



**Social Networking Sites -
Relevant Laws and Recent Decisions**

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There are relatively few judicial decisions that involve social networking sites as such. But the category is an amorphous one, so decisions involving providers such as online dating services, and virtual worlds such as Second Life, among other services, can properly be counted in the universe of such cases. This paper also includes decisions that involve various other types of online services, such as traditional Web sites, blogs, Internet message boards and the like, as the same laws and legal principles are applicable to these services as are applicable to online social networking sites.

Defamation – Responsible Parties & Online Issues

The law of defamation addresses harm to a party's reputation or good name through the torts of libel and slander.¹ The Internet makes it easier than ever before to disseminate defamatory statements to a wide audience.² The risk of liability associated with such statements is an important consideration for parties seeking to communicate with others on the Internet.

- **Simpson Strong-Tie Co., Inc., v. Stewart, Estes & Donnell** - A law firm that announced on its Web site that it was investigating a defectively manufactured product may be protected from liability for defamation by the absolute litigation privilege under Tennessee law.³ Responding to state law questions certified by a federal district court, the Tennessee Supreme Court ruled that the litigation privilege applies to attorney solicitations published prior to the start of litigation, provided certain criteria are met. The Supreme Court further ruled that the litigation privilege applied to statements made to persons unconnected with the litigation. The court commented that limiting the privilege to persons already connected with the litigation would "inhibit potential parties or witnesses from coming forward and impede the investigatory ability of litigants or potential litigants, thereby undermining the reasons for the privilege."
- **Hamilton v. Prewett** - Website content that humorously commented upon the personal and professional character of a private business owner was not defamatory because, according to the court, no reasonable person could believe that the comments were true.⁴ In affirming the lower court's dismissal of the plaintiff's defamation claims, the appellate court ruled that, taken as a whole, the website was clearly a parody and "not subject to a defamatory interpretation" due to its obvious tongue-in-cheek customer testimonials as well its numerous outrageous statements about the amazing effects of the plaintiff's water products, including claims that "Amish Aliens" from another solar system were placing minerals in the water supply.

¹ Libel generally involves written communications, while slander is based on oral communications.

² The ability to disseminate statements virtually instantaneously on a global basis has also raised issues of jurisdiction and the extraterritorial application of law.

³ *Simpson Strong-Tie Co., Inc., v. Stewart, Estes & Donnell*, No. M2006-02407-SC-R23-CQ, 2007 Tenn. LEXIS 654 (Tenn. Aug. 20, 2007).

⁴ *Hamilton v. Prewett*, No. 12A01-0601-cv-32, 2007 Ind. App. LEXIS 228 (Ind. Ct. App. Feb. 6, 2007).

Publication on the Internet has also raised issues concerning the applicability of statutes and other legal rules that were developed with print publications in mind, such as the statute of limitations, retraction requirements, and heightened First Amendment standards, as well as rights such as the right of publicity.

- **Brown v. AMCI Pop Division** - The display of low resolution photographs by a copyright owner on its stock photography Web site, in order to offer the photographs for licensing, may violate the rights of a celebrity depicted in the photographs under the Illinois Right of Publicity statute.⁵ The Illinois appeals court responded to questions certified by a trial court, concluding that the trial court was correct in declining to dismiss the celebrity's Illinois right of publicity claims. The court reasoned that the licensing of the photographs could be construed as a use of the celebrity's identity for a "commercial purpose" within the meaning of the Illinois right of publicity statute. The appeals court also concluded that the celebrity's right of publicity claim with respect to the licensing of the photographs was not preempted by section 301 of the Copyright Act.
- **Rivera v. NYP Holdings, Inc.** - Under New York law, the subsequent publication of a print article on a newspaper Web site constitutes a republication of the print article, giving rise to a new cause of action for defamatory statements contained in the article.⁶ The court declined to dismiss the plaintiff's separate claim for the Web site publication, concluding that the claim was not barred under the single publication rule. The court ruled that the subsequent publication on the newspaper defendant's Web site was a "separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the Internet." Note, however, that in another recent case involving a claim of defamation on a Web site, a federal court stated that, if faced with the issue of whether an article continues to be published once it moves to a Web site's online archive, it is not clear that a South Carolina court would adopt the single publication rule. *Taub v. McClatchy Newspapers, Inc.*, No. 9:05-678, 2007 U.S. Dist. LEXIS 60037 (D. S.C. Aug. 7, 2007) (refusing to grant summary judgment to the newspaper on defamation claims stemming from a print article that was subsequently published on the newspaper's Web site).
- **Jankovic v. Int'l Crisis Group** - The District of Columbia single publication rule bars an individual's defamation claims based upon the republication by a third-party Web site of an allegedly defamatory report authored by the defendant, absent evidence that the original publisher took steps beyond its initial publication to expand the audience for its material.⁷ The appeals court upheld the district court's ruling that the one-year statute of limitations on one of the plaintiff's claims began to run with the initial publication of the allegedly defamatory report. The court rejected the plaintiff's argument that the "foreseeable republication of a libelous document" by a third-party Web site "resets the limitations clock." The court commented that, like the print media

⁵ *Brown v. AMCI Pop Division*, No. 1-06-0870, 2007 Ill. App. LEXIS 843 (Ill. App. Ct., 1st Dist. Aug. 2, 2007).

