

INJUNCTION RELIEF:
MUST NONPARTY WEBSITES OBEY COURT ORDERS TO
REMOVE USER CONTENT?

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ABSTRACT

*Websites are normally immune to suits arising from illegal user-posted content due to 42 USC § 230. Victims of illegal postings must therefore bring suit, if at all, against the original posters. However, when websites refuse to take down illegal content, a suit against an original poster might not provide relief. In the recent case *Blockowicz v. Williams*, a family won a default judgment against persons posting defamatory content to *Ripoff Report*. But the plaintiffs could not contact the defendant to enforce the judgment, and thus they sought enforcement of an injunction against *Ripoff Report*. The court refused because *Ripoff Report* was not a party to the action. As a result, the top Google hit for the *Blockowicz* family name remains a defamatory posting. This Article considers how the traditional exceptions to the rule that injunctions do not bind nonparties apply in the context of the relationship between a poster and a website and when, if ever, a nonparty website might be bound by an injunction against a poster. This Article also discusses alternative remedies plaintiffs can seek if they are unable to obtain an injunction against a nonparty website.*

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INTRODUCTION

The Blockowicz family faced a problem both new and ancient: someone with ill intent wrote negative public statements about them. The person wrote, among other things, that one of the family's daughters was a prostitute. These statements were published in a prominent place, a website entitled Ripoffreport.com (Ripoff Report), making the post the top Google hit for the Blockowicz name. Despite a default judgment against the poster that the communications were defamatory, the Blockowicz family has yet to succeed in having the statements removed from the website.

This result occurred because of 47 U.S.C. § 230¹ and the longstanding doctrine that injunctions may not be directed to nonparties to litigation. Section 230 provides, in part, that no website or Internet service provider may be treated as the publisher or speaker of any material provided by a third party for the purpose of any lawsuit.² This provision insulates Web providers from liability for illegal third-party communications made on their sites. This protection is most frequently associated with defamation claims.³ Victims of online defamation can ordinarily only sue original posters rather than websites that contain defamation.

However, if a post remains in the control of the website operator, an injunction directed to the poster may not provide relief. Under

¹ 47 U.S.C. § 230 (2006).

² 47 U.S.C. § 230(c)(1) (2006).

³ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009).

Federal Rule of Civil Procedure 65, injunctions may bind only parties to a suit, persons legally identified with them (such as agents), and persons acting in active concert or participation.⁴ Section 230 prohibits plaintiffs from naming website operators as parties; such operators cannot be bound by injunctions unless they are legally identified with or in active concert or participation with the original poster.

This Article describes the *Blockowicz* case, examines the general prohibition against forcing nonparties to comply with injunctions and the traditional exceptions to that prohibition, and considers the possibility that plaintiffs may obtain relief using the legal remedy of garnishment.

I. BLOCKOWICZ V. WILLIAMS

The *Blockowicz v. Williams* case involved the website Ripoffreport.com, which allows users to post complaints.⁵ Ripoff Report's policy is to never take down any complaint.⁶ When posting materials, persons agree to terms of service including that: "By posting information on ROR, you understand and agree that the material will not be removed even at your request."⁷ Williams posted to Ripoff Report regarding the Blockowicz family, alleging among other things that one of the family's daughters is a prostitute.⁸ As of May 2011, this post was the top Google hit for the name "Blockowicz."

In 2009, the Blockowiczs filed a defamation suit against Joseph David Williams and Michelle Ramey.⁹ The defendants defaulted and

⁴ Fed. R. Civ. P. 65(d).

⁵ See *Blockowicz v. Williams*, 630 F.3d 563, 565 (7th Cir. 2010); RIPOFF REPORT, <http://www.ripoffreport.com> (last visited Sept. 29, 2010).

⁶ *Blockowicz v. Williams*, 630 F.3d 563, 565 (7th Cir. 2010).

⁷ *Id.*

⁸ "Report: Megan Blockowicz, Mary Blockowicz, David J. Blockowicz, Brendon Blockowicz, Lisa Blockowicz," <http://www.ripoffreport.com/Prostitutes/Megan-Blockowicz-Mar/megan-blockowicz-mary-blockow-47e98.htm> (Friday, October 31, 2003). Although the original report remains accessible, it is now supplemented with a statement of ripoffreport.com's position regarding the case and a caution that a court order found the statements not to be true.

