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Hot Topics in UGC Liability

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47 USC 230

- **Immunity elements**
 - Provider/user of interactive computer service
 - Publisher/speaker claim (not federal crime, [federal] IP, ECPA)
 - Provided by another information content provider
- **Unless the claim fits a statutory exclusion, websites aren't liable for third party content**
 - But courts are wavering on Iqbal
 - SJ v 12(b)(6)
- **Possible 230 bypasses**
 - Promissory estoppel / False advertising claim over site text/marketing
 - Intermediary was partially responsible for content creation (Roommates.com)
 - Agency liability for moderators (Ex: Cornelius v. DeLuca)
 - [Federal] IP claim
 - Sue poster and present injunction to others

Enforcing Orders and FRCP 65

- **FRCP 65(d)(2)(C): orders bind “persons who are in active concert or participation”**
 - Blockowicz v. Williams (7th Cir. 2010) = “the fact that Xcentric is technologically capable of removing the postings does not render its failure to do so aiding and abetting”
 - Bobolas v. Doe (D. Ariz. 2010) = GoDaddy as web host/domain name registrar isn’t an agent
 - Giordano v. Romeo (Fla. Cir. Ct. 2010) = “Xcentric [sic] refusal to comply with this Court’s Order and the demand of the publisher to remove the statements makes XCentric the publisher of the statements. This is different from determining that they are the publisher solely because of the posting”
 - Amaretto v. Ozimals (N.D. Cal. 2010) = Second Life ordered to stop removing content in response to 512(c)(3) takedown notices

Potentially Bogus Takedown Practices

- Threaten the poster
- Default/stipulated judgments that aren't based on adversarial adjudication
- Prospective copyright assignments to support notice-and-takedown for unwanted posts
 - Plus, 512(h) expedited identity disclosure
- 512(c)(3) notices without traceable contact information

Transborder Issues and the Giggs Effect

- HR 2765, the SPEECH Act (28 USC §§ 4101-4105)
 - Foreign defamation judgment unenforceable unless
 - judgment satisfies First Amendment or similar state constitutional protections,
 - foreign court had jurisdiction that comports with our due process requirements
 - if 47 USC 230 would have applied in US suit, plaintiff must show the foreign judgment comports with 230
- Lessons from Ryan Giggs v. Twitter
 - The British are soccer fanatics!
 - Another futile foreign government's effort to censor an American UGC site?
 - Superinjunctions are archaic, breed legal disrespect and are possibly counterproductive
 - Information asymmetries are unstable on the Internet. "Information wants to be free"
 - Twitter doesn't care about British law...until it opens its British office
 - But Twitter honored disclosure ordered by CA court
 - The world scrutinizes UGC sites' policies for disclosing user identities

Anti-SLAPP

- **CA CCP 425.16**
 - Defendant must show the lawsuit is against protected activity
 - “in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue”
 - If so, burden shifts to plaintiff to show a probability of prevailing
 - If plaintiff fails, lawsuit ends and defendant gets attorneys fees
 - Wong v. Jing: distinction between private vendor disputes (no PI) and social consequences of vendor’s practices (PI)
 - DC v. RR: cyberbullying attack lacked public interest
- **Proposed Federal Anti-SLAPP Law (HR 4364)**