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Beware of Liability for Web Site Postings

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IN THE AGE of the Internet, Web sites have become an indispensable business tool. With a Web site, a corporation can present its public face at a fraction of the cost of traditional media advertising. Some corporations owe their entire existence to the Web, while others, especially those providing information and entertainment services, have refashioned their businesses around their Web sites. One of the chief advantages of a Web site is the opportunity it offers corporations to interface directly with investors, customers and the public at large. The possibility of immediate feedback from investors and customers makes businesses more efficient and profitable.

But this two-way flow of information comes at a price. When a corporation disseminates content through its Web site, it exposes itself to liability. Obviously a corporation is responsible for the material it creates and disseminates. Less obvious, but no less dangerous, is the possibility that a corporation may be held responsible for content on its site created by parties who have no relationship whatsoever to the corporation. Moreover, liability may attach even if the corporation had no knowledge, actual or constructive, of the third-party's content. Defamation claims are the most common form of content-based liability, but the content of a site can render a Web site operator liable for copyright and trademark infringement, for business torts, and even for securities law violations.

Web-based businesses like America Online, Yahoo!, and eBay are the most vulnerable to such liability, but any business with a Web site that allows any participation by third parties is open to suit. This corporate exposure is exacerbated by two additional considerations, one that is common to all business litigation and one that is unique to Internet litigation.

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First, a corporate Web site host will almost always be an attractive defendant simply because of its deep pockets. In a typical case, the offending content is created by an individual without the resources to satisfy a judgment; therefore, the corporation is made the target of the suit and will be unable to seek indemnification from the individual. Moreover, corporations are often subject to suit in multiple fora, allowing the plaintiff a "home field advantage" he or she might not have if constrained to sue in the content creator's jurisdiction. For these reasons, plaintiffs' counsel will frequently target the corporate Web site host rather than the individual creator, and can be counted on to devise creative theories of corporate liability.

Because the Communications Decency Act provides immunity, rather than an affirmative defense, the CDA should be raised promptly in any pretrial negotiations, and no later than in a motion to dismiss.

Second, the anonymous culture of the Internet, which encourages the use of pseudonyms, often veils the true identity of the content creator. By contrast, the potential plaintiff will well know the identity of the corporate Web site host. Therefore, in any lawsuit, the corporate Web site host may be the only realistic target of the lawsuit and the corporation will have no identifiable target onto which to shift the monetary liability.[1]

This article surveys recent cases involving liability for content posted by third parties and explores strategies corporations can use to defend themselves from suits based on such content.

1. Defamation Claims

Not surprisingly, given that Web sites consist mainly of words and pictures, the most common claim for Web site liability is the defamation suit. Examples abound, from disgruntled employees defaming their former employers on job-search sites to celebrities being defamed by the obsessive fans who populate chat rooms and answer Internet surveys.

Best Tool for Defense

Fortunately for corporate Web hosts, the free-for-all culture of the Internet has prompted Congress to give businesses their best tool in defending content-based lawsuits: the Communications Decency Act of 1996 (CDA), codified at 47 U.S.C. §230. Written into the statute are findings and policies embodying a concept of the Internet as a place for the free exchange of ideas:

> The Congress finds the following: (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.... It is the policy of the United States ... (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

47 U.S.C. §§230(a)(1) and (b)(2). To effectuate this policy, Congress proceeds to give computer Web site operators a blanket of immunity: "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).[2]

The Fourth Circuit was the first to consider the breadth of the CDA, and applied the broadest conceivable definition:

Congress recognized the threat that

tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.... 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.... The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Zeran v. America Online, Inc. 129 F.3d 327, 330-31 (4th Cir. 1997).

America Online was also a defendant in another seminal CDA defamation case which extended the immunity offered by the statute. In *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998), a White House aide, Sidney Blumenthal, was defamed by Web gossip columnist Matt Drudge on Drudge's America Online page. Blumenthal sued both America Online and Drudge. Even though the district court found that America Online had the opportunity to edit Drudge's content, the court held that because America Online did not create the content it was immune from suit pursuant to the CDA. Id. at 52-53.

While it is clear from the text of the statute, as well as from the exalted language of the Fourth Circuit in *Zeran*, that the CDA offers very broad immunity, a question remains as to what computer services are included in the concept of "interactive computer service" used by the CDA. There seems to be no question that a company that provides users access to the Internet such as America Online or Earthlink (called an "Internet service provider" or "ISP") would qualify as an interactive computer service. The open question is whether destination Web sites that permit third parties to post content would qualify as an "interactive computer service" and thus be immunized from suit.

A recent state court case has provided a signal that the CDA will provide immunity for a non-ISP Web site operator sued over content posted by a third party. In *Schneider v. Amazon.com, Inc.* 31 P.3d 37 (Wash. Ct. App., 2001), an author sued Amazon.com because a third party had posted an allegedly defamatory book review on Amazon.com's Web site. The Washington Court of Appeals affirmed the trial court's dismissal of action on the grounds that Amazon.com is immune to suit under the CDA. The court squarely held that the CDA immunizes all Web site operators, not just ISPs, explaining: "We can discern no difference between web site operators and ISPs in the degree to which immunity will encourage editorial decisions that will reduce the volume of offensive material on the Internet." Id. at 41. The court also rejected the argument that because Amazon.com had the opportunity to edit the offending book review, Amazon.com lost its immunity under the CDA. Id. at 42.