⁶ *Rivera v. NYP Holdings, Inc.*, No. 114858/06, 2007 N.Y. Misc. LEXIS 5684 (Sup. Ct., N.Y. Cty. Aug. 2, 2007) (unpublished).

⁷ *Jankovic v. Int'l Crisis Group*, No.06-7095, 2007 U.S. App. LEXIS 17511 (D.C. Cir. July 24, 2007).

world, the copying of an article by a reader, even for wide distribution, does not constitute a new publication.

- **Canatella v. Van de Kamp** - The California single publication rule bars an attorney's federal Civil Rights Act claims over the online availability of his disciplinary record and its subsequent use by an adversary in a motion to recover court costs.⁸ The appeals court upheld the district court's ruling that the one-year statute of limitations on the attorney's claims began to run several years prior to the commencement of the action, when the disciplinary record was first published in the print and online versions of the state bar journal. The court rejected the argument that republication occurred, and re-started the statute of limitations period, when the disciplinary record was made available by a search function on the bar Web site. The court concluded that the "touchstone" for analysis of the single publication rule is the Web site upon which disciplinary record appeared, and that the subsequent availability of the disciplinary record at a slightly different URL on the same Web site did not give rise to a new cause of action.
- **Sundance Image Technology, Inc. v. Cone Editions Press, Ltd.** - Providing hyperlinks to allegedly libelous statements already published on the Web, without more, is not a "republication" for purposes of the statute of limitations applicable to the plaintiff's libel claim.⁹ In granting the defendant's motion for summary judgment on the plaintiff's libel claims, the court found that providing hyperlinks to previously published statements was more akin to publishing additional copies of the same edition of a book, and as such, would not constitute republication. However, the court let stand the plaintiff's related trade libel claims, finding that testimony about the negative effect of the Web posts on the image of the plaintiff's print software company and the large number of visitors to the defendant's Web site was sufficient evidence to defeat the defendant's summary judgment motion.
- **Blair v. Nevada Landing Partnership** - The reuse of the plaintiff's photograph on a Web site does not restart the limitations period on the plaintiff's right of publicity claim, where the photo had previously been used in several different media over a period of time, for a single purpose and for a single audience.¹⁰ The appeals court affirmed the trial court's ruling that the plaintiff's claims under common law and under the Illinois Right of Publicity Act were barred by the one-year limitations period applicable to both types of claim. The court rejected the argument that the multiple uses of the photograph in print media, on billboards and on a Web site constituted a "continuing violation," concluding that the multiple uses constituted a "single overt act." The court noted that the single image of the plaintiff, a former employee of the defendant, was used to promote a single product and was not altered, and the purpose of its use on the Web site "was the same as the purpose of its use in the other mediums" in which it was used.

⁸ *Canatella v. Van de Kamp*, No. 06-15186, 2007 U.S. App. LEXIS 10344 (9th Cir. May 3, 2007).

⁹ *Sundance Image Technology, Inc. v. Cone Editions Press, Ltd.*, No. 02-cv-2258, 2007 U.S. Dist. LEXIS 16356 (S.D. Cal. Mar. 7, 2007).

¹⁰ *Blair v. Nevada Landing Partnership*, No. 04--L--459, 2006 Ill. App. LEXIS 1136 (Ill. App. Ct. 2d Dist. Dec. 8, 2006).

