

# **Legal Issues vs. 'Pitfalls' in the Digital Age**

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## I. Citizen Journalism

### A. Exactly what is "Citizen Journalism"?

- Hyperlocal news site (aka local-local or microsite) – a website that posts content almost exclusively of local interest, often aimed at particular neighborhood, zip code or interest group in an area.
- Reader comments – reader/viewer reactions to stories; may also contain information that advances the story, like breaking news and source information. Often vetted prior to posting.
- Forums (aka discussion groups, message boards) – sites where users are invited to opine on wide variety of subjects or start new discussion. Generally not vetted prior to posting.
- Hyperlocal Reader-Generated News –geographically targeted sites, readers report news of limited local interest (car accident, closing of a barbershop) (e.g., YourHub.com) . Like a Hyperlocal News site except readers doing the reporting. Degree of vetting varies.
- User-Generated Photographs and Videos –footage and photos of news events taken by ordinary citizens. Provides news organizations with images much earlier. Many organizations now have designated UGC businesses (e.g., CNN's I-Report.com)
- Reverse Publishing – organization publishes in print or broadcasts citizen journalism from its website (e.g., ABC's "i-Caught", CNN's "News to Me").
- Crowdsourcing (aka pro-am [professional-amateur] journalism) – using combined knowledge and talent of many to perform job traditionally assigned to a single person (e.g., Wikipedia). Some organizations solicit users for narrow reporting, combine reports into one product.

### B. Some vetting questions related to authenticity:

- ✓ How was it that you were there?
- ✓ What did you see yourself before and after the video was shot?
- ✓ Was anybody there with you that we could talk to?
- ✓ Does the information fit the facts we already have?
- ✓ Is the source believable?
- ✓ Does the submitter's motive for submitting seem rational?

## II. Misappropriation/Right of Publicity

### A. Use of MySpace Photos

- The media often uses photos off of a subject's profile on social networking site when they're unable to otherwise get images of the person. Is this permissible?
  - (1) Lawyers for Alexandra Dupre threatened to sue media outlets on privacy, copyright and right of publicity grounds after her Myspace photos appeared in dozens of publications and commercial websites without her consent. Would these be viable claims?

### B. Framing and digital rights issues

- *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9<sup>th</sup> Cir 2007). Ninth Circuit reversed the District Court's findings on fair use and contributory infringement. Held that Google's use of thumbnails was fair, lifted preliminary injunction. Remanded on contributory infringement because district court failed to apply the proper test. Huge victory for search engines? Future implications?
  - (1) *Greenberg v. National Geographic*: Freelancers claiming infringement arising from CD-ROM of complete National Geographic digital archive. Awaiting decision from 11<sup>th</sup> Circuit en banc. Last year, 11<sup>th</sup> Circuit overruled district court opinion in favor of National Geographic.
  - (2) *In re: Literary Works in Electronic Databases Copyright Litigation*, (2d Cir. Nov. 29, 2007). Settlement rejected by 2<sup>nd</sup> Circuit. En banc review denied. Now on remand to SDNY.

## III. Section 230 Developments

### A. *Fair Housing Council of San Fernando Valley v. Roomates.com, LLC*, 2008 WL 879293 (9th Cir. 2008)(en banc)

- Facts:
  - (1) Defendant Roomates.com, LLC ("Roommate") operates a website designed to match people renting out spare rooms with people looking for a place to live
  - (2) Subscribers can search listings, post housing opportunities, or be notified of housing opportunities through Roommate's website but must first

