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Balancing the Risks and Rewards of User Generated Content

USER GENERATED CONTENT

As businesses increase their efforts to monetize user-generated content, they risk losing the protections granted under Section 230 of the Communications Decency Act, a federal statute that shields online publishers from liability for third-party content. Attorneys from Garvey Schubert Barer analyze a Ninth Circuit decision which they say raises questions about the line between website hosts that merely edit content and those that adapt or develop content.



BY JOHN CROSETTO AND CHIKE EZE

John Crosetto is a litigator with experience representing clients with disputes over trademarks, trade dress, licensing, trade secrets and non-competition agreements. John has a varied clientele that includes software and hardware companies, equipment manufacturers, video game companies, and creative firms. He can be reached at jcrosetto@gsblaw.com.

Chike Eze is an associate in the Intellectual Property Practice at Garvey Schubert Barer in Seattle. He engages in a broad range of intellectual property matters for clients, including copyright, trademark, technology licensing and IP agreements. Chike can be reached at ceze@gsblaw.com.

Web sites leveraging user-generated content, such as consumer review sites, social networking sites, blogs, or collaborative wikis, may take comfort in the recent Ninth Circuit decision finding Yelp not liable for negative reviews posted on its site. See *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 9th Cir., 9/12/16. But, there is an argument to be made that the protections afforded under Section 230 of the Communications Decency Act (“CDA”) are wearing thin as websites make increasingly creative efforts to profit from user-generated content. As businesses look for more ways to collect and leverage consumer reviews, posts, and comments, the farther they may slip outside the protective umbrella afforded by Section 230 to “passive hosts” of user-generated content.

About CDA Section 230

Section 230 was designed to protect online freedom of expression by creating a safe harbor for websites that provide virtual shared workspaces or bulletin boards for users to contribute content: “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.” 47 U.S.C. § 230(c)(1) (1998). In other words, if a host can point the finger at someone else as the creator of the website’s content, it escapes liability for the libelous, defamatory, or otherwise unlawful statements it posts.

Section 230 even lets a website host tinker with user-generated content to the extent that the host does not become the creator of the content. But if a host modifies, comments on, or solicits certain user content, it

may be deemed the creator of that content. Section 230 essentially draws a line between mere “editors,” who are generally protected, and “authors,” who are not. It is this line between “editors” and “authors” that is becoming harder to discern.

Key Court Cases on Section 230

In the seminal case of *Fair Housing Council of San Fernando Valley, et al v. Roommates.com, LLC*, the Ninth Circuit found that Roommates.com fell outside the scope of Section 230’s protection because it did not simply post content provided by users. Roommates.com was deemed an “information content provider” rather than an “interactive computer service” because the user-generated content was provided in response to certain questions Roommates.com solicited from its subscribers.

Granted, Roommates.com was asking subscribers questions during the registration process that were illegal under the Fair Housing Act, such as marital status and sexual orientation, but the salient point is that Roommates.com’s “development” of user content was sufficient to strip it of Section 230’s protections, despite the fact that the answers ultimately displayed on Roommates.com’s site were those of the users. As the Ninth Circuit put it:

[B]y providing a limited set of pre-populated answers, [Roommates.com] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not ‘creat[e] or develop[]’ the information “in whole or in part.”

Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008).

According to the court, if a website host invites or induces user content that is ultimately deemed unlawful (e.g., libelous, defamatory, or violating privacy or IP rights), the host may be deemed to have “contributed materially to the alleged illegality of the conduct” to the extent it “develops” that user content. Because of its material contribution to the unlawful content, the website host is deemed a co-author of the unlawful content rather than a mere editor of the content.

Similarly, the District Court of Utah denied Section 230 immunity for a defendant accused of posting defamatory content about the plaintiff’s private boarding school in Utah because the defendant included summaries and commentary of third-party content. See *Diamond Ranch Academy, Inc. v. Filer*, D. Utah, No. 2:14-CV-751-TC, 2/17/16. The court found that the defendant’s summaries of third-party complaints about the school “[did] not lead a person to believe that she [was] quoting a third party.” Instead, the defendant had used the statements of others to create her own comments.