- **Auscape International v. National Geographic Society** - The California single publication rule bars state claims based on rights to privacy and publicity brought by freelance authors against the publisher of a CD-ROM collection of issues of a print publication in which their works appeared.¹¹ The court ruled that that the statute of limitations on those claims began to run in 1998, upon the first publication of the CD-ROM collection, thus the claims should be dismissed as time-barred. The court rejected the argument that annual editions of the CD-ROM constituted a new publication and thus restarted the statute of limitations, because the authors' works appeared in exactly the same manner in the subsequent editions of the CD-ROM as in the original CD-ROM, and the subsequent editions were targeted at the same audience as the original.
- **Atkinson v. McLaughlin** - A modification which did not change the content or substance of the allegedly defamatory portions of a Web site is not deemed a republication which would have reactivated the two-year state law statute of limitations period for defamation.¹² The court considered that while many courts have held that the single publication rule applies to defamation actions arising out of statements published on the Internet, some courts have recognized, in certain circumstances, that a Web site may be republished and create a new cause of action for defamation if that portion of the defamatory portion of Web site is "substantially modified." In ruling that the plaintiff's claims arising out of the defendant's Web site were time barred, the court stated that the defendants' changes to an unrelated portion of their Web site that occurred during the two-year statute of limitations period was insufficient to warrant a finding of republication.
- **Steinbuch v. Cutler** - A plaintiff who filed an action for invasion of privacy against a blogger who posted information about intimate encounters between them may amend his complaint to add similar claims against a second blogger who added a link to the original blog post on her blog.¹³ The court noted that the two invasion of privacy torts alleged by the plaintiff -- public disclosure of private facts and false light -- require the plaintiff to demonstrate that the defendant gave "publicity to the matter in question," and pointed out inconsistencies in the plaintiff's allegations concerning the responsibility of the respective proposed defendants for the publicity given to the original blog post. While the court granted the motion to amend the complaint in light of the policy favoring liberal amendment of complaints, the court cautioned the defendant, citing the requirements of Fed. R. Civ. P. 11, that he "should seek to add defendants ... only where he has a good faith belief that those persons are liable under the tort claims that he pleads and meet each element of those claims."
- **In re Grand Jury Subpoena (Joshua Wolf)** - A blogger's constitutional rights were not violated by a grand jury subpoena directing him to testify and to produce a video tape that he made of a protest demonstration.¹⁴ The court

¹¹ *Auscape International v. National Geographic Society*, No. 02 Civ. 6441, 2006 U.S. Dist. LEXIS 81027 (S.D.N.Y. Nov. 7, 2006).

¹² *Atkinson v. McLaughlin*, No. 1:03-cv-091, 2006 U.S. Dist. LEXIS 86405 (D. N.D. Nov. 28, 2006).

¹³ *Steinbuch v. Cutler*, No. 05-0970, 2006 U.S. Dist. LEXIS 78462 (D.D.C. Oct. 30, 2006).

¹⁴ *In re Grand Jury Subpoena*, No. 06-16403, 2006 U.S. App. LEXIS 23315 (9th Cir. Sep. 8, 2006) (unpublished).

rejected the argument that the blogger was a journalist under either California or federal law, because he failed to show that he made the video in question while he was connected with or employed by a press organization, and because he merely taped a public event without making any promises of anonymity or confidentiality to the participants. The court also noted that even if the balancing test applicable to journalist claims of press privilege was applied, the subpoena was proper because there was no showing of bad faith by law enforcement authorities, and the item to be produced was "non-confidential material depicting public events."

- **Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.** - Employees of an electronic financial newsletter who are engaged in news gathering or news disseminating activities are entitled to assert the news media privilege under Maryland law in response to questions posed at a deposition in a defamation action.¹⁵ The appellate court decided that it should rule on the question "for the guidance of the parties" even though the trial court did not err or abuse its discretion in refusing to rule on the applicability of the privilege except in the context of an actual deposition question. The court noted that while some state news media privilege statutes limit their protection to a narrower category of news media such as newspapers and press associations, the Maryland statute defined "news media" to include a broader class of entities, including "[a]ny printed, photographic, mechanical, or electronic means of disseminating news and information to the public."

Online "Publishing" Immunity Under §230 Of The Communications Decency Act

Section 230(c)(1) of the Communications Decency Act of 1996 (CDA) provides 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."¹⁶ Section 230(c)(1) immunity has been invoked to bar defamation claims against Internet Service Providers and private individuals,¹⁷ and has been extended to non-speech communications as well.¹⁸

- **Global Royalties v. Xcentric Ventures** - CDA immunity is available to an online service provider even if the provider refuses to remove allegedly defamatory content at the request of the party who originally provided the content.¹⁹ Notably, the court rejected Roommates.com – like theories of liability, namely, that the site provided editorial content by supplying a list of titles from which the user picked the phrase "Con Artists" to label his first posting. The court concluded: "This minor and passive participation in the development of content will not defeat CDA immunity..." Commenting on the result, the court stated: "If it was an unintended consequence of the CDA to render plaintiffs

¹⁵ *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, No. 2621, 2006 Md. App. LEXIS 216 (Ct. Special App. Sep. 19, 2006).

¹⁶ 47 U.S.C. § 230(c)(1).

