RECENT DEVELOPMENTS IN MEDIA, PRIVACY, DEFAMATION, AND ADVERTISING LAW

INTERNET LAW

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A. *Protection for Anonymous Online Speech*

In civil cases, anonymous online speakers gained more protection from unmasking efforts this year than in most years. The most remarkable decision in this area of law was issued by the Sixth Circuit. The court carved a new path for anonymous speakers seeking to remain anonymous even in the wake of a civil judgment being entered against them on the basis of their speech. *Signature Management Team, LLC v. Doe* concerned a copyright infringement case brought by a multi-level marketing company against an anonymous blogger who had criticized the company and, in connection with that criticism, posted online an entire copy of the company's copyrighted book.[46] The district court required the blogger to disclose his identity to the court and to the plaintiff's attorneys early in the litigation. After obtaining a judgment against the blogger and an injunction ordering him to destroy all copies of the book, the plaintiff requested the blogger's identity, but the court refused.

42. Franchise Tax Bd. of State of Ca. v. Hyatt, 407 P.3d 717, 734 (Nev. 2017), *cert. granted sub nom.* Franchise Tax Bd. of Ca. v. Hyatt, 138 S. Ct. 2710 (2018).
43. *Id.*
44. Doe v. HarperCollins Publishers, LLC, 17-CV-3688, 2018 WL 1174394, at *1 (N.D. Ill. Mar. 6, 2018).
45. *Id.* at *5.
46. 876 F.3d 831 (6th Cir. 2017).

On appeal the Sixth Circuit, invoking the "presumption of open judicial records," observed that there is "a presumption in favor of unmasking anonymous defendants when judgment has been entered for a plaintiff."[47] But the court held that this presumption could be overcome and set forth in detail the various factors courts should consider in making that determination.[48] On remand, the district court held that the presumption of openness had been overcome and permitted the speaker to remain anonymous.[49] The court was influenced by the facts that the infringement led to "insignificant" loss, the blogger regularly provided commentary on a public issue (i.e., the validity of multi-level marketing schemes), the blogger proffered credible evidence that unmasking him would chill his speech, the blogger had "acted in good faith and without malicious intent throughout [the] litigation," and the blogger had already complied with the relief ultimately ordered before the litigation had even begun.[50] Like the courts in *Signature Management Team*, other courts issued decisions this year rejecting vigorous efforts by banks and other corporations to unmask their anonymous critics.[51]

B. *Personal Jurisdiction Premised on Online Publication*

Evolving communications technologies have continued to confront courts with new challenges to determine under what circumstances a speaker may be subject to personal jurisdiction outside of his or her home forum. Recently, two federal courts of appeals held that where the plaintiff cannot show that anyone in the forum state actually received the challenged publication, personal jurisdiction over the speaker was lacking.

The ability to determine which users have accessed digital content benefitted the defendant in a First Circuit case involving a subscription-based financial news provider.[52] The plaintiffs in *Scottsdale Capital Advisors Corp. v. The Deal, LLC* claimed that three articles the defendant made available to its subscribers defamed them by asserting they were under investigation by law enforcement and securities authorities.[53] Although none of the parties had a connection to New Hampshire, plaintiffs filed suit there, relying on the fact that Dartmouth College had an institutional subscription to

47. *Id.* at 837.
48. *Id.* at 837–38.
49. 2018 WL 3997373 (E.D. Mich. Aug. 21, 2018).
50. *Id.* at *2–4.
51. *See, e.g.*, Doe v. Mahoney, 418 P.3d 1013 (Ariz. Ct. App. 2018); MiMedx Grp., Inc. v. Sparrow Fund Mgmt. LP, No. 17CV07568PGGKHP, 2018 WL 847014 (S.D.N.Y. Jan. 12, 2018), *report and recommendation adopted*, No. 17 CIV. 7568 (PGG), 2018 WL 4735717 (S.D.N.Y. Sep. 29, 2018).
52. Scottsdale Capital Advisors Corp. v. The Deal, LLC, 887 F.3d 17 (1st Cir. 2018).
53. *Id.* at 18–19.

