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BIGGER FISH, DEEPER POCKETS: BUSINESS BLOGS, DEFAMATION AND THE COMMUNICATIONS DECENCY ACT

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Abstract

Bloggging is a form of online communication that encourages instantaneous postings and viewer comments. More and more businesses are creating blogs to talk about and promote their products and services. This article will focus on a business' potential exposure to defamation liability stemming from content posted on a company-sponsored blog. The history of the Communications Decency Act in the courts indicates that companies will likely be immune from liability for defamation when the suit treats the company blog as the publisher of third party defamatory content. However, businesses that host blogs should be aware that this immunity may not extend to third party content not specifically provided to the blog for publishing, distributing or posting.

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WHAT IS A BLOG?

<1> Weblogs or "blogs" are online journals published on a microsite² or within a larger website on the Internet.³ Similar to a traditional website, a blog is capable of displaying text and images, can be viewed in a

standard browser and is recognized by search engines. However, blogs possess several characteristics that differentiate them from websites. First, blogs can be launched in under five minutes without any technical knowledge or expertise. Second, blogs tend to be informal in nature, and contain links to other blogs and websites. Third, blogs are updated frequently with each entry or "post" bearing a time and date stamp and appearing in reverse chronological order according to the time of posting. Fourth, many blogs give viewers the ability to post a comment, viewable on the blog site, in response to any entry made by the blog host.

<2> Due to its ease of use and unique structure, blogging is one of the fastest growing forms of Internet communication and information delivery. Since the introduction of blogs in the late 1990s, over 2.7 million individuals, groups and companies have entered the "blogsphere."⁴ Business blogs are one of the fastest growing segments of the blogging population.⁵

WHY WOULD A BUSINESS CHOOSE TO HOST A BLOG?

<3> Businesses of all sizes, from Microsoft to the latest start-up, are recognizing the unique benefits of blogging. A business blog is distinguishable from an individual blog because it is endorsed by a company and its content is generally more targeted than the meandering, personal entries posted by an individual using blogging technology to host an online diary. A business blog is defined as "a blog published by or with the support of an organization to reach that organization's goals."⁶ Business blogs focused on an external audience can help strengthen relationships with target groups and position the business or specific employee blogger as an expert in the industry.⁷ Within a company, blogs are commonly used as a knowledge management tool and a vehicle for informal collaboration.⁸ In short, businesses of all sizes can benefit from the format's ease of use, informality and interactive capabilities.

WHAT ARE THE RISKS?

<4> With the instantaneous posting of thoughts, articles, and weblinks comes the potential for defamation and thus liability. While the college student who posts defamatory content or her friend who comments with a defamatory response usually do not have any assets with which to pay damages, businesses do. Large businesses' deep pockets make them vulnerable to defamation claims that are not likely to be brought against an individual blogger.

DOES THE COMMUNICATIONS DECENCY ACT PROTECT BUSINESS BLOGS FROM LIABILITY FOR DEFAMATORY CONTENT?

<5> The Communications Decency Act (CDA) is likely to provide immunity to business blogs that allow content created or developed by a third party to be accessible on their blogs, even if the blog host edits the content of the information. However, a decision by the Ninth Circuit

Court of Appeals suggests that the CDA may not give immunity to business blogs that post defamatory material not “provided” to the blog for posting or online dissemination.⁹

<6> Section 230 of the CDA provides immunity to an interactive computer service from any cause of action that seeks to hold the service liable for publishing information that was created by another information content provider.¹⁰ Specifically, § 230(c)(1) states that “[n]o 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.”¹¹ Therefore, in order for a business blog host to be granted immunity from an action for defamation under the CDA it must (1) be a provider or user of an interactive computer service; (2) the cause of action must treat the business blog host as a publisher or speaker of information; and (3) the information at issue must be provided by another information content provider.¹²

IMMUNITY ONLY AVAILABLE FOR INFORMATION PUBLISHING

<7> In order for a business blog to maintain immunity from a cause of action, the complaint must treat the blog host as an interactive computer service that is the publisher of the information and not as an information content provider. If the cause of action treats the blog as an information content provider, § 230 will not apply. For example, if a business blog host is sued for defamatory comments that originated with and were posted by its own employee blogger, the host will not be granted § 230 immunity because § 230 only applies to “information provided by *another* information content provider.”¹³

