

Privacy

COMMENTARY

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Net-Venting: Should a Server or a Speaker Face Civil Liability for Spite Speech on the World Wide Web?

By David A. Furlow, Esq.

Fyodor Dostoevsky began his "Notes from the Underground" with a memorable confession: "I am a spiteful man. I am an unattractive man. I think there is something wrong with my liver."

If Dostoevsky were alive today, he, a spiteful man, would find the Internet a wonderful place to work, play and vent his spleen. Often these days, a spiteful man will use the World Wide Web to hassle, harangue, and belittle others, frequently through the cover of "John Doe" anonymity.

Should a Web server be responsible for the nasty vengefulness of those who post mean-spirited diatribes on a blog, or does the Communications Decency Act immunize that server from liability? Does the First Amendment protect Dostoevsky's spiteful man when he becomes a spiteful blogger?

The Blogosphere or "World Live Web" facilitates spite speech along with countless forms of useful and interesting expression as it continues its explosive growth. Technorati, the search engine of the World Live Web, reported tracking nearly 93 million blogs and 250 million pieces of tagged social media July 19.¹

According to Technorati, more than 175,000 new blogs appear daily. Blogger updates occur in more than 1.6 million posts per day, or more than 18 updates a second.

Spite Speech About Matters That Clearly Affect the Public

"Spite speech" often serves journalism's traditional purposes by revealing hypocrisy, exposing leaders' foibles, and broadening the exchange of important political,

social and cultural ideas with a zing reminiscent of Jonathan Swift's sharpest satire.

University of Tennessee Law School Professor Glenn H. Reynolds' *Instapundit* blog spiked then-Senate Majority Leader Trent Lott's career by widely publicizing his Dec. 5, 2002, toast to Sen. Strom Thurmond's segregationist, Dixiecrat career:

When Strom Thurmond ran for president, we voted for him ... and if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years, either.²

That blog posting publicized a story that traditional media sources had largely ignored. It made millions of voters aware of Lott's interesting view of Southern history, embarrassed other Republican leaders and resulted in Bill Frist becoming the Republicans' new leader in the Senate.

Conservative bloggers soon gleefully joined the fray by hoisting CBS anchorman Dan Rather by his own journalistic petard. During fall 2000 they dethroned Rather and embarrassed CBS by exposing the network's failure to adhere to its own journalistic standards in its coverage of President Bush's National Guard service.³

Journalists, writers and politicians use blogs to interact with readers, voters and decision-makers and often to take well-aimed jabs at political parties, sacred cows, rivals, former colleagues and other targets of opportunity.

Attorneys increasingly use law blogs, or blawgs, to communicate with colleagues, the public and potential clients. Those Web sites often mix spite, satire and sound legal

reasoning in their critiques of past and pending cases, analyses of rules and regulations that affect the legal profession, and observations about prominent judges.⁴

Spite Speech of a More Personal Nature: Bad Drivers, Cat-Callers and Lousy Lovers

But most of the time, spite speech concerns less important, more personal issues. In a Jan. 23 article, Florida Times-Union reporter Rachel Davis described how one driver, Mark Buckman, converted his road rage to Web venom by creating the Web site PlateWire.com.⁵ The site gives John Q. Motorist an opportunity to get back at the arrogant fool who braked too fast, failed to use a turn signal or nearly sideswiped his car on the way to work.

Poor, victimized John Q. can jot down the miscreant's license plate, go to work, log onto PlateWire.com, type the offender's plate number into a replica of his home state's license plate, and describe the idiot's outrageous ignorance of the rules of the road for all the world to see. It's payback time! And there's less danger of hearing the bad guy's Colt .45 barking a savage reply to an uplifted finger.

Buckman and co-creator Luke Sevenski view their creation as a deterrent to highway discourtesy and a remedy to reckless driving. They accomplish these goals by identifying bad drivers' license plates and giving them the labels "Maniac," "Jerk on the Phone" and the like.⁶

Washington Post reporter Eric M. Weiss quoted Buckman as saying, "We are a society driven by fear — the fear of being ostracized."⁷ Indeed, according to the Times-Union's Davis, one blog poster with the *nom de Web* Abe Froman said, "I even find myself being more cautious on the way home because I don't want to look like a dumb ass with my license plate up for the world to see my idiocy."

A July 19 visit to PlateWire.com revealed a smattering of complaints about drivers identified through crisp color images of their license plates.

One such posting, a bright-blue New York license plate, identified the plate's owner by make and model of his car (black Jaguar), the date of offense (July 19, 2007) and the place of his moving violation (Chili, New York). The posting was titled, "Trying to blow us up?" It contained the following anonymous complaint:

That sign that says, "Turn Off Engine While Refueling" ... yeah, that applies to you too. I don't care how special you think you are. It amazes me that you left your engine running with your child in the backseat. Do you think the sign is just there

for decoration? Oh, and that whole law about not talking on your cell phone while driving ... and the somewhat more important law about wearing your seatbelt ... those apply to you too. *Idiot.*

That'll teach Mr. Jaguar Driver.

In another incident, Davis contacted Hawthorne, Fla., resident Kelly Burton and confirmed that his driving record was in good standing. He told her of his surprise that his license plate appeared under the post "Idiot Driver" in September. "I don't know how I got on there, but I guess I did," Burton told Davis, and questioned whether the posting of the complaint violated his privacy.

In a May 31 article, Chicago Tribune journalist Tracy Swartz discussed a similar Web site, aboveaveragedriver.com, as an example of "cyber snitching."⁸ She described Chris Beggs as running the site "devoted to ratting out road hogs nationwide and overseas." Like PlateWire.com, Beggs' site registers offenders by license plates and plasters their alleged offenses across the Blogosphere.