The Deal.[54] Jurisdictional discovery revealed that no one at Dartmouth had accessed any of the challenged articles.[55] Two people at Dartmouth had subscribed to The Deal's emailed newsletter, and analysis showed neither had opened two of the three relevant newsletters.[56] Without any indication that anyone read the articles, there was no personal jurisdiction because the publication element of defamation did not occur in New Hampshire.[57] And though there was no way to tell if either user had opened the third newsletter; the court held that the number of recipients was "too small to generate on its own a reasonable assumption that at least one recipient must have opened the attachment."[58]

The Eleventh Circuit came to a similar conclusion in *Catalyst Pharmaceuticals, Inc. v. Fullerton*.[59] There, the Florida-based plaintiff sued a Texas resident over posts he made about the company to a Yahoo! Finance page.[60] Florida law allows for jurisdiction over an out-of-state defamation defendant where the challenged publication was accessed in Florida.[61] Catalyst submitted affidavits from its counsel and three shareholders testifying that they had accessed the posts in Florida.[62] Those were insufficient to make a prima facie showing of personal jurisdiction at the pleading stage, the Eleventh Circuit panel said, because defamation requires publication to a third party, not an owner or agent of the plaintiff corporation.[63]

Other courts have frequently interpreted the Supreme Court's jurisdictional jurisprudence—particularly *Walden v. Fiore*[64]—far more narrowly. For example, a court in the Eastern District of Tennessee held that it did not have personal jurisdiction over a South Carolina resident who made Facebook posts critical of a Tennessee resident who headed a company that owned a South Carolina golf course, because commentary about the golf course was aimed at South Carolina, not Tennessee.[65]

Another jurisdictional wrinkle is the question of whether linking to content that is aimed at the forum state is sufficient to confer jurisdiction over the person who posted the link. Two federal courts held that the answer to that question is "no." In *Marfione v. KAI U.S.A., Ltd.*,[66] a court in the Western District of Pennsylvania held that it did not have jurisdiction

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 21.
58. *Id.* at 22.
59. 748 F. App'x 944 (11th Cir. 2018).
60. *Id.* at *1.
61. *Id.* at *2.
62. *Id.* at *2–3.
63. *Id.*
64. 571 U.S. 277 (2014).
65. *Kent v. Hennelly*, 328 F. Supp. 3d 791, 799 (E.D. Tenn. 2018).
66. Civil Action No. 17-70, 2018 WL 1519042 (W.D. Pa. Mar. 28, 2018).

over an Oregon resident who made an Instagram post linking to a third party's article about the plaintiff corporation.[67] Because the post was available worldwide and did not mention Pennsylvania or any other forum, the court held that it did not target Pennsylvania residents and therefore jurisdiction there did not exist.[68] Likewise, a federal court in Minnesota held that tweets and Facebook posts linking to an allegedly defamatory article about a Minnesota resident did not confer personal jurisdiction over the out-of-state defendant.[69] The court held that "if the use of a Facebook page or Twitter handle was sufficient to confer personal jurisdiction, a defendant could be haled into court in any state."[70]

C. *Section 230 Immunity for Intermediaries*

2018 saw an upturn in the trajectory of recent judicial precedents applying Section 230 of the Communications Decency Act of 1996. In a case that was watched closely over the past two years, California's Supreme Court, in July 2018, reversed the Court of Appeals' ruling in *Hassell v. Bird*[71] and held that Section 230 barred the trial court's order commanding consumer review website Yelp to remove third party content that was held (by default judgment) to be false and defamatory.

The ruling was widely celebrated by the internet community, which had previously feared the prospect of other crafty libel plaintiffs following Dawn Hassell's game plan (her counsel conceded they had not named Yelp as a defendant because they feared it would invoke Section 230 immunity).[72]

Two significant developments in the law of Section 230 occurred in the legislative domain. First, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA") was passed into law in April 2018, to address the scourge of online advertising of sexual escort services,

67. *Id.* at *4–5.

68. *Id.*

69. Higgins v. Save Our Heroes, Civil No. 18–42(DSD/BRT), 2018 WL 2208319, at *3 (D. Minn. May 14, 2018).

70. *Id.*

71. 420 P.3d 776 (Cal. 2018).