⁹ *Blockowicz v. Williams*, 630 F.3d 563, 564-65 (7th Cir. 2010).

the court granted a permanent injunction requiring the defendants to remove defamatory postings from websites.¹⁰ The injunction also provided that the Blockowicz's counsel could directly contact third-party Web hosts and ask them to delete the postings.¹¹ Websites such as Facebook.com, Myspace.com, and complaintsboard.com took down the postings.¹² Ripoff Report, unlike other website operators, refused to remove the postings. The Blockowicz sought to enforce the injunction against Ripoff Report, which challenged enforcement on the basis that Ripoff Report was not a party to the lawsuit.¹³

The Blockowicz argued that Ripoff Report acted in concert with Williams by entering into the terms-of-service agreement promising not to remove any posted material even in the face of an injunction.¹⁴ The United States District Court for the Northern District of Illinois ruled that there was insufficient evidence to find that the terms of service represented an agreement to aid and abet the evasion of an injunction.¹⁵ The court pointed out that the terms explicitly forbid the posting of defamatory content.¹⁶ The United States Court of Appeals for the Seventh Circuit affirmed, holding that an action with knowledge of an injunction that aids and abets the evasion of an injunction must occur after the injunction.¹⁷ The court asserted that the only relevant action of Ripoff Report was entering into the terms-of-service agreement, which occurred before the injunction.¹⁸ Therefore, this action could not qualify as aiding and abetting.

As a result of this ruling, the Blockowicz family has no apparent recourse to remove defamatory postings. In this case the postings were ruled defamatory in a default judgment proceeding, so the precise facts of the case were never argued in court. However, the doctrinal result would be the same whether the underlying injunction resulted from a default judgment or a judgment after a full trial on the

¹⁰ *Id.* at 656.

¹¹ Blockowicz v. Williams, 675 F.Supp. 2d 912, 914 (N.D. Ill. 2009).

¹² *Id.* at 914-15.

¹³ Blockowicz v. Williams, 630 F.3d 563, 565-66 (7th Cir. 2010). *See* Blockowicz v. Williams 675 F.Supp. 2d 912, 914 (N.D. Ill., 2009).

¹⁴ Blockowicz v. Williams, 630 F.3d 563, 567-68 (7th Cir. 2010).

¹⁵ Blockowicz v. Williams, 675 F.Supp. 2d 912, 915-16 (N.D. Ill. 2009).

¹⁶ *Id.* at 916.

¹⁷ Blockowicz v. Williams, 630 F.3d 563, 568 (7th Cir. 2010).

¹⁸ *Id.*

merits against the poster.¹⁹

II. THE GENERAL RULE: INJUNCTIONS DO NOT BIND NONPARTIES

The result in *Blockowicz* stems from the general rule that courts do not direct injunctions to persons who are not parties to litigation.²⁰ When rigid application of this rule allowed parties to evade injunctions, courts traditionally developed common-law exceptions.²¹ For example, courts enforced injunctions against the agents of parties and people aiding or abetting parties in violating injunctions.²² Based on these common-law exceptions, Fed. R. Civ. P. 65 codified two categories of nonparties bound by injunctions: those in active concert or participation with them and those legally identified with the parties.

A. Active Concert or Participation

A website may be subject to an injunction on the basis that it is in “active concert or participation” with the user.²³ In order to be subject to an injunction under this prong, the defendant (Williams in the *Blockowicz* case) must be violating the injunction and the nonparty (Ripoff Report) must be in some way working with that party.²⁴ This exception first appeared in *Seaward v. Patterson*, where a lessor was

¹⁹ See Ben Sheffner, *Court: ‘No recourse’ for victims of defamatory postings under Section 230*, COPYRIGHTS & CAMPAIGNS (Dec. 22, 2009, 8:36 PM), <http://copyrightsandcampaigns.blogspot.com>. The *Blockowicz* family never had the option of a trial on the merits. Williams, the original defendant, did not appear. A trial on the merits against Ripoff Report would be precluded by § 230.

²⁰ This rule was repeatedly stated by courts of the eighteenth and nineteenth centuries. Note, *Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719, 719 (1965) (citing *Iveson v. Harris*, (1802) 82 Eng. Rep. 102 (Ch.); 7 Ves. 251; *Gadd v. Worrall*, (1795) 145 Eng. Rep. 965 (Exch.); 2 Anstr. 555; *Dawson v. Princeps*, (1795) 145 Eng. Rep. 954 (Ex.); 2 Anstr. 521).

²¹ See, e.g., *Wellesley v. Mornington*, (1848) 50 Eng. Rep. 786 (Ch.); 11 Beavan 181.

²² *Id.*

²³ See Fed. R. Civ. P. 65(d)(2).