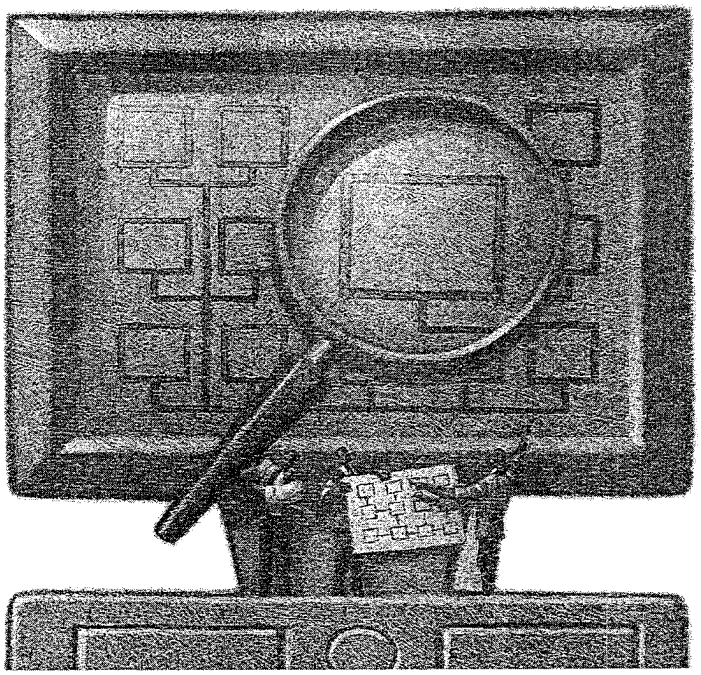
Trademark and Copyright

Trademark and copyright law represents another fertile area for Internet-based litigation. Two recent cases demonstrate the interplay of the CDA and traditional intellectual property doctrine.

In *Stoner v. eBay*, 2000 WL 1705637 (Cal. Supr., Nov. 1, 2000), the plaintiff contended that third parties were offering "bootleg" recordings for sale on eBay's auction Web site. The plaintiff sought to hold eBay responsible for infringement under California law. Notably, the court held that eBay, which is not an ISP but rather a destination site like Amazon.com, qualified as an "interactive computer service." The court further held that eBay was immune from suit under the CDA because eBay did not post the offending content. Id. at *3. The court reasoned that all conduct short of meeting all the elements of aiding and abetting the commission of the underlying "bootlegging" crime is covered by Congress' broad grant of immunity in the CDA.

A recent case in the Southern District of New York held the CDA inapplicable in the trademark context but pointed to another strategy to defending these cases. In *Gucci America, Inc. v. Hall & Assocs.*, 135 F.Supp.2d 409 (S.D.N.Y. 2001), the plaintiff sued Mindspring, an ISP, for trademark infringement by a third party that appeared on its Web site. Mindspring sought refuge in the immunity provisions of the CDA, but Judge Richard M. Berman held that the CDA did not immunize Mindspring from a trademark violation because that statute explicitly excludes intellectual property law from its purview. Id. at 412.[3]

Nevertheless, the court pointed to the "innocent infringer defense" under traditional trademark law as a way out for Mindspring at a later stage. The court explained that under trademark law principles, to overcome such a defense the plaintiff would need to demonstrate that Mindspring had knowledge of the trademark infringement on its site. The court characterized this knowledge requirement as a "heavy burden" for a trademark plaintiff to meet. Id. at 420. The court's focus on Mindspring's lack of knowledge suggests that where knowledge of infringement can be established, liability will attach.



Securities Fraud Claims

The Internet has developed into one of the foremost resources for investors. Information that was previously available only to those connected to the large investment banks or the SEC is now readily found on-line. But with the increased availability of information has come the increased possibility that false information will be disseminated. As unsophisticated investors rely more and more on Web-based information sources, the potential for fraud has increased. Additionally, with the burst of

the technology stock bubble, disappointed investors are increasingly ready to allege that Web site content constitutes false or misleading information. Two recent cases illustrate how companies can defend against suits based on third-party postings on corporate Web sites.

In *Ben Ezra, Weinstein, and Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000), the plaintiff alleged that America Online had posted inaccurate information on its own site about the plaintiff's stock price and share volume. America Online successfully demonstrated that it had not created the information, but simply had posted stock price and share volume information obtained from independent third parties. Therefore, the court held that America Online, an ISP, was immune from suit pursuant to the CDA. Id. at 986.