The court pointed to three critical facts in ruling that Section 230 does not protect the defendant. First, as in *Roommates.com*, the court noted that the defendant elicited responses from third parties through surveys that “contained specific questions to gather information about specific issues.” Second, the defendant seemingly selected only negative user feedback for publication and discarded others. Third, the defendant adopted the selected negative feedback and “used them to create her comments on the website.”

Roommates.com and *Diamond Ranch* show that pointed survey questions that yield defamatory statements can strip a defendant of Section 230 protection (especially if added to or commented upon). But, notably, creating a list of “2011 Dirtiest Hotels,” for example, based on survey responses and accompanied by traveler quotes such as “They have dead roaches all over the hotel,” enjoys Section 230 protection because it is user-generated content. See

Seaton v. TripAdvisor LLC, 728 F.3d 592, 599 n.8 (6th Cir. 2013). The key to TripAdvisor’s successful defense in *Seaton* was that it merely provided a platform for posting reviews, and even though it aggregated that information and gave it a title, it still enjoyed Section 230 protections.

The Ninth Circuit’s *Kimzey v. Yelp* Decision

In this context, the Ninth Circuit’s recent (Sept. 12) decision in *Kimzey v. Yelp* was hardly earthshattering. But the court’s characterization of what exactly Yelp is doing with user-generated content raises questions about the line between mere passive hosts of user-generated content and hosts that adapt or develop such content to the point of becoming the creator or author of such content.

Kimzey sued Yelp on the basis of a negative review of his locksmith business. As noted by the court, Kimzey attempted to plead around the CDA by alleging, among other things, that Yelp provided “a star-rating function that transforms user reviews into Yelp’s own content.” The court affirmed the dismissal of Kimzey’s complaint, which was based on Kimzey’s theory that Yelp was the “author” of the one-star rating, and that Yelp’s use of the statements on Google were “newly developed advertisements” sufficient to qualify Yelp as the actual author of the new iteration of the content.

The court acknowledged that the theory had “superficial appeal” but ultimately found that it stretched the definition of “information content provider” too far. Kimzey may have done well to point out that when the shoe is on the other foot, Yelp makes crystal clear to its users that the website owns “Yelp Content,” which includes its “compilation of User Content and other Site Content, computer code, [and] aggregate user review ratings. . . .” (See Yelp’s terms of service). Further, Yelp asserts that it owns the copyright in Yelp Content just as any other author of a work: “As such, you may not modify, reproduce, distribute, create derivative works or adaptations of, publicly display or in any way exploit any of the Yelp Content in whole or in part except as expressly authorized by us.” (See Yelp’s terms of service). TripAdvisor similarly asserts copyright ownership of all content on its website: “All contents of this Website are: ©2016 TripAdvisor LLC.” See TripAdvisor’s terms). This raises the question whether Section 230 immunity should apply where the passive host asserts ownership rights in the user-generated content at issue.

Key Takeaways

There is a thin line between website hosts that merely edit content (passive hosts) and hosts that contribute to or further develop original content to the point that they

become authors of the edited content. The cases discussed in this article do not clearly delineate between the two, however, we can glean some general guidelines for website hosts to avoid the “author” label:

- Avoid soliciting and posting user feedback from questionnaires or surveys asking users to provide specific information about their negative opinion of a third party;
- Avoid soliciting user responses to discriminatory (illegal) questions where the website host also provides a limited choice of answers to the users;
- Avoid excessive editorializing or editing of potentially defamatory user-generated content and posting such modified content;
- Avoid encouraging users to post defamatory content, for example, by using a website name that in and of itself encourages posting of only potentially defama-

tory content and adding comments to users’ potentially defamatory content on such website.

Conclusion

There are certainly advantages to businesses hosting and owning user-generated content, including higher conversion rates from organic traffic and higher rankings from search engine optimization (SEO) efforts, but it raises questions regarding their responsibility for the content. Yelp and other review sites have had their share of litigation arising from user reviews, and so far Section 230 has provided sufficient shelter. However, other website hosts, like Roommates.com, deemed to create or author the content have not enjoyed Section 230 immunity. Indeed, as opportunities to monetize user-generated content expand, so might the exposure to liability as hosts fall outside the scope of Section 230’s protections.