²⁴ *United Pharm. Corp. v. United States*, 306 F.2d 515, 517-18 (1st Cir. 1962), *Paramount Pictures Corp. v. Carol Pub. Grp., Inc.*, 25 F. Supp. 2d 372, 374-75 (S.D.N.Y. 1998).

granted an injunction against a lessee forbidding him from holding a boxing match.²⁵ Notwithstanding this injunction, the lessee worked together with a third party to put on the boxing match.²⁶ Because the third party knew of the injunction and helped the lessee violate it, he was subject to contempt prosecution even if not an agent.²⁷ A defamation plaintiff attempting to bind a website could argue that the website acted similarly to the nonagent third party and is therefore bound by the injunction.

The active concert or participation exception appeared in one case related to telecommunications services.²⁸ In the case of *South Central Bell Telephone Company v. Constant, Inc.*, a moving company was subject to a trademark injunction preventing it from using the name “Atlas.”²⁹ Prior to the injunction, South Central Bell distributed its telephone book with the moving company’s name listed as Atlas.³⁰ The plaintiff in the trademark case learned that the moving company was still answering its phone as “Atlas” in violation of the injunction and contacted South Central Bell.³¹ The telephone company established an intercept wherein an operator would ask persons placing calls to the moving company’s number who they intended to call.³² Those that said “Atlas” were redirected to a company authorized to use that name.³³

The moving company sued South Central Bell, seeking an injunction prohibiting the company from using this intercept.³⁴ South Central Bell argued that the injunction bound it to make use of its technological capacity.³⁵ The court agreed, stating, “[a]s soon as South Central Bell was apprised of the fact that its subscriber, Constant, was, by use of South Central Bell’s equipment, violating

²⁵ [1897] 1 Ch. 545, 545-47.

²⁶ *Id.*.

²⁷ *Id.* at 549.

²⁸ *S. Cent. Bell Tel. Co. v. Constant, Inc.*, 304 F. Supp 732, 733-34 (E.D. La. 1969), *aff’d*, 437 F.2d 1207 (5th Cir. 1971).

²⁹ *Id.* at 734.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 734-735.

the injunction imposed by this Court, it had a duty not to act in any way in concert with Constant to effectuate or perpetuate the violation.”³⁶

This language raises the possibility that a website that knowingly allows its equipment to be used in violation of an injunction might be considered to be acting in concert with the poster. The importance of this language might be limited, however, by the fact that the South Central Bell case arose in the unique situation where the telecommunications provider took the initiative to uphold the injunction and defended a suit arising from that activity. No court appears to have applied the South Central Bell rationale to enforce an injunction.

The general conception of a telephone service as a common carrier indiscriminately acting as a conduit for others’ speech argues against the application of such an injunction.³⁷ On the other hand, a court that was particularly troubled by a case where a defamed party would otherwise be left without remedy could potentially make use of the broad language in South Central Bell as a basis to hold that a website that knowingly allowed defamatory content to continue being disseminated using its equipment acted in concert with a party defendant and could therefore be enjoined.

B. Legally Identified

The legal identification exception to the rule that injunctions must be directed solely to parties states that a person acting as an officer, agent, servant, employee, or attorney for an enjoined party can also be subject to an injunction.³⁸ A website could not act as an officer or attorney. However, it is conceivable that a website could act as an agent for a third-party poster.

Agency is the fiduciary relationship that arises when one person (a “principal”) agrees the agent will act on the principal’s behalf and subject to the principal’s control, and the agent agrees to do so.³⁹ A website may in theory act as agent for a Web user. When a user

³⁶ *Id.* at 736.

³⁷ *See* 1 ZUCKMAN ET AL., MODERN COMMUNICATION LAW 210 (West 1999).

³⁸ Fed. R. Civ. P. 65(d)(2).

³⁹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

contracts with the website in order to make a sales listing or post information, the website arguably acts on the behalf of the user by providing information to other people. The level of control exerted over the interaction by the site user varies, but it may rise to a level at which a court could find an agency relationship.

There is one important qualification to the agency relationship in the website context: a person must be acting as an agent at the time of an alleged breach of an injunction.⁴⁰ That means that the website must still be subject to the user's control at the time of the injunction. In a situation where the user's control over posted content ceases as soon as the content is posted, the agency relationship likely ends at the same time. For example, in the *Blockowicz* situation, the poster gave up all control over the posting to Ripoff Report at the time of posting. Even if a court were to find that Ripoff Report acted as an agent at the time the posting occurred, the website would no longer be an agent at the time of the injunction and would not be bound.

Even given this limitation, it is plausible that a court may find a website continues to act as an agent for a party who posted content as long as the poster retains the ability to edit or remove content. When a user retains authority to tell a website to remove illegal content but refuses to do so, it is possible that a website might be subject to an injunction.