¹⁷ See, e.g., *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

¹⁸ *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. Jan. 16, 2003), (electronic signal sent through AOL chat room is "information" for purposes of determining § 230(c)(i) immunity)

¹⁹ *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 07-956-PHX-FJM (D. Ariz. Oct. 10, 2007).

helpless against website operators who refuse to remove allegedly defamatory content, the remedy lies with Congress through amendment to the CDA."

- **Fair Housing Council of San Fernando Valley v. Roommates.com** – The Ninth Circuit granted a rehearing *en banc* in this controversial case. A panel of the court ruled in May 2007 that a roommate-matching Web site is not entitled to immunity under Section 230 of the Communications Decency Act from Fair Housing Act claims where it elicited information about roommate preferences based on age, sex, sexual preference and children in the household, and then used that information to determine roommate matches.²⁰ The appeals court reversed the district court ruling dismissing the Fair Housing Act claims, concluding that the Web site utilization of the roommate preference information meant that it was "neither a passive pass-through of information provided by others nor merely a facilitator of expression by individuals." The court concluded that the Web site was therefore "responsible ... in part, for the creation or development of [the] information" within the meaning of Section 230(c). The rehearing *en banc* is set for December 2007.
- **Dimeo v. Max** - An operator of an Internet message board and Web site is immune under Section 230 of the Communications Decency Act (CDA) for a series of allegedly defamatory postings made by third-parties that disparaged the plaintiff following a New Year's Eve party gone awry.²¹ The appeals court upheld the dismissal of plaintiff's complaint and found that the defendant qualified for CDA immunity since his Web site was an interactive computer service and the posts alleged in the complaint constituted information provided by third parties. The court rejected the plaintiff's argument that the CDA was inapplicable because the defendant edited portions of the third-party content and selected material for publication.
- **Doe v. SexSearch.com, Inc.** - An online dating service is an "interactive service provider" entitled to immunity under Section 230 of the Communications Decency Act (CDA) from liability for false profiles posted by underage users of the service.²² The court granted the online dating service's motion to dismiss a user's claims related to his exposure to criminal liability as a result of his encounter with a minor who posted a false profile on the dating service claiming that she was 18 years of age. The court also rejected the plaintiff's multiple claims of liability on the merits, concluding, among other things, that the provider's online terms and conditions, which contained a limitation of liability clause, was not substantively unconscionable. The court further concluded that the dating service did not have a duty to warn the user that the service might have users who were minors, because it was "common knowledge that 'young children all over America use the Internet,'" and that "given the 'anonymity of the Internet,' the danger that a minor might enter an adult-only website was open and obvious, as persons wishing to gain access merely had to click a box stating they were above 18 years of age."

²⁰ *Fair Housing Council of San Fernando Valley v. Roommates.com*, No. 04-56916 (9th Cir. May 15, 2007).

²¹ *Dimeo v. Max*, No. 06-3171, 2007 U.S. App. LEXIS 22467 (3rd Cir. Sept. 19, 2007).

²² *Doe v. SexSearch.com, Inc.*, No. 3:07cv604, 2007 U.S. Dist. LEXIS 61776 (N.D. Ohio Aug. 22, 2007).

- **Zango v. Kaspersky Lab, Inc.** - A software maker whose anti-spyware software classified the plaintiff's Web-based product as potential malware is immune from liability under the "Good Samaritan" provision of the Communications Decency Act (CDA) for claims of tortious interference and trade libel.²³ The court dismissed the plaintiff's action, finding the software maker immune under Section 230(c)(2)(B) as an "access software provider" who made available tools to restrict access to material that the provider or user considers "objectionable." The court also refused to consider the plaintiff's conclusory assertions of bad faith concerning the software maker's classification of the plaintiff's software, rejecting the plaintiff's argument that Section 230(c)(2)(B) only immunizes those providers who take actions in good faith.
- **Avery v. Idleaire Technologies Corp.** - Section 230 of the Communications Decency Act does not bar a Title VII sexual harassment claim brought by an employee who was exposed to adult images on a shared company computer as a result of the use of that computer by other employees.²⁴ The court refused to dismiss the plaintiff's Title VII complaint, finding that a reasonable jury could conclude that, despite numerous complaints by the plaintiff and other employees about the appearance of the images on the shared computer in the form of "pop-up" ads and otherwise, the employer failed to exercise reasonable care to prevent and promptly correct the "sexually harassing behavior." The court summarily rejected the employer's CDA Section 230 defense on the ground that the employer had cited no supporting authority for the proposition that Section 230 "prohibits any federal or state claim that seeks to hold an employer that provides computer systems to its employees for use on the job from being held liable based upon the content of the information 'provided by another information content provider.'"
- **Energy Automation Systems, Inc. v. Xcentric Ventures, LLC** - Section 230 of the Communications Decency Act (CDA) provides interactive service providers with immunity from claims of liability for information provided by third parties, but it does not provide immunity from the exercise of long-arm jurisdiction in lawsuits where such liability is claimed.²⁵ In denying the interactive service provider's motion to dismiss for lack of long-arm jurisdiction, the court ruled that CDA Section 230 provides a broad defense to liability, but that its application to any particular set of facts "is a question that goes to the merits of that case, not to the question of jurisdiction." The court noted that the plaintiff's complaint and moving papers contained allegations that the interactive service provider and its employees participated in the development of the alleged defamatory content at issue, and that adjudicating the validity of such allegations required the development of a factual record.
- **Doctor's Assoc., Inc., v. QIP Holders, LLC** - A request for dismissal of the plaintiff's claims based upon the immunity provisions of Section 230 of the Communications Decency Act (CDA) is not properly made in a motion to dismiss

