

# Santa Clara University

## Defamation, False Information & 47 USC 230

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# What's Different About Online Defamation?

## ● Content Publishers

- Fitting defamatory statements into small spaces
- Contextual evaluation
  - Ex: DiMeo v. Max (ED Pa 2006): "After viewing the tuckermx.com message boards, which are read by people using screen names like "Jerkoff," "Drunken DJ," and "footinmouth...it palpably is not serious"
  - Ex: Finkel v. Dauber (NY Sup Ct 2010): "The entire context and tone of the posts constitute evidence of adolescent insecurities and indulgences, and a vulgar attempt at humor. What they do not contain are statements of fact"
- People misunderstanding privacy settings of online publishing tools
- Anti-cyberbullying/"E-personation"
  - CA Penal Code §528.5: "knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person"
- Insurance coverage

## ● Potential Plaintiffs

- Streisand Effect/Reputation management as a litigation substitute
- The First Rule of Holes/"The cure for bad speech is more speech"

# Unmasking Anonymous/Pseudonymous Posters

- Ask the service provider
- John Doe lawsuits / petition for pre-litigation discovery
- 17 USC 512(h) subpoenas
- Re-identification

# 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)**

# Libel Tourism

- 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

# 47 USC 230

- Elements of defense
  - Provider/user of interactive computer service
  - Publisher/speaker claim (not federal crime, [federal] IP, ECPA)
  - Provided by another information content provider
- Effect: unless the claim fits a statutory exclusion, websites aren't liable for third party content
- 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
- 47 U.S.C. § 230: a 15 Year Retrospective, March 4, SCU <http://j.mp/aZsmFk>

# 230 Workaround? Prospective © Assignments

- Some doctors take a prospective copyright assignment in unwritten online patient reviews of the doctor
- Doctors can then send 512(c)(3) takedown notice for unwanted patient reviews
- Problems with this approach (selected)
  - Consumer protection laws (New York v. Network Associates, 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003))
  - Contract unconscionability
  - 17 USC 512(f)
  - Medical ethics rules and HIPAA

# 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



# My Preferred Policy Changes

- Close the trademark hole
- Issue sanctions for 230-prrempted cases
- Enact federal anti-SLAPP protection
- “Threats Action” for bogus takedown notices
- Close the 512(c)(3) hole
- Extend 230 protection to offline publishers