 2004. Hamad argued that limitations should not run while the Front Page article remains publicly available on the website’s archive.

**Single Publication Rule**

No court in Texas had yet addressed how the state’s statute of limitations applies to Internet publications. Texas courts had, however, adopted the “single publication” rule for print publications. That rule provides that “the statute of limitations begins to run on the last day of mass distribution to the public.”

Judge Sparks’ opinion dismissing Hamad’s claims noted that when the single publication rule was adopted, Texas courts had specifically rejected the argument that limitations should “begin to run only when the allegedly libelous article is removed from circulation.” Instead, the single publication rule “provides certainty regarding the limitations tolling date – “otherwise publishers would have to worry about continually extended limitations periods based upon retail sales or secondary distributions of the printed matter.”

Applying the Texas rule and rationale to Internet publications, Judge Sparks held that “limitations begin to run from the date the article is first posted and made available to the public,” noting that each court to address this question had reached the same conclusion. Because the Front Page article was posted more than a year before suit was filed, Hamad’s libel claim was time-barred. The Court also dismissed a host of other state law claims based on the same publication, noting that in Texas “the one year statute of limitations applies to any claim wherein the primary complaint is injury to reputation, humiliation and mental anguish from allegedly false publications.”

Hamad promptly filed a *pro se* notice of appeal, so this issue may ultimately be decided by the Fifth Circuit.

Pete Kennedy of Graves, Dougherty, Hearon & Moody, P.C., represented David Horowitz and the Center for the Study of Popular Culture. Plaintiff Riad Elsolh Hamad was *pro se*.

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MLRC Defense Counsel Section Annual Breakfast

New York, New York
Second Circuit Affirms No Jurisdiction Over Consumer Gripe Website

**Judge Sack Gives Detailed Analysis of Jurisdictional Issues**

In a detailed decision, the Second Circuit Court of Appeals affirmed that New York courts do not have jurisdiction to hear libel claims against the out-of-state operator of a consumer website. *Best Van Lines, Inc. v. Walker*, No. 04-3924 (2d Cir. June 26, 2007) (Kearse, McLaughlin, Sack, JJ.). The website was not targeted at New York and thus defendant did not “transact business” in New York, within the meaning of the state’s long arm statute.

Plaintiff is a New York moving company. The defendant is a resident of Iowa and the operator of the website www.movingscam.com which provides information, and often derogatory comments, about moving companies. Defendant included plaintiff in its “Black List Report” and stated that plaintiff was not licensed to perform interstate moves and was not insured as required by law. Defendant also repeated these allegations in response to a query posted on his site, and advised a consumer “DO NOT USE THEM.”

Best Van Lines sued over both statements. The district court dismissed for lack of personal jurisdiction over the defendant. In a lengthy opinion written by Judge Sack that analyzes the relationship between New York’s limited long arm statute and federal constitutional law, the Second Circuit affirmed. The Court affirmed that the posting of defamatory material on a website accessible in New York does not, without more, constitute “transacting business” for purposes of New York’s long arm statute. Defendant’s statements were not directed to New York, but rather a national audience. And the solicitation and receipt of donations through the website was entirely unrelated to the complained of statements.

The defendant appeared pro se. Slade Metcalfe and Katherine Bolger, Hogan & Hartson, LLP, in New York were appointed by the Court as amicus counsel for the defendant. Plaintiff was represented by Thomas Freedman, Oved & Oved. NY.