



Online Service Provider's Ownership of User Content Held Not to Eviscerate CDA Immunity

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Online service providers that claim ownership of user-generated content can breathe easier because a court recently confirmed the broad scope of immunity available under the Communications Decency Act of 1996 ("CDA"). In *Finkel v. Facebook, Inc.*, 2009 N.Y. Slip Op. 32248 (N.Y. Sup. Ct. Sept. 15, 2009), a New York state court held social-networking giant Facebook immune from defamation liability by virtue of the CDA. The court rejected plaintiff's argument that CDA immunity should not apply because Facebook's terms of service claim ownership of the content created by its users.

The CDA Immunizes Online Service Providers from Liability for Content Created by Third Parties

The "Good Samaritan Immunity" provision of the CDA, 47 U.S.C. § 230(c), grants online service providers immunity from liability for content found on, or taken down from, their networks. Immunity here is sweeping, insulating service providers—such as Facebook, Craigslist, Twitter, and others—from liability created by third-party (i.e., user) content. The statute explains 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." *Id.* The statute's grant of immunity explicitly preempts contrary state laws, such as state defamation and invasion of privacy claims. See 42 U.S.C. § 230(d)(3).

Traditionally, when content created liability in the offline world, publishers faced strict liability for the content they published, distributors faced liability under an actual knowledge standard, and common carriers faced no liability. The CDA categorized online service providers not as publishers, but as common carriers, exempting them from liability for material created by their users. As the Fourth Circuit explained in *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), "[section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise



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of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” The CDA provides immunity to service providers as long as they do not create the content at issue; nonetheless, service providers remain liable for any illegal content that they create or “cause” to be created. *Compare Chicago Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (Easterbrook, C.J.) (CDA immunity granted for illegal advertisements posted by users on defendant Craigslist's web site), *with Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. en banc 2008) (Kozinski, C.J.) (CDA immunity not granted to online service provider for user content created in response to the online service provider's leading questions, the answers to which violated the Fair Housing Act, upon the court's finding that the questions “caused” the illegal content to be created).

New York State Court Finds that Online Service Provider's Ownership of User-Created Content Does Not Factor into CDA Immunity Analysis

In *Finkel*, plaintiff Denise Finkel was a high school student who sued four of her classmates, their parents, and Facebook for defamation. Finkel's state-law claim arose out of a group page the student defendants created on Facebook, allegedly titled "90 Cents Short of a Dollar." As the court wrote in its opinion, the page “posted defamatory statements with negative sexual and medical connotations.” *Finkel*, 2009 N.Y. Slip Op. 32248, at *2. For instance, the student defendants' Facebook group page claimed that Finkel had AIDS, took intravenous drugs, and engaged in bestiality.

Although Finkel's claim seemed to fall well within the purview of CDA immunity, Finkel's attorney attempted to undercut immunity by arguing that, because Facebook's terms of service claim ownership of all of the content created by its users, CDA immunity should be unavailable. But Justice Debra A. James rejected this argument as meritless, finding that, “[o]wnership’ of content plays no role in the Act's statutory scheme. The only issue is whether the party sought to be held liable is an ‘interactive computer service[.]’ If that hurdle is surmounted the immunity granted by 42 USC [§] 230(c)(1) is triggered[, so long as] the content was provided by another party.”

Under this analysis, the court found that Facebook qualified as an interactive computer service and that plaintiff did not claim that Facebook played any role in creating the allegedly defamatory content. Thus, the court conferred CDA immunity and granted Facebook's motion to dismiss it from the action.

In some respects, Finkel's ownership argument was doomed from the start: throughout the two years during which plaintiff claimed the allegedly defamatory group page was active, from late January 2007 through plaintiff's February 2009 complaint, Facebook's terms of use never claimed actual ownership of user content. Although Facebook revised the language of these terms various times, Facebook merely claimed a nonexclusive perpetual license to user content. See, e.g., Archived Web Page of Facebook Terms of Use, http://web.archive.org/web/*/http://www.facebook.com/terms.php (last visited Nov. 3, 2009) (follow the "Feb 02, 2007," "Dec 26, 2007," and "Jul 30, 2008" hyperlinks, respectively, to compare "User Content Posted on the Site" section over time) ("By posting User Content to any part . . . of the Site, you automatically grant . . . to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate,

excerpt (in whole or in part) and distribute such User Content for any purpose . . ."). Later iterations of Facebook's terms of use expressly disavowed ownership of user content. See Archived Web Page of Facebook Terms of Use, http://web.archive.org/web/*/http://www.facebook.com/terms.php (last visited Nov. 3, 2009) (follow "Jul 30, 2008" hyperlink) ("Facebook does not assert any ownership over your User Content; rather, as between us and you, subject to the rights granted to us in these Terms, you retain full ownership of all of your User Content and any intellectual property rights or other proprietary rights associated with your User Content.").¹

Nonetheless, in spite of plaintiff's factual shortcoming, the *Finkel* court's opinion stands for the stronger proposition that, as a matter of law under the statute, an online service provider's ownership of user-generated content does not affect CDA immunity analysis. Thus, even if Facebook had claimed ownership of user content, CDA immunity would have persisted.

Conclusion

Ultimately, this ruling confirms that courts are comfortable relying on the CDA to find online service providers immune from defamation liability. Thus, web sites that qualify as online service providers may afford users free rein to publish content without the need to police that content for defamatory speech. Nonetheless, plaintiffs will seek out deep-pocketed defendants and try to craft legal arguments to remove the CDA's shield. Online service providers must remain cognizant of the boundaries of CDA protection when designing interactive web sites and soliciting user content. Consulting with their attorneys to ensure that the CDA's valuable immunity is available remains the most prudent course.

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¹ Facebook's current terms of service go even further to disclaim ownership of user content, telling users: "You own all of the content and information you post on Facebook. . . ." Facebook Statement of Rights and Responsibilities, <http://www.facebook.com/terms.php?ref=pf> (last visited Nov. 3, 2009). Nonetheless, Facebook maintains that users grant Facebook "a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook". *Id.*