FENWICK & WEST LLP

The California Supreme Court Considers Web Site Immunity

BY CHAD WOODFORD

Update: The California Supreme Court decided the *Barrett v. Rosenthal* case on Monday, November 20, 2006, holding that Section 230 provides immunity for distributor liability as well as publisher liability. The Court also held that, pursuant to the express language of the statute, both the service providers and its users benefit from Section 230 immunity for content created by another, so long as they are not the original "content provider." This immunity obtains regardless of whether such users are engaged in "active" or "passive" use of the computer service. The Court did express some trepidation in reaching its holding, saying that the "prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications." But the Court felt that this was the only logical interpretation, given the language of Section 230 and the legislative history. As Associate Justice Carol Corrigan stated in the opinion, if this interpretation is at odds with Congress's intent, it will be up to Congress to clarify its intent. The following article is background on the case that led up to this Supreme Court decision.

If a visitor posts libelous statements to a Web site, and the Web site operator knows the statements are libelous, should the site operator be liable to the person who has been libeled? That is the question the California Supreme Court will answer next month in the appeal from *Barrett v. Rosenthal*, 114 Cal. App.4th 1379 (2004). That case involves Section 509 of the Communications Decency Act, as codified at 47 U.S.C. Section 230, which provides immunity for Web site operators and other online service providers. Before examining *Barrett*, let's take a closer look at the Communications Decency Act and the state of the law pre-*Barrett*.

Recognizing that Internet services "offer a forum for a true diversity of political discourse" and other forms of intellectual activity, Congress enacted several pieces of legislation in the late 1990s to foster this fledgling medium. The Digital Millennium Copyright Act of 1998 limits liability for copyright infringement by online service providers for third party content. The Communications Decency Act (passed as part of the colossal 1996 Telecommunications Act), was enacted primarily to protect children from online pornography. However, Section 230 of the CDA also shields providers and users of interactive computer services from liability for third party content. The provisions regulating pornographic content were struck down as unconstitutional, but Section 230 remains intact.

Along with other state and federal laws, these two laws create a patchwork of immunities for Web sites and other online service providers.

Subsection (c)(1) of the CDA states that "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." Because of the use of the words "publisher" and "speaker" in this section, most courts agree that the law only protects online services (and their users) against claims where publishing or speaking is an element, such as libel. Also,

regardless of the original congressional intent, no one disagrees that an "interactive computer service" includes a Web site. Finally, the "information content provider" is the author of the speech at issue in a given case and would normally not include the service provider, unless the provider has materially contributed to the content.

Subsection (c)(2) of the CDA shields providers and users of an interactive computer service from liability for "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." That subsection also immunizes such persons from liability for making the technical means available to restrict access to such material.

In passing the CDA, both the House and Senate emphasized that the section was to intended overrule *Stratton-Oakmont v. Prodigy*, an unreported 1995 New York case which imposed liability on Prodigy for libelous statements posted to its online message boards, in part because Prodigy had screened and edited messages posted to its bulletin boards.

No doubt, Section 230 could certainly be clearer about its reach, the laws it modifies, and the parties it is supposed to protect. Although the statute was probably not intended to provide the breadth of immunity it has come to provide, perhaps it is a happy accident that the statute was drafted in such imprecise terms. This has allowed courts to mold it to their evolving understanding of the appropriate balance between protecting reputations and protecting online speech.

So far, federal judges have unanimously interpreted the CDA to provide immunity to providers and users of interactive computer services that have not been involved in the creation of the offending content. One of the earliest cases to address the issue was *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), in which the plaintiff was the victim of defamatory postings and sued AOL for defamation. In a failed argument that California appellate courts later accepted, *Zeran* argued that Section 230 immunity should not attach where the defendant service provider had knowledge of the defamatory nature of the statements. However, the court reasoned that distributor liability is merely a subset of publisher liability, and that Section 230 therefore shields AOL.