72. A couple of decisions in 2018 applied the traditional expansive view of Section 230 immunity to Internet intermediaries. *See* Bennett v. Google, LLC, 882 F.3d 1163 (D.C. Cir. 2018) (Google's Blogger service immune from plaintiff's claim that the blogging platform facilitated the preparation of a third party's defamatory blog posting, notwithstanding that the blog post complied with Google's "Blogger Content Policy"); Twitter, Inc. v. Super. Ct. ex rel Taylor, Case No. A154973 (Cal. Ct. App. Aug. 17, 2018) (Section 230 protects Twitter from claims of a white supremacist whose account was permanently suspended under Twitter's policy barring "violent extremist groups"). *But see* HomeAway, Inc. v. City of Santa Monica, Case Nos. 2:16-cv-06641-ODW (AFM), 2:16-cv-06645-ODW (AFM), 2018 WL 1281772 (C.D. Cal. Mar. 9, 2018) (denying preliminary injunction against city ordinance that websites from offering rentals not listed on the City's registry), *appeal pending* (Ninth Circuit No. 18-55367); the district court case was subsequently dismissed, 2018 WL 3013245 (C.D. Cal. June 14, 2018).

embodied in the (former) website Backpages.com. That law specifically removed from Section 230's immunity websites that promote or facilitate child sex-trafficking or prostitution. Second, in October 2018, the United States-Mexico-Canada Agreement ("USMCA"), which President Trump heralded as "NAFTA's replacement," extends to internet intermediaries immunity mirroring that of Section 230 to Canada and Mexico. If the Senate approves that new treaty, it will export our country's protective view of Section 230 to our neighbors to the North and South.

D. *The Single Publication Rule Applied to Online Speech*

In May, 2018, New Jersey's Supreme Court applied the single publication rule to an internet publication, and set forth a substantive test to determine whether modification of a prior posting constitutes a new publication, which triggers a new statute of limitations. In *Petro-Lubricant Testing Labs, Inc. v. Adelman*,[73] the defendant posted an article, in August 2010, summarizing a gender discrimination, workplace harassment, and retaliation lawsuit that had been filed against the testing lab company. More than a year later, the company complained about the posting and the defendant made some "minor modifications" to it. The company sued based on the modified article, and the defendant sought to dismiss on grounds that the claim was time barred, and the modified article accurately summarized the allegations in the filed civil case against the company.

The trial court ruled that the modifications the defendant made to the article in December 2011 rendered the revised article a new publication within the statute of limitation. However, because the modified article was a fair report of the filed lawsuit, the plaintiff's claims were dismissed. New Jersey's Appellate Division reversed the trial court's finding that the modifications made in December 2011 rendered the revised article a new publication and therefore affirmed the trial court's dismissal on that ground alone, without reaching the fair report privilege issue.

On review, New Jersey's Supreme Court held that the single publication rule applies to internet publications.[74] The court held that "a material and substantive change" to the article's defamatory content will constitute a new publication triggering a new statute of limitations.[75] The court held that there was a genuine issue of material fact whether one of the modifications to the article—changing the allegation that the company's co-owner "allegedly forced workers to listen to and read white supremacist materials" to the allegation that he "regularly subjected his employees to 'anti-religion, anti-minority, anti-Jewish, anti-[C]atholic, and anti-gay rants'"—was

73. 184 A.3d 457 (N.J. 2018).
74. 184 A.3d at 467.
75. 184 A.3d at 468–69.

sufficiently material to constitute a new publication. However, because the court found that the modified article was a fair report of the filed civil complaint, the court affirmed the trial court's dismissal of the lawsuit.

E. *Defamation in Social Media (a/k/a Twibel)*

As the number of defamation actions involving social media postings has continued to increase, courts have continued to wrestle with questions about how—or whether—comments on platforms such as Twitter or Facebook should be treated differently from traditional print, broadcast, or spoken defamation. Although most courts have applied traditional principles of defamation law in the social media context, some judges have found difficulties in applying longstanding legal standards to this relatively new medium.