²³ *Zango v. Kaspersky Lab, Inc.*, No. 07-0807 (W.D. Wash. Aug. 28, 2007).

²⁴ *Avery v. Idleaire Technologies Corp.*, No. 04-312, 2007 U.S. Dist. LEXIS 28924 (E.D. Tenn. May 29, 2007).

²⁵ *Energy Automation Systems, Inc. v. Xcentric Ventures, LLC*, No. 06-1079, 2007 U.S. Dist. LEXIS 38452 (M.D. Tenn. May 25, 2007).

under Fed. R. Civ. P. 12 (b)(6) because the assertion of CDA immunity constitutes an affirmative defense, and a plaintiff is generally not required to plead around defenses in its complaint.²⁶ In denying the defendant's motion to dismiss the plaintiff's Lanham Act claims stemming from an online contest that encouraged users to submit video entries comparing the sandwich products of the plaintiff and defendant, the court found that it could not decide whether the defendant is entitled to immunity at this stage of the proceeding. According to the court, it could not, as a matter of law, find that "the plaintiff can prove no set of facts in support of a finding of no immunity under the CDA" and without more discovery, could not determine whether or not the defendant is an "information content provider."

- **Perfect 10 v. CCBill** – Section 230 of the Communications Decency Act (CDA) immunizes interactive service providers from liability under state intellectual property laws.²⁷ The appeals court reversed a lower court ruling that the exception from immunity contained in Section 230(c)(2), which provides that Section 230 immunity should not be construed in a manner that would "limit or expand any law pertaining to intellectual property," extends to state law intellectual property claims. The appeals court concluded that the term "intellectual property" in the exception clause refers only to federal intellectual property rights, because allowing the states' varying definitions of intellectual property to "dictate the contours of [CDA] immunity would be contrary to Congress's expressed goal" of fostering the Internet.
- **Doe v. MySpace** - A social networking site is entitled to immunity under Section 230(c) of the Communications Decency Act for allegedly failing to institute adequate safety measures to prevent sexual assaults of minors and for the failure to institute policies relating to age verification.²⁸ In dismissing the complaint, the court rejected the argument that the claims were not barred by Section 230 because the plaintiffs were not seeking to hold the defendant liable as a publisher of defamatory content, but rather were asserting a negligence claim for failure to take reasonable safety measures to prevent sexual predators from communicating with minors on the defendant's site. The court noted that the defendant had no duty to protect the plaintiff, nor to institute safety measures on its Web site. The court concluded that the plaintiffs' claims were directed toward MySpace for alleged harms relating to its publishing and screening capacities as a social networking site, and that judicial interpretations of Section 230 have generally barred such suits for non-defamation claims based in negligence.
- **Universal Communications Systems, Inc. v. Lycos, Inc.**- An operator of a financial-oriented Internet message board and Web site is immune under Section 230 of the Communications Decency Act (CDA) for a series of allegedly false and defamatory postings made by third-parties that disparaged the financial condition of the plaintiff, a publicly traded company.²⁹ The appeals court upheld the

²⁶ *Doctor's Assoc., Inc., v. QIP Holders, LLC*, No. 3:06-cv-1710 2007 U.S. Dist. LEXIS 27681 (E.D. Pa. Apr. 12, 2007).

²⁷ *Perfect 10, Inc. v. CCBill LLC*, No. 04-57143, 2007 U.S. App. LEXIS 7238 (9th Cir. Mar. 29, 2007).

²⁸ *Doe v. MySpace*, No. 1:06-cv-00983-SS, 474 F. Supp. 2d 843 (W.D. Tex. 2007).