Dozens of other federal decisions mirror *Zeran*, one of the most recent being *Dimeo v. Max*, 433 F.Supp.2d 523 (E.D. PA. 2006), where the operator of an online discussion board was held immune from liability for libel despite Max's selecting which messages to publish.

Under California common law, one who transmits or publicizes another's libel may be treated in one of three ways: as the primary publisher (*e.g.*, newspaper publisher); as a conduit (*e.g.*, the telephone company); or as a distributor (*e.g.*, a news stand). Conduits are typically immune from liability for defamation because they do not screen or control the speech that travels through their systems. On the other hand, primary publishers are typically held liable for defamatory speech, even where they had no hand in authorship, because they are expected to know the content of the speech. In the middle are distributors who are only held liable where they knew, or should have known, that statements were defamatory.

In *Barrett*, two medical doctors notorious for debunking practitioners of alternative medical practices filed suit against Rosenthal and other defendants for, among other things, libel. Rosenthal had reposted to online discussion forums numerous e-mails written by her co-defendant, Timothy Bolen, referring to the doctors as "quacks" and accusing one doctor of stalking women. As a "user" of an interactive computer service publishing information provided by another "content provider," Rosenthal argued immunity under Section 230.

The appellate court in *Barrett* held that Section 230 did not shield Rosenthal from liability because she was more akin to a distributor, rather than a primary publisher. The court rejected Rosenthal's appeal for Section 230

immunity, holding that the law preempts common law primary publisher liability but not distributor liability. Justice Anthony Kline, who penned the opinion, reasoned that, where a statute has two reasonable interpretations, it should be read to be consistent with the common law. However, given Section 230's ambiguity, it is not immediately clear what type of reading would be consistent with common law.

Kline took issue with two critical determinations in *Zeran*. First, he disagreed that "publisher" refers to both primary publishers and distributors of third-party defamation. He also disagreed that confining immunity to primary publishers would frustrate the policies behind Section230. Instead, he emphasized the importance of an "individual's right to the protection of his own good name" and attempted to strike more of a balance between protecting online speech and individual reputation.

Web sites currently receive blanket immunity for third-party content. Sites like Amazon.com host customer product reviews without concern about defamatory content posted by a user. But, if the California Supreme Court imposes distributor liability on Web sites, the Amazon.coms of the world will be faced with a new duty to investigate alleged libel in user content. As a result, many Web sites may decide that the most cost effective policy is to automatically take down posts alleged to contain defamatory content.

Although this would chill online speech, perhaps it is the appropriate balance to strike. In any case, as the *Barrett* court points out, this type of normative decision is better left to Congress. And it is not clear that Congress has carefully considered the issue. Until it has, according to this reasoning, courts should read the immunity provided by Section 230 narrowly.

Barrett makes for an unfortunate test case. Unlike most Communications Decency Act cases where a Web site was a defendant, the defendant was an individual who was knowingly reposting information in an online discussion forum. This makes the defendant less squarely within the class of persons the CDA was enacted to protect. Moreover, the fact of actively reposting the material with knowledge of its content makes it easier to distinguish the original publisher and subsequent distributor in *Barrett*. By contrast, if the service provider hosting the discussion forum were the defendant, then that may be a more clear-cut case for immunity.

Barrett has garnered a lot of attention, prompting amicus briefs from the Electronic Frontier Foundation, the ACLU, Amazon.com, AOL, eBay, Google, Microsoft, Yahoo, the U.S. Internet Service Provider Association, and law professors. News coverage of the Supreme Court oral arguments indicated that the Court was skeptical of the lower court's reasoning and that they may be leaning toward a reversal. This would be good news for Web site operators but bad news for plaintiffs. Whatever the Court decides, it will have a significant impact on the behavior of online service providers.

Chad Woodford, is an associate in the Intellectual Property Group of Fenwick & West LLP. His practice focuses on technology transactions, intellectual property counseling, and privacy and information security. He can be reached at cwoodford@fenwick.com.

This article was first published in *The Daily Journal*, November 2006.