- (a) create profiles by answering a series of questions including name, location, email address, sex, sexual orientation, and whether he would bring children to a household
  - (b) describe his preferences in roommates with respect to the same three criteria: sex, sexual orientation and whether they will bring children to the household.
- (3) The site also encourages subscribers to provide “Additional Comments” describing themselves and their desired roommate in an open-ended essay.
  - (4) Plaintiffs Fair Housing Councils of the San Fernando Valley and San Diego (“Councils”) sued Roommate in federal court, alleging that Roommate's business violates the federal Fair Housing Act (“FHA”), 42 U.S.C. § 3601 et seq., and California housing discrimination laws.
- The district court held that Roommates was immune under CDA section 230 and dismissed the federal claims without considering whether Roommate's actions violated the FHA. The court then declined to exercise supplemental jurisdiction over the state law claims.
  - En banc the Ninth Circuit held, per Chief Judge Kozinski, that:
    - (1) CDA section 230 does not protect Roommate which posed questions and required answers that arguably violated the FHA. These statements rendered Roommate a content provider. The posted profiles derived from the mandatory questionnaires and the searching and email notification capabilities of the site are also outside of CDA's immunity.
    - (2) "The [CDA] was not meant to create a no-man's-land on the Internet" nor does it "grant immunity for inducing third parties to express illegal preferences"; "Roommate becomes much more than a passive transmitter of information provided by others; it becomes a developer, at least in part, of that information."
    - (3) CDA section 230 protects Roommate with respect to the "Additional Comments" section of website because only the subscribers—not the website operator—are content providers in that circumstance. Roommate "does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences."

B. *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

- Facts:

- (1) Plaintiff Chicago Lawyers' Committee challenged legality of craigslist under Fair Housing Act (FHA), because online users employed site to assert gender, race, and other prohibited preferences.
  - (2) Craigslist argued that section 230 of the CDA provided "broad immunity from liability for unlawful third party content" while the Lawyers' Committee argued that immunity only applied to screening and filtering out material as suggested by the subsection's heading: "Protection for 'Good Samaritan' blocking and screening of offensive material"
- The Seventh Circuit, per Chief Judge Easterbrook, held that:
    - (1) Neither party's interpretation of statute was correct and adopted its position from *Doe v. GTE. Corp.*, 347 F.3d 655 (7th Cir. 2003).
    - (2) Section 230(c)(1) is not a grant of immunity but a definitional clause: "an entity would remain a 'provider or user'—and thus be eligible for 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 under § 230(c)(2) if it created the objectionable information.
    - (3) Section 230(c)(1) commands that an "online information system must not 'be treated as a publisher or speaker of any information provided by' someone else. Yet only in a capacity as publisher could craigslist be liable under [the FHA]. It is not the author of the ads and could not be treated as the 'speaker' of the posters' words, given section 230(a)(1)."
    - (4) "Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination...." Craigslist thus entitled to CDA 230 immunity.

### C. *Roommates* and *Craigslist* Considerations

- *Reconciling holdings:* On their face, the cases are easily reconciled as *Craigslist* contemplated the possibility of liability for an ISP if it "induced" illegal statements and *Roommates* presented a case where the website arguably did just that.
- *What do these cases mean for CDA 230 immunity?* Both limit the broader immunity described in other cases, e.g. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir.1997) (immunity applied to claim that AOL unreasonably delayed in removing defamatory messages posted by third party, failure to post retractions, and failure to screen for similar postings); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir.2000) (no liability for posting of incorrect stock information); *Green v. America Online*,

318 F.3d 465 (3d Cir.2003); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir.2007) (liability does not arise by making it marginally easier for others to develop and disseminate misinformation). The door is open for CDA to face future challenge.

- (1) What is next? These cases—particularly *Roommates*—may create litigated issues wherever websites ask questions or solicit content.
- *Is FHA special?* These cases also leave open the possibility that parsing of the CDA is only required in the FHA context, often noted for its most-favored statute reputation in the federal courts. That said, nothing in *Roommates* or *Craigslist* limits their holdings to FHA cases, and it is fair to conclude the contours of the CDA will be further defined by non-FHA cases in the future.