For example, a federal court in the Southern District of Ohio struggled with the question of how to determine the proper context in evaluating whether an allegedly defamatory tweet should be considered a statement of fact or an expression of opinion.[76] *Boulger v. Woods* involved a retweet by actor James Woods of a post juxtaposing a photograph of a Bernie Sanders supporter with a photograph of a woman giving a Nazi-like salute at a Donald Trump rally, and commenting, "So-called #Trump 'Nazi' is a #BernieSanders agitator/operative?"[77] As it turned out, the plaintiff was not the woman at the Trump rally, and she sued the conservative actor for defamation.[78] In analyzing whether the tweet would be considered a statement of fact, the court noted that "the nature of a 'tweet' is fundamentally different from a statement appearing in the context of a longer written work" and found it difficult to determine whether the proper context was simply the tweet itself, Woods' Twitter feed as a whole, or "the entire Twitter social media platform."[79] Because each Twitter account "is unique in tone and content," the court said, "a reader cannot tell anything about whether a particular Twitter account is likely to contain reporting on facts, versus personal opinion or rhetorical questions, from the mere fact that the author uses . . . Twitter as his or her preferred communication medium."[80] The court eventually held that while it could not determine what the proper context would be, the question was moot—the tweet was not actionable because reasonable readers could interpret it as a question rather than an assertion of fact.[81]

76. Boulger v. Woods, 306 F. Supp. 3d 985, 1002–03 (S.D. Ohio 2018).
77. *Id.* at 990.
78. *Id.*
79. *Id.* at 1002–03.
80. *Id.* at 1003.
81. *Id.* at 1004.

A California appellate panel confronted a similar question of context in an unpublished opinion involving videos and comments posted on YouTube.[82] In *Nelson v. Superior Court*, the plaintiff sued over videos posted to You Tube and statements made in the platform's comment sections denigrating him and his company's vegan food products.[83] One of the defendants argued that her video was satiric commentary on a different user's video about the plaintiff's products, thus rendering it nonactionable opinion.[84] The court rejected that argument: "The context of [the defendant's] video may include other statements [the defendant] makes *in the same video*; it does not include the statements [a third person] allegedly made in a different video on a different You Tube channel."[85] Although the unpublished opinion cannot be cited as precedent in California courts, it illustrates a contextual analysis that other courts may find persuasive.

In contrast, a New York appellate court considered an allegedly defamatory Facebook post in the context of other posts on the same Facebook page in affirming a trial court's ruling that the post was nonactionable opinion rather than verifiable fact.[86] The defendant had made a series of comments critical of the owner of a building next to the defendant's home, including one that the owner had "lied" about his plans to redevelop the property.[87] The court held that "[a]lthough one could sift through the series of posts, including the challenged one, and argue that the author made false factual assertions, viewing the entire series of posts as a whole, as we must, we conclude that the posts constituted an expression of protected opinion."[88]

Unsurprisingly, President Trump has been embroiled in several significant cases involving allegations of defamation via Twitter. In the most recent cases, courts in New York split over whether his tweets should be considered expressions of fact or opinion. In *Jacobus v. Trump*, a New York appellate court affirmed a trial court ruling dismissing a lawsuit against the president on the grounds that his tweets would not be considered statements of fact.[89] The plaintiff, a Republican political consultant, sued over Trump's tweets calling her a "dummy" who had unsuccessfully "begged" his campaign for a job (she said she decided not to pursue possible employment with the Trump camp).[90] On the other hand, a state trial court denied Trump's motion to dismiss a defamation lawsuit by a woman who accused

82. Nelson v. Superior Court, No. B283743, 2018 WL 1061575, at *7 (Cal. Ct. App. Feb. 27, 2018), *as modified on denial of reh'g*, Mar. 27, 2018 (unpublished and nonprecedential).
83. *Id.* at *1.
84. *Id.* at *7.
85. *Id.*
86. Stolatis v. Hernandez, 77 N.Y.S.3d 473, 476–77 (App. Div. 2018).
87. *Id.*
88. *Id.*
89. Jacobus v. Trump, 64 N.Y.S.3d 889, 889 (App. Div. 2017), *leave to appeal denied*, 102 N.E.3d 431 (2018).
90. *Id.*

Trump of sexual harassment.[91] The court held that Trump's tweets asserting that Summer Zervos had made "100% fabricated and made up charges" against him asserted verifiable facts rather than opinions.[92] The New York Court of Appeals summarily dismissed Trump's appeal on its own motion.[93]

91. Zervos v. Trump, 74 N.Y.S.3d 442, 445–46 (Sup. Ct. 2018).
92. *Id.*
93. Zervos v. Trump, 105 N.E.3d 354 (N.Y. 2018).