III. BEYOND INJUNCTIONS: THE POSSIBILITY OF GARNISHMENT AS A REMEDY

Given that *Blockowicz* does not neatly match either exception that allows injunctions to bind nonparties, persons in the situation of the *Blockowicz*s may need to seek other remedies. One possibility is a garnishment proceeding. Garnishment allows a plaintiff to make a claim on property of a defendant held by a third party known as a garnishee.⁴¹ A person attempting to take down a defamatory or otherwise illegal Web posting would argue that the posting is a form of property owned by the defendant and therefore the third party

⁴⁰ See *Regal Knitware Co. v. NLRB*, 324 U.S. 9, 15 (1945) (“[W]hether one brings himself in contempt as a ‘successor or assign’ depends on an appraisal of his relations.”).

⁴¹ 38 C.J.S. *Garnishment* § 1 (2008).

website may be compelled to “turn over” the property.

State statutes create and control garnishment.⁴² Garnishment ordinarily extends to both tangible and intangible personal property.⁴³ In order to gain a garnishment remedy, a plaintiff in the situation of the Blockowiczs would argue that the posting constitutes intangible personal property. The most obvious form this argument could take would be one based on the copyright in the posting.

In a garnishment suit, the plaintiff steps into the shoes of the defendant and has only those rights to the property held by the garnishee that the defendant would have.⁴⁴ In the *Blockowicz* case, this would mean that if the Blockowiczs were able to treat the posting as property for garnishment purposes, they would be able to take only those rights in relationship to the posting that the original poster could take. The nature of the Ripoff Report terms of service would thus provide a second hurdle in the Blockowicz case itself, given that posters grant “an irrevocable, perpetual, fully-paid, worldwide exclusive license to use, copy, perform, display and distribute such information and content” to the website.⁴⁵

In order to get an order to take down the post in a garnishment proceeding, a party in the Blockowicz situation would have to overcome the contract granting the license to distribute the posting as well as the contract provisions providing that the posting will not be taken down even on request of the poster. A plaintiff could argue as a matter of contract law that the contract itself was illegal or in violation of public policy.⁴⁶ A plaintiff could also argue that a

⁴² *See id.* § 2.

⁴³ *Id.* § 110.

⁴⁴ *Id.* § 211.

⁴⁵ *Blockowicz v. Williams*, 630 F.3d 563, 565 (7th Cir. 2010).

⁴⁶ In this context, the fact that the contract itself forbids the posting of defamatory content might argue against a finding of illegality. That the posting of defamatory content is prohibited by the terms of service agreement is of little help to a person in the situation of the Blockowiczs. This contract would potentially allow Ripoff Reports to sue the original poster for damages resulting from the defamatory posting, but gives no powers to the Blockowiczs, who are not parties to the terms of service contract. *See Blockowicz v. Williams*, 630 F.3d 563, 568-569 (7th Cir. 2010) (Ripoff Report’s refusal to remove defamatory posting does not render terms of service agreement not to post defamatory information illusory because the agreement allows Ripoff Report to seek compensation from poster).

contract is unconscionable in demanding on a take-it-or-leave-it basis that all rights to information be turned over. If the parties attempting to take down information are successful in overturning the contract granting license to display the post and forbidding content removal, they would presumably be able to use garnishment to step into the shoes of the defendant and compel a takedown.

Because of the dual hurdles of showing that the posting qualifies as property of the poster and demonstrating that the poster would have the right to take down the posting, garnishment would be a difficult means to avoid the problem created by the interaction of § 230 and the rule limiting injunctions to parties. This method would likely require a very sympathetic court.

CONCLUSION

Blockowicz illustrates the difficulty a plaintiff faces in forcing a recalcitrant website to remove third-party content. Given the apparent injustice of the result, which leaves victims of illegal postings without recourse, it seems other courts may stretch existing legal doctrines to reach an opposite result. A court may find that a web provider that knowingly allows use of its equipment in a way that violates an injunction is in active concert or participation and may be bound. If a website acts on the behalf of the user and under some level of user control after the time that an injunction is issued, it is plausible that a court could find that the website acted as an agent and is subject to an injunction because it is legally identified with the defendant. A plaintiff might also convince a court to issue a writ of garnishment to compel the site to turn over the post. In order to do so, however, the plaintiff would also have to convince a court that any terms-of-service agreement that abridges the right of a poster to take down materials is either void as being against public policy or otherwise unenforceable.

PRACTICE POINTERS

- Most websites take down content that is subject to a court order. Although a website that is not a party to an action is probably not subject to an injunction arising from that action, voluntarily taking down content eliminates any possibility

of contempt liability.

- Determine whether the website took any action regarding the posting after the court issued its injunction. Such contact may allow the court to enjoin the nonparty website based on “active concert or participation.”
- Determine whether the poster of the content retains any authority to alter or control the defamatory content. If so, the website could qualify as an agent and be bound under the “legal identification” exception.