Business Blogs as Interactive Computer Services

<8> An “interactive computer service” is defined in the CDA as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”¹⁴ The courts have interpreted the term “interactive computer service” broadly, finding that both traditional Internet service providers (such as America Online) and individual websites (such as eBay.com) fall within the statutory definition of interactive computer service.¹⁵

<9> The structure of business blogs is similar to that of websites which the courts have found to be immune under the CDA. For instance, the website characteristics considered by a California district court in determining that matchmaker.com is an interactive computer service are characteristics commonly found in business blogs.¹⁶ In *Carafano v. Metroplash*, the court found the website, matchmaker.com, to be an interactive computer service for two reasons: (1) matchmaker.com is an information service that provides or enables access by multiple users to a computer server; and (2) the website includes a searchable

database.¹⁷ Like the website at issue in *Carafano*, business blogs provide access by multiple users to a computer server and generally include a searchable database of archived posts. Therefore, courts are likely to consider business blogs to be interactive computer services for purposes of § 230 immunity.

Business Blogs as Information Content Providers

<10> In order to receive § 230 immunity the business blog must not author the defamatory information content. Section 230 defines an “information content provider” as: “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”¹⁸ Business blogs, like most websites, are information content providers in that they create and develop information through their postings and response to viewers’ comments. This does not necessarily exempt them from § 230 immunity. As recognized in *Gentry v. Ebay*, “it is not inconsistent for eBay [or a business blog] to be an interactive service provider and also an information content provider; the categories are not mutually exclusive. The critical issue is whether eBay acted as an information content provider *with respect to the information that appellants claim is false or misleading*.”¹⁹ Therefore, a business blog can be an information content provider and still qualify for §230 immunity as long the company has not created or developed any of the defamatory content.

What Happens if the Company Fails to Remove Defamatory Content?

<11> When designing its blog, a business will often create a format for viewers, whether internal or external, to comment on a particular posting. If a viewer’s comment is defamatory, it is highly unlikely that the blog host will be held liable for the damage caused by the comment. The courts have consistently held that § 230 “forbid[s] the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.”²⁰ Those editorial functions include deciding “whether to publish, edit, or withdraw the posting.”²¹ In *Zeran v. America Online*, the Fourth Circuit Court of Appeals held that AOL’s failure to remove a defamatory statement upon request was a publishing decision immune from liability.²² Thus, under the same reasoning, a business that does not remove from its blog a defamatory comment posted by a third party will probably not be liable for its contents because the decision not to remove the comment is an editorial function.

Will a Business Blog be Liable for Defamatory Content that was not “Provided” to the Blog Host?

<12> Under § 230(c), “so long as a third party *willingly* provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”²³ Whether the content is *willingly* provided is determined under a

reasonable person standard. In *Batzel v. Smith*, the Ninth Circuit held that an interactive computer service is immune from liability under § 230(c)(1) if “a reasonable person in the position of the service provider or user would conclude that the information was provided for publication.”²⁴ In that case, the operator of a moderated listserv²⁵ distributed an email that the sender later claimed he never intended to be sent out in the listserv’s newsletter. In developing its reasonable service provider standard the court noted that “the focus should [not be] on the information provider’s intentions or knowledge when transmitting” but on the perception of the service provider.²⁶ Thus, if a reasonable listserv moderator or business blog host would not believe that the information was *provided* for posting or publication on the Internet, then the act is outside the scope of § 230 immunity.

<13> Companies should be aware that under the holding in *Batzel*, if a blog posts defamatory information that was not specifically *provided* to it by another information content provider, it will not be protected under § 230 of the CDA. For instance, if the blog posts internally generated content or content from a medium that is not offered electronically (such as a local newsletter), and is sued for defamation, it is likely that the CDA will not provide immunity to the blog host.²⁷ In order to prevent potential exposure to defamation liability, companies should carefully control who is posting information to the blog and the content of the postings. One way of doing this would be to create a filter system where all blog content is first screened internally before being posted. However, companies should keep in mind that the informal and off-the-cuff nature of blogging is a major part of what has made the format so popular. Careful monitoring, balanced against the spontaneity needed to give the blog a genuine texture, is the best way to reduce the risk of costly lawsuits.