#### IV. Identities of anonymous bloggers and posters

- Summary: plaintiffs use pre-suit discovery or file "john Doe" lawsuits and serve 3d-party subpoenas to compel news organizations' websites and ISPs to disclose information to identify individuals who post anonymous blogs or comments on websites. Subpoenaing party claims that it needs the identity to proceed with a viable suit for libel or other publication-wrong.
- Impact on press:
  - (1) To protect the internet speaker's First Amendment right to speak anonymously, courts applying varying legal tests that are creating appellate precedent that makes publications actionable. Some courts have decided that the speaker's choice to speak anonymously enjoys First Amendment protection only if the content itself is protected.
  - (2) Several courts require more – subpoenaing party must produce sufficient evidence in support of each element, akin to summary judgment. *E.G.* – NASDAQ-traded company submitted affidavit testimony from executive that the posting caused the company's stock price to drop. Issue became whether that evidence would have been sufficient to defeat a summary judgment motion on element of reputational injury. *Dendrite Internat'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. 2001).
  - (3) Most often, the subpoenaing party is large non-media company or public official with no free-speech interest at stake in precedent it creates. Typically litigate against an individual represented by pro bono counsel. *E.G.* - Subpoena served on Google, Inc. to learn poster's identity. Google's legal position was to ensure that the poster receives notice of the subpoena and an opportunity to object in court. Google has agreed to refrain from disclosing subpoenaed information

only if blogger or commentator succeeds in blocking. *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 697-698 (Sup. Ct., NY Cty, 2007).

- Press interests that counsel for/against resisting these subpoenas:
  - (1) Influencing appellate precedent that controls what kinds of statements are actionable – News organizations have legal expertise in that area that amateur bloggers and web communicators and their counsel don't have.
  - (2) Protect confidential sources – the potential to help this area of law: If press websites establish standing to resist subpoenas on behalf of individuals who posted anonymous messages on their sites, could provide sorely-needed precedent to do the same for confidential news sources. Isn't newspaper source exercising the same First Amendment right to speak anonymously as internet poster?
  - (3) Business interests of news organizations. News organizations perceive that interactive forums with their attendant anonymous speech enhance business. Doesn't news organization have business interest in resisting a subpoena to unmask an anonymous poster?
  - (4) Barring anonymous postings: Does it dilute a news organization's brand use forum for distributing the anonymous, often mean-spirited commentary.
  
- Developing law – John Doe subpoenas
  - (1) The *Dendrite* standard – produce evidence of each element of prima-facie case – plus show need. *Dendrite Internat'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. 2001).
  - (2) No disclosure unless:
    - (a) The anonymous posters first receives notice of the subpoena and an opportunity to be heard;
    - (b) The subpoenaing party sets forth the exact statements claimed to be actionable;
    - (c) The subpoenaing party produces "sufficient evidence supporting each element of its cause of action." 775 A.2d at 760.
    - (d) The subpoenaing party demonstrates need for the communicator's identity, which the court weighs against the strength of the prima facie case.

This fourth element was dictum. The appellate court affirmed the lower court's denial of the subpoenaed discovery because the evidence that the contested anonymous posting caused reputational harm to the subpoenaing party was too speculative. So the court did not reach the fourth element.

- (3) New Jersey Supreme Court – constitutional privacy where the First Amendment does not apply. In April, 2008, the New Jersey Supreme Court declined to adopt the *Dendrite* test in establishing a standard for a grand jury subpoena that seeks ISP's records identifying an anonymous user. *State v. Reid*, 2008 WL 1774969 at \*9 n.4 (N.J., Apr. 21, 2008). Holdings:
- ✓ New Jersey Constitution afforded internet users right of privacy in their identities, when using internet, against disclosure to the government.
  - ✓ Context of New Jersey's protection against unreasonable searches and seizures. The court declined to follow near-unanimous federal case law that has declined to recognize a similar right for internet users under the Fourth Amendment.
  - ✓ Court decided grand jury subpoena would overcome that constitutional privacy right so long as identity of anonymous internet-user relevant to subject matter of the grand jury's investigation.
  - ✓ State privacy right did not require anyone to notify anonymous poster of grand jury's subpoena.
  - ✓ *Reid* did not evaluate the First Amendment right to speak anonymously, as the defendant's communicative use of the internet in that case was a crime, and not apparently First Amendment-protected speech. First Amendment would protect.
- (4) The *Cahill* standard. *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Cahill was city councilman seeking to prosecute suit for libel and invasion of privacy based on remarks posted on a newspaper's website critical of Cahill's performance in office.
- ✓ Cahill obtained leave from the trial court to conduct a pre-service-of-process deposition of the newspaper that owned the website to learn who owned the IP address that originated the anonymous post.
  - ✓ That yielded the identity of the internet service provider, Comcast Corporation.
  - ✓ Cahill next obtained a court order to require Comcast to disclose the poster's identity.
  - ✓ Upon receiving the order, Comcast notified poster, who quickly filed motion for protective order.
  - ✓ Court denied motion, ordered Comcast to disclose identity.
  - ✓ Delaware Supreme Court reversed, but adopted a modified version of the *Dendrite* test:

The subpoenaing party must take steps to have the anonymous poster notified of the subpoena in time to object to it.

The subpoenaing party must present "facts sufficient to defeat" the speaker's (hypothetical) motion for summary judgment. 884 A.2d at 460.

This includes showing that the content of the contested postings was actionable.

The subpoenaing party need not present facts to make a prima facie case on any element where the needed facts are not in the subpoenaing party's control, *e.g.*, actual malice where the subpoenaing party is a public-official suing for libel.

The court should not also require the showing of need against the strength of the prima facie case that is part of the *Dendrite* test.

- (5) Arizona court of appeals has rejected *Cahill's* rejection of the showing of need that *Dendrite's* dicta requires. *Mobilisa, Inc. v. Doe 1*, 217 Ariz. 103, 170 P.2d 712 (Az. App. 2007). The court stressed the importance of that factor, analogizing the required showing to the balance of hardships required of a movant for preliminary injunction.
- (6) Texas court of appeals has adopted *Cahill's* analysis, but did not comment on *Cahill's* rejection of the *Dendrite* requirement that the subpoenaing party show a need for the anonymous poster's identity after the subpoenaing party presented a prima facie case. *In re Does 1-10*, 242 S.W.3d 805 (Tex. App., 2007).
- (7) Motion-to-dismiss standard. The California court of appeal has adopted what amounts to a motion-to-dismiss standard. *Krinsky v. Doe 6*, 159 Cal.App.4<sup>th</sup> 1154, 72 Cal.Rptr.3d 231 (2008). Requires the subpoenaing party:
  - (a) To attempt to notify the anonymous poster of the subpoena in time for that poster to object.
  - (b) To set forth evidence that the anonymous poster made an actionable statement.

"Where it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiff's claim, the court may refuse to quash a third-party subpoena if the plaintiff succeeds in setting forth evidence that a libelous statement has been made." 159 Cal.App.4<sup>th</sup> 1154, 1172, 72 Cal.Rptr.3d 231, 245.

- ✓ In *Krinsky*, however, the subpoenaing party – the president of a corporation -- also produced evidence of the statement's falsity and effect.
  - ✓ *Krinsky* court rejected the balancing of interests that comprises the fourth element of the *Dendrite* test.
  - ✓ Court decided postings at issue were not actionable as opinion and rhetorical hyperbole.
- (8) Wisconsin Supreme Court has rejected *Cahill's* and *Dendrite's* requirement that subpoenaing party produce evidence to make a prima facie case of libel before obtaining an order requiring disclosure of anonymous poster's identity. Ruled subpoenaing party would prevail by showing that it could overcome a motion to dismiss -- that the particular contested words are actionable. *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006).

V. Criminal Liability of the Media for Publishing

- Online Gambling Advertising. The DOJ contends that online entities that accept advertising for illegal online gambling websites are equally guilty of promoting illegal gambling under the federal aiding and abetting statute. In December 2007, Microsoft, Google and Yahoo agreed to pay a total of \$31.5 million to resolve claims they promoted illegal gambling via this practice. In January 2007, *The Sporting News* settled with the DOJ for \$7.2 million.