More recently, Judge Milton Pollack dismissed a securities claim in *Hart v. Internet Wire, Inc.*, 145 F.Supp.2d 360 (S.D.N.Y. 2001). In *Hart*, a former employee of a news gathering Web site, Internet Wire, sent a phony press release to Internet Wire which contained information designed to cause Emulex's stock price to plummet and allow the former employee to profit by short selling Emulex stock. Internet Wire published the phony press release on its Web site, without realizing its falsity, and the release was then picked up by and republished by Bloomberg, a separate news service. Predictably, Emulex's stock price plummeted. The former employee was arrested and pleaded guilty to securities fraud.

Shareholders who lost money because of the phony press release sued Internet Wire and Bloomberg. Without considering the CDA, the court focused on the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995.[4] Judge Pollack held that because the defendants were used as "unwitting dupes," the defendants did not have the requisite scienter to be held liable for securities fraud. Id. at 368. Therefore, even without the immunity offered by the CDA, the corporate Web site hosts were able to escape liability for the false information transmitted through their sites.[5]

Foreign Laws

Governments in the United States cannot generally regulate the content of Web sites, but other countries do not have the same speech protections enjoyed here. Given the global reach of the Web, content on corporate Web sites may run afoul of foreign rules. A recent federal case in California, *Yahoo!, Inc. v. La Ligue Contre Le Racism Et L'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001) (hereinafter "LICRA"), suggests a strategy for United States-based corporations seeking to avoid liability overseas. In *LICRA*, French groups sued Yahoo! in France to stop sales in Yahoo! auctions of items deemed anti-semitic. These items were not created by Yahoo!, but by third parties who posted information about the items on Yahoo!'s auction site. The French court ordered Yahoo! to block French citizens' access to the material. Yahoo! was able to comply with the order for its French site, but could not comply on its U.S.-based site. Yahoo! thereafter sought a declaratory judgment that the French court's order is not cognizable or enforceable in the United States. Id. at 1186.

The district court granted summary judgment for Yahoo!, finding that the French court's order could not be enforced in the United States. The district court applied bedrock First Amendment principles in holding that an order that "prohibits the sale or display of items based on their association with a particular political organization and bans the display of Web sites based on the authors' viewpoint" would be an unconstitutional prior restraint. Id. at 1188 (citing *Shelly v. Kramer*, 334 U.S. 1 (1948)). Because no U.S. court could enforce the French court's order without violating Yahoo!'s First Amendment speech rights, the district court granted declaratory judgment for Yahoo!, relieving it of the obligation to censor the content posted on its U.S. site by third parties.

Strategy Road Map

Obviously, the best legal strategy for a corporation is to avoid liability in the first place. Though a corporation cannot be required to censor its content, the wise operator will monitor the content posted on its Web site by third parties. Corporations should also maintain security to ensure that the corporation's Web site cannot be manipulated by third parties. Corporations must also be quick to respond to cease and desist notices, coordinating their response with the personnel who run their Web sites, to make clear that the corporation has not ratified the offending content.

Nevertheless, if suit is brought, the CDA is the most potent defense tool available to a corporate defendant. If the corporate defendant can show it is not a "content provider" with respect to the offending material, it should find itself immune to suit for defamation and other non-intellectual property torts. Because the CDA provides immunity, rather than an affirmative defense, the CDA should be raised promptly in any pretrial negotiations, and no later than in a motion to dismiss.

If the CDA is not applicable, the corporation's best defense is a genuine lack of awareness of the offending content. As demonstrated by both the *Internet Wire* and the *Gucci America* cases, courts remain willing to accept the idea that a corporation may not be fully aware of, or responsible for, the content of their own Web site; Blumenthal shows this is the case even where the corporation has the ability to edit the third-party content. Accordingly, plaintiffs complaining of third-party content will have difficulty meeting heightened knowledge requirements, such as those under the securities laws. However, the flip side of this premise is that the failure to act quickly after the corporation has received notice of the offending content will aid a plaintiff in showing scienter, or at least get the plaintiff past summary judgment and to a jury. Therefore, prompt responses to cease and desist letters and coordination between a corporation's legal department and its information technology department is critical.

Finally, in situations where offending content posted by third parties is a predictable but not preventable event, a declaratory action may be the best route. Courts will likely embrace an argument that speech on the Web should not be chilled — after all, Congress has expressly made this a "Policy" of the United States. Therefore, as in *Yahoo! v. LICRA*, courts may grant declaratory judgment ensuring that the corporation can operate its Web site without fear of liability.

(1) For an extended discussion of strategies for identifying anonymous posters, see David W. Quinto, *Law of Internet Disputes* §8.04[D] (2001).

(2) The CDA's blanket of immunity does not extend to intellectual property law claims and criminal statutes. 47 U.S.C. §§230(d)(1) and (d)(2).

(3) The CDA reads: "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. §230(e)(2).

(4) Securities Exchange Act of 1934 §10(b), as amended 15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5.

(5) Judge Pollack dismissed an amended complaint on similar grounds. See *Hart v. Internet Wire, Inc.*, 163 F.Supp.2d 316 (S.D.N.Y. 2001).