²⁹ *Universal Communications Systems, Inc. v. Lycos, Inc.*, No. 06-1826, 2007 U.S. App. LEXIS 3946 (1st Cir. Feb. 26, 2007).

dismissal of plaintiff's complaint, which included claims of cyberstalking, state securities fraud and trademark dilution. The court rejected the plaintiffs' argument that the CDA was inapplicable because defendant was "manifestly aware of the illegal nature of the subscriber postings." The court followed established precedent in construing Section 230 immunity broadly and found that such immunity applies even after notice of the potentially unlawful nature of the third-party content, particularly when there was no evidence that the defendant was responsible for the creation of the third-party posting. The court also rejected the plaintiff's novel argument that the defendant's conduct was a form of "culpable assistance" to parties wishing to disseminate misinformation, analogous to the "active inducement of infringement" that the U.S. Supreme Court found actionable in *MGM Studios v. Grokster*, 125 S.Ct. 2764 (2005).

- **Pallorium, Inc. v. Jared** - A Web site owner who created a spam "block list" that identified open relay servers useful to spammers is immune from liability under the "Good Samaritan" provision of the Communications Decency Act (CDA) for incorrectly listing the plaintiff's IP address on the block list.³⁰ The appellate court upheld a trial court judgment finding the owner immune under Section 230(c)(2)(B) as a "provider" of an "interactive computer service" who made available "technical means" to restrict access to material that the provider thought was "harassing or otherwise objectionable." The court further found that the fact that the owner's block list might have been over-inclusive was irrelevant so long as the owner deemed the material he sought to block (i.e. offensive spam e-mails) as harassing and objectionable.
- **Doe v. Bates** - An Internet Service Provider (ISP) is immune under Section 230 of the Communications Decency Act (CDA) from a civil action alleging that it "knowingly hosted" an e-mail newsgroup on which illegal images of children were disseminated.³¹ Acknowledging that the issue was one of first impression, the district court upheld the recommendation of a magistrate judge to dismiss claims of negligence, intentional infliction of emotional harm, invasion of privacy and conspiracy against Yahoo! based on Yahoo!'s alleged "knowing hosting" an e-mail group on which illegal images of children were disseminated. The court recognized that the government has the authority to prosecute ISPs for alleged violations of the federal statute proscribing the images at issue, but concluded that private civil suits for the same conduct are prohibited by Section 230 of the CDA. The court commented that while the facts of a case involving such images "may be highly offensive, Congress has decided that the parties to be punished and deterred are not the internet service providers but rather are those who created and posted the illegal material."
- **Delfino v. Agilent Technologies, Inc.** - An employer whose computer network was used by an employee to send threatening e-mails and post similar messages on an Internet bulletin board is immune under Section 230 of the Communications Decency Act from liability for plaintiff's claims of emotional

³⁰ *Pallorium, Inc. v. Jared*, No. G036124, 2007 Cal. App. Unpub. LEXIS 241 (Cal. Ct. App. Jan. 11, 2007) (unpublished).

³¹ *Doe v. Bates*, No. 5:05-CV-91, 2006 U.S. Dist. LEXIS 93348 (E.D. Tex. Dec. 18, 2006).

distress.³² The court dismissed the tort claims brought against the defendant employer by the private individuals who were the subject of the anonymous threatening messages. The court deemed that the employer, with its networked computer system, was a "provider of an interactive computer service" and the messages in question were produced by another "information content provider" (i.e. the employee) and thus, the court reasoned that the employer was entitled to CDA immunity from liability for plaintiff's claims that treated the employer as a publisher or speaker of the allegedly wrongful e-mails.

- **Barrett v. Rosenthal** - Section 230 of the Communications Decency Act immunizes interactive service providers from "distributor" liability for content supplied by third parties.³³ The California Supreme Court reversed a lower California appeals court that had ruled, contrary to the weight of authority in prior cases, that the immunity from liability provided to interactive service providers by Section 230 does not extend to liability for knowing distribution of a defamatory statement made by a third party. The California Supreme Court concluded that an individual who posted on a Web site a defamatory article authored by a third party and e-mailed to her, after being warned of its defamatory content, is entitled to immunity under Section 230 as a "user" of an "interactive computer service."
- **Anthony v. Yahoo! Inc.** - An online dating service is not immune under CDA Section 230 from a subscriber's claim that the service lured subscribers to extend their subscriptions by sending them false profiles as fictitious "matches."³⁴ The court ruled that to the extent that the subscriber alleged that the dating service itself created false profiles, claims are not subject to CDA Section 230 immunity. A final settlement of the class action is pending as of November 2007.

Section 230 of the Communications Decency Act also immunizes interactive computer service providers and users 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." The "otherwise objectionable" language has been broadly construed.

