Six Months after New York Spoke on Defamation Immunity for Online Service Providers, Analysis & Thoughts

By Lauren Mack & Kaiser Wahab

The New York Court of Appeals, New York's highest court, handed down an opinion this June that was a big win for online service providers in one of the Union's most populous and critical states. The Court of Appeal's first decision involving Section 230 of the Communications Decency Act (47 U.S.C. §230), (following nearly a decade of case law on this statutory provision in other jurisdictions) *Christakis Shiamili & c., v. The Real Estate Group of New York, Inc. et al.*, found that The Real Estate Group of New York ("TREGNY") was still protected from liability by Section 230, even after it had promoted a user's comment to its own stand-alone post and added a new heading, subheading, preface, and image with caption.

Analysis:

Background

The plaintiff, Christakis Shiamili, is the CEO and founder of Ardor Realty Corp., an apartment rental and sales company operating in New York City. TREGNY, the defendant in the case, is a competitor of Ardor in the New York City rental market and hosts a blog on its website dedicated to covering the New York City real estate industry. An anonymous user, operating under the name "Ardor Realty Sucks," posted a comment to TREGNY's blog that suggested Shiamili mistreated his employees and was racist and anti-Semitic.

TREGNY took the lengthy comment and moved it to its own stand-alone post. To this new post, TREGNY added the heading "Ardor Realty and Those People," the sub-heading "and now it's time for your weekly dose of hate, brought to you unedited, once again, by 'Ardor Realty Sucks'. and for the record, we are so. not. afraid.," and prefaced the comment with "the following story came to us as a … comment, and we promoted it to a post." TREGNY also added a depiction of Jesus Christ with Shiamili's face and the caption, "Chris Shiamili: King of the Token Jews." This post sparked further anonymous comments, including ones that suggested Shiamili abused his wife and that Ardor was in financial trouble.

After commenting on the thread himself, Shiamili asked TREGNY to take down the allegedly defamatory statements. TREGNY refused, and Shiamili then sued TREGNY, its COO Daniel Baum, and the COO's assistant Ryan McCann who was operating the website, claiming defamation and unfair competition by disparagement.

The New York Supreme Court denied TREGNY's motion to dismiss for failure to state a claim because discovery was necessary to uncover more information to determine the "defendants' role, if any, in authoring or developing the content of the website." The Appellate Division unanimously reversed and dismissed the complaint on the basis that it did not allege that TREGNY authored the defamatory statements and that Section 230 of the Communications Decency Act "***protects website operators from liability derived from the exercise of a publisher's traditional editorial functions***."

The Opinion

The Court of Appeals affirmed the Appellate Division in a 4-3 decision, explaining that Section 230 provides 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." A defendant is immune from liability if it is "(1) a 'provider or user of an interactive computer service'; (2) the complaint seeks to hold the defendant liable as a 'publisher or speaker'; and (3) the action is based on 'information provided by another information content provider.'" The Court of Appeals also quoted seminal Section 230 case *Zeran v. America Online, Inc.*, which found "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."

Turning to an analysis of the case at hand, the court found that the action sought to treat TREGNY as the publisher or speaker of information provided by another content provider because the complaint did not allege that TREGNY authored the defamatory content, only that it published and edited it. Analysis of Section 230 from other courts made it clear that TREGNY could not be held liable for reposting content provided by another because it is within "a publisher's traditional editorial functions." Critically, the court found that *even though TREGNY did write the heading, sub-heading, introduction, and image caption, those portions of the post were not defamatory as a matter of law*. The court also rejected Shiamili's argument that TREGNY was a content provider because it implicitly encouraged users to write negative comments on the grounds that the ability to create a forum for others to post negative commentary was precisely what Section 230 was meant to protect.

Shiamili urged the court to adopt the Ninth Circuit's broader view of what constitutes "development" of third party content by an online service provider. In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the Ninth Circuit held that Roommates.com was not protected by Section 230 because it had contributed "materially to the alleged illegality of the conduct." The Court of Appeals declined to consider this view because that even under the Ninth Circuit's narrower analysis, Section 230 still shielded TREGNY.

A Note on the Dissent's Arguments

The three dissenting judges accepted that reposting the comment could be considered within the traditional editorial functions of a publisher, but felt that a reasonable reader could have believed the content of the post after seeing the headings, image, and caption that TREGNY had added. This, the dissent argues, should be considered a material contribution to "the alleged illegality of the conduct" and deprive TREGNY of Section 230's shield. To them this was not the conduct of a passive conduit, especially in light of the competition between TREGNY and Ardor.

The Future

This case signals that New York courts will take a very broad approach when it comes to future Section 230 cases and may outright dismiss claims when the site operator has exercised traditional editorial functions on the third party content. But recent discussion around other laws pertaining to the Internet may signal a change of tone in the future (perhaps even a massive shift in the philosophy that governed

early Internet legislation). For example, one of the cornerstone Internet statutes, the Digital Millennium Copyright Act's safe harbor provision ("DMCA"), which has for fifteen years protected online service providers from copyright infringement committed by users under certain conditions, faces a severe reversal of fortunes if pending legislation is signed into law. Though having enjoyed broadly beneficial interpretations for online service providers (see the *YouTube* and *MP3Tunes* cases), legislation introduced this year – the PROTECT IP Act in the Senate and the Stop Online Piracy Act ("SOPA") in the House – threaten to greatly weaken and possibly negate the DMCA's protection.

Could we see a similar legislative curtailing of Section 230 in the future? It is unlikely to happen on its own, as the victims of speech constituting defamation and other torts shielded by Section 230 generally do not have the enormous lobbying power of large media companies. Our own firm penned a Journal Note in the Cardozo Arts & Entertainment Law Journal about applying DMCA frameworks to defamation (DOES LIABILITY ENHANCE CREDIBILITY?: LESSONS FROM THE DMCA APPLIED TO ONLINE DEFAMATION). However, if legislation similar to PROTECT IP and SOPA does become law, there is the potential for it to shift the norms and expectations of what responsibilities belong to online service providers to the point where the courts, legislature, or both may determine that online service providers should held responsible for the speech of their users as well.

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