CONCLUSION

<14> Business blogs are one of the fastest growing segments of the blogging population.²⁸ Blogging allows companies to provide information in an easy, informal and instantaneous format. However, this format provides almost no built-in information filters and thus exposes business blog hosts to liability for defamation. The CDA has the potential to substantially limit this liability by providing immunity to business blog hosts that publish content provided by a third party. However, the CDA will not protect businesses from liability for defamatory content that a reasonable service provider would not believe was expressly provided to the blog host for publication or posting. Thus, businesses choosing to take advantage of the many attractive features of blogging should take precautions to avoid unnecessary exposure to liability for defamation.

PRACTICE POINTERS

- Limit the number of employees authorized to post content on the blog.

- Institute a short delay period for review between the development of blog content and actual posting.
- Educate employees who post on the blog about the types of actions that could expose the company to defamation liability, such as posting emails not addressed to the blog.
- Avoid posting content, especially verbatim, unless it is expressly provided for publication.
- Clearly post contact information on the blog for viewers who wish to request the removal of a particular posting.
- Post a statement on the blog indicating that the blog host takes no responsibility for the comments of third parties but reserves the right to make any editorial publishing decisions regarding comments submitted to third parties, including but not limited to, removing the comment.
- Post a statement on the blog that includes a contact for anyone who wishes to complain about any allegedly defamatory posting, for example: "If you believe any defamatory material has been posted on this blog, contact blogger@xyz.com." This should be a permanent email address with a pseudonym monitored by the blog host.

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Footnotes

1. Emma Scanlan is a member of the University of Washington School of Law Class of 2006. She would like to thank Paula Royalty for her substantial assistance in the creation of this Article. Scanlan can be reached at escanlan@u.washington.edu.
2. "[A] microsite is a separately promoted part of a larger Web site . . . designed to meet separate objectives, [with] a separate Web address (or Uniform Resource Locator) [from] its home page. Typically, a microsite resides on the same Web server and reflects the branding and overall visual design of the larger site with which it is associated."
Whatis.com *at*
http://searchwebservices.techtarget.com/sDefinition/0,,sid26_gci212570.00.htm
(last visited November 19, 2004).
3. 101 Series: Blogging, *at*
http://h30046.www3.hp.com/news_article.php?topiccode=20040712_76407_0_121_0_0&pagesite=SMB_LIVE_OOV®ioncode=
(last visited December 17, 2004).
4. *Id.*
5. *See id.*
6. Corporate Blog - A Short Definition, *at*
<http://www.corporateblogging.info/2004/06/corporate-blog->

7. *Id.*
8. *Id.*
9. See *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).
10. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).
11. 47 U.S.C. § 230(c)(1).
12. *Gentry v. Ebay, Inc.*, 121 Cal. Rptr. 2d 703, 714 (Cal. Ct. App. 2002).
13. 47 U.S.C. § 230 (c)(1) (emphasis added).
14. 47 U.S.C. § 230(f)(2).
15. See, e.g., *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003) (America Online); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (matchmaker.com); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (online newsletter); *Gentry v. Ebay*, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002) (ebay.com); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001) (amazon.com); *Weinstein v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000) (America Online); *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998) (America Online).
16. *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1065-66 (C.D. Cal. 2002).
17. *Id.*
18. 47 U.S.C. § 230 (f)(3).
19. *Gentry*, 121 Cal. Rptr. 2d at 717 (emphasis added).
20. E.g., *Weinstein.*, 206 F.3d at 986.
21. *Zeran*, 129 F.3d at 332.
22. *Id.* at 333.
23. *Carafano*, 339 F.3d at 1124 (emphasis added).
24. 333 F.3d at 1034.
25. “[A] [I]istserv...is a small program that automatically redistributes email to names on a mailing list. Users can subscribe to a mailing list by sending an e-mail note to a mailing list they learn about.” *Whatis.com at http://searchvb.techtarget.com/sDefinition/0,,sid8_gci212488,00.html* (last visited December 17, 2004).
26. *Batzel*, 333 F.3d at 1034.
27. See *id.* at 1032-33.

28. See 101 Series: Blogging, *at*

[http://h30046.www3.hp.com/news_article.php?](http://h30046.www3.hp.com/news_article.php?topiccode=20040712_76407_0_121_0_0&pagesite=SMB_LIVE_OOV®ioncode=)

[topiccode=20040712_76407_0_121_0_0&pagesite=SMB_LIVE_OOV®ioncode=](http://h30046.www3.hp.com/news_article.php?topiccode=20040712_76407_0_121_0_0&pagesite=SMB_LIVE_OOV®ioncode=)

(last visited December 17, 2004).

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