- **Langdon v. Google, Inc.**- A claim based upon a search engine's refusal to accept and place a Web site owner's proposed ads in prominent places among search engine results and its removal of the owner's Web sites from its search result rankings is precluded by the search engine's First Amendment rights and Section 230 of the Communications Decency Act (CDA).³⁵ In dismissing the pro se plaintiff's constitutional and fraud-based claims against various search engines, the court found that compelling the defendants to accept the plaintiff's ads and "honestly" rank his Web site in search rankings is precluded by the search engine's First Amendment rights and by the CDA, which provides

³² *Delfino v. Agilent Technologies, Inc.*, No. H028993, 2006 Cal. App. LEXIS 1937 (Cal. Ct. App. Dec. 14, 2006).

³³ *Barrett v. Rosenthal*, No. S122953, 40 Cal. 4th 33 (Cal. 2006).

³⁴ *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006).

³⁵ *Langdon v. Google, Inc.*, No. 1:06-cv-319, 2007 U.S. Dist. LEXIS 11902 (D. Del. Feb. 20, 2007).

immunity from suit for claims grounded upon a search engine's exercise of editorial discretion over screening Internet content. However, the court did let stand the plaintiff's breach of contract claim against Google, declining to dismiss the claim at such an early stage of the litigation.

Social Networking & The Digital Millennium Copyright Act (DMCA)

The provisions of the DMCA, among other things, provide a Safe Harbor for certain types of "service providers" from direct and secondary copyright infringement liability. As the functionality and ease of media sharing within social networks increases, issues arise as to the duty of social networking sites as to copyright protection, and already, some litigation has commenced.

- **Viacom International Inc., v. YouTube, Inc., No. CV: 07- 02103 (S.D.N.Y. filed Mar. 13, 2007)** – In addition to direct infringement, Viacom alleged claims of inducement of copyright infringement, contributory copyright infringement and vicarious copyright infringement. As to contributory infringement, Viacom has claimed that YouTube enables, induces, facilitates and materially contributes to each act of direct infringement by its users. Under its theory of vicarious liability, the plaintiff alleged that YouTube has the right and ability to supervise the infringing conduct of its users but only enforces content restrictions for those works of its business partners with whom it has entered into licensing agreements.
- **UMG Recordings, et al. v. MySpace, Inc., No. 2:06-cv-06561 (C.D. Cal. Nov. 17, 2006)** – Universal Music has alleged that MySpace "knowingly and intentionally" encourages copyright infringement by its users, and that MySpace became "one of the most prominent and valuable websites on the Internet through rampant copyright infringement."

Third Party Liability Under Foreign Law

- **Mme M. B., M. P.T., M. F .D. c/ Wikimedia Foundation Inc.** – The Wikimedia Foundation is not liable for defamatory statements made by third parties in the Wikipedia online encyclopedia. The High Court of First Instance of Paris ruled on Oct. 29, 2007 that the Wikipedia site is a "hosting provider," under the French Act of 21 June 2004 on Confidence in the Digital Environment (which implements the EC Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services).³⁶ The court ruled that "hosting providers" are not liable for information stored on a site, provided that they did not have actual knowledge of illegal activity or information. A hosting provider, the court ruled, does not have a general obligation to monitor information on a site, nor an obligation to actively seek facts or circumstances indicating illegal activities. The court also ruled that the plaintiffs did not give the Wikimedia Foundation proper notice of the defamatory content prior to the institution of litigation.

³⁶ TGI Paris, référé, 29 octobre 2007, Mme M. B., M. P.T., M. F .D. c/ Wikimedia Foundation Inc. (Judgment in French at <http://www.juriscom.net/jpt/visu.php?ID=980>). English language account of the judgment by Spitz & Langlois, "Wikipedia French Case: hosting providers do not have the obligation to monitor content," Copyright and media in France (Nov. 5, 2007), available at <http://copyrightfrance.blogspot.com/2007/11/wikipedia-french-case-hosting-providers.html>.

- **Jean-Yves L ("Lafesse") v. MySpace.com** – MySpace is liable for copyright infringement in connection with the posting of a video of the plaintiff's performance on a user's MySpace personal page. The High Court of First Instance of Paris ruled on June 22, 2007 that although Myspace site is a "hosting provider," under the French Act of 21 June 2004 on Confidence in the Digital Environment (which implements the EC Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services), it is also a "publisher" because it makes content available and profits by broadcasting advertisements each time a video is viewed.³⁷

Revealing the Identity of Anonymous Speakers

Courts have reached differing results regarding anonymous speech in online defamation cases. In some cases courts have ordered the identities of alleged tortfeasors to be revealed, or have applied a heightened level of scrutiny to discovery requests directed at revealing the identity of an anonymous speaker.

- **McMann v. Doe** - A party seeking to obtain discovery of the identity of an anonymous speaker via a subpoena to the speaker's domain name registrar and proxy registrant company must first establish its claim against the speaker and survive a motion for summary judgment.³⁸ The court commented that it believed that the "correct standard" in evaluating efforts to discover the identity of an anonymous speaker "through any compulsory discovery process" is the so-called summary judgment standard enunciated by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (2005). The court dismissed the plaintiff's complaint without prejudice, ruling that the plaintiff's defamation claims could not withstand a motion for summary judgment.
- **Best Western International, Inc. v. Doe** - Allegations that posts by anonymous bloggers breached confidentiality and trademark licensing agreements supports a corporation's motion for discovery directed at determining the bloggers' identities.³⁹ The court ruled that the corporation's allegations that the anonymous postings defamed the corporation, revealed confidential information, violated fiduciary duties and infringed the plaintiff's trademarks satisfied the "prima facie claim" standard applicable to discovery. The court commented that the First Amendment "does not absolutely protect Defendants' identities from disclosure," and that the anonymous posters "may not use the First Amendment to improperly encroach upon the valid contractual rights of the Plaintiff."

Social Networks And Foreign Governments

Social networking sites and other Internet providers that are located in or do business in foreign countries may be subject to legal requirements and legal process that conflict with U.S. law and public policy, or public expectations concerning their obligations under foreign law.

³⁷ An English language account of the judgment is available at <http://juriscom.net/actu/visu.php?ID=942>.

³⁸ *McMann v. Doe*, No. CV 2006-092226 (Ariz. Super. Ct. Maricopa Cty Jan. 18, 2007).

³⁹ *Best Western International, Inc. v. Doe*, No. CV006-1537, 2006 U.S. Dist. LEXIS 77942 (D. Ariz. Oct. 24, 2006).

- **Wang Xiaoning v. Yahoo! Inc.** - Yahoo! provided the Chinese government with information identifying Chinese bloggers, who were arrested and tortured and received 10 year sentences. A lawsuit brought in U.S. federal court by the blogger and his family allege claims under the Alien Tort Statute, 28 U.S.C. § 1350, the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, various California tort statutes, and the federal Electronic Communications Privacy Act.⁴⁰ Congressional hearings in November 2007 focused on Yahoo! failure to fully inform lawmakers of its actions with respect to the Chinese government request for information. Following the hearings, Yahoo announced that it had reached a settlement of the tort litigation.
- **Brazil v. Orkut (Google Brazil)** – In 2006, Brazilian authorities investigating racism, pedophilia and homophobia on the search engine's social networking site, Orkut, subpoenaed user data. Google Brazil disputed the court's jurisdiction since the authorities requested information on Brazilians located on servers in the U.S. The court threatened Google with a fine of US\$23,000 per day for failure to comply with court orders directing release of the information. In 2007, Google Brazil agreed to respond to enforcement subpoenas through the office of Google U.S.
- **Global Online Freedom Act of 2007, H.R. 275** – The purpose of the proposed law is "To promote freedom of expression on the Internet, to protect United States businesses from coercion to participate in repression by authoritarian foreign governments, and for other purposes." The proposed law would require annual designation of "Internet restricting countries"; U.S. firms would be prohibited from storing personally identifiable information and e-mails on servers in such countries, and from responding to requests of governments of such countries for user information, without US Department of Justice approval of "legitimate law enforcement" purposes. Failure to comply could result in fines of up to \$2 million.

Enforceability of Terms of Use

- **Cohn v. Truebeginnings, LLC** - A California user who clicked on a "Continue" button signifying assent to Terms of Use as part of a Web site membership registration process, during which a conspicuous hyperlink for viewing the entire Terms of Use was displayed, is bound by the forum selection clause included in the Terms of Use.⁴¹ The appeals court ruled that the lower court did not abuse its discretion in concluding that the user had assented to the Terms of Use. The court noted that despite the user's assertion that he had not been presented with the Terms of Use as part of the registration process, the Web site operator had submitted declarations supporting the conclusion that the user could not have completed the registration process without clicking on the "Continue" button. The court also commented that there is "nothing inherently unfair in requiring him to access contractual terms via hyperlink."

⁴⁰ Wang Xiaoning v. Yahoo! Inc., No. C07-02151 (N.D. Cal. amended complaint filed July 2007).

⁴¹ Cohn v. Truebeginnings, LLC, No. B190423, 2007 Cal. App. Unpub. LEXIS 6232 (Cal. Ct. App. July 31, 2007) (unpublished opinion).