There also are a number of "hollaback" Web sites that provide opportunities for women in Chicago, New York and other cities to "holler back" at men who whistle, catcall, ogle and simply stare too long by posting camera-phone photographs of them.

The New York hollaback Web site explains that it empowers New Yorkers to holler back at street harassers, whether they're "commuting, lunching, partying, dancing, walking, chilling, drinking or sunning."

It explains to potential posters that they "have the right to feel safe, confident and sexy without being the object of some turd's fantasy, so stop walkin' on and holla back: send us some pictures of street harassers!"

A recent posting under the heading "Not Subtle Enough" is typical of what appears on the site:

So I walk into my local Staples in Brooklyn. As I walk past the copy area this balding perv looks at me and follows with head and eyeballs every step I make. I say ... "well that wasn't subtle enough."

I get what I need but as I'm looking it over he has the nerve to throw this weak comeback, "if you didn't want to be stared at you shouldn't go outside." No, jerk.

There's a difference between a glance and visually harassing and undressing someone with your eyes. He then kept standing there, saying he wasn't doing anything wrong and gesturing to the copy center.

I said I was going to report him, and he [says], "how?" The power of Blackberry my friend. That's how.

Women don't like to be harassed and leered at. When will these pervs get that?

The Chicago Web site tells users, "Just 'cause this is Beeftown, it doesn't make you a piece of meat."

The posting of license plates, driving complaints and catcall alerts pales by comparison with the vitriol on dontdatehimgirl.com.⁹ The site offers a free, global, online public forum where women can get helpful tips on romance, issue a "credit report" on men, share bad dating experiences, warn other women of men allegedly suffering from herpes and HIV, and determine if they are dating a married man engaging in extramarital activities.

The terms "jerk," "psycho" and worse often appear on the site, which remains open to a posting by anyone with an e-mail address and accepts postings from members without review or editing. One of the least controversial anonymous postings on the site from July 20 reads as follows:

I suspected that my boyfriend of two years was cheating on me, but I didn't really have any concrete evidence, so I decided to take matters into my own hands and go out and get some. A girlfriend of mine from California was due to visit me. She'd never met my boyfriend. I asked her to pose as a woman at a Starbucks next to our house that he goes to all the time.

She started talking to him there, and sure enough it only took two minutes for him to exchange phone numbers with her. When he called the number she gave him, it was a voicemail message from me telling him what a scumbag he was and that he was busted. He's still trying to get back together with me and it's been a year!

Men can respond to such postings by sending an e-mail, which will be posted on the site. By September 2006 the site had identified more than 15,000 bad dates and received up to a quarter of a million hits a day. The Canadian site playersandpsychos.com offers a similar forum for aggrieved members of both sexes.

Dontdatehimgirl.com has also generated its share of litigation. Last year Pittsburgh criminal defense attorney Todd Hollis filed suit in the Allegheny County Court of Common Pleas against the company, two alleged blog posters and five unidentified women who claimed to be former girlfriends. Several anonymous postings accused

him of spreading herpes, not paying child support and being bi-sexual — all statements actionable in a defamation case if made falsely and maliciously.¹⁰

The Electronic Frontier Foundation, the Center for Democracy and Technology and the American Civil Liberties Union of Pennsylvania filed an *amici curiae* brief in support of dontdatehimgirl.com and its owner Tasha Cunningham, a former columnist for the Miami Herald. On April 5 Judge R. Stanton Wettick dismissed dontdatehimgirl.com after concluding that Section 230(c)(1) of the Communications Decency Act immunized the site from liability.¹¹

Web tattlers can provide useful information about dangerous drivers, loathsome lotharios, lousy lawyers, naughty nannies, deadbeat dads, straying spouses and almost any group that has annoyed or enraged them.

Net-venting sites like PlateWire.com, aboveaveragedriver.com and dontdatehimgirl.com can sometimes provide truthful, accurate and extremely helpful information that shames the wicked, deters the negligent, informs the naive and warns potential victims.

But the absence of editorial standards, the opportunity to post anonymously and the chance to "get back" at someone for a petty oppression offer limitless opportunities for false, malicious and malignant postings, as well as a coarsening of society.

Those who support postings on spite sites often say they enable ordinary people to "vent," releasing feelings of frustration, anger and inadequacy. However, it is questionable whether such tattling improves the blog poster's long-term mental health, avoids road-rage, cures broken hearts or keeps car tires from getting slashed. Instead of helping people move past unhappy events to get on with their lives, such postings can lead to retaliation, litigation and obsessions with past victimization.

As the histories of Mount St. Helens, Mauna Loa and Mount Etna demonstrate, volcanoes can vent for years yet still erupt explosively with little warning. The same holds true for drivers.

Does Section 230 of the Communications Decency Act Immunize Spite-Speech Web Sites From Liability?

Can those who set up these blog sites escape liability for privacy-invading or defamatory statements that appear there? For the most part, yes. Section 230 of the Communications Decency Act of 1996, aka Title V of the Telecommunications Act of 1996, provides a safe harbor for service providers in most circumstances.

Originally introduced as part of the Internet Freedom and Family Empowerment Act and passed by a near-unanimous vote, this part of the CDA reflects Congress' intent to encourage the growth of the Internet and protect free speech. The law essentially frees service providers of any need to unduly censor their customers' actions out of fear that they might be held liable as "publishers" of controversial content.

Section 230(c)(1) of the CDA provides immunity from liability for providers and users of an "interactive computer service" who publish information provided by others. It says, "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."

Courts generally use a three-part test in determining the availability of Section 230 immunity. A defendant must show that:

- (1) It is a "provider or user" of an "interactive computer service";
- (2) The plaintiff's claim "treats" the defendant "as the publisher or speaker" of the harmful statement(s); and
- (3) The information on the defendant's server was "provided by another information content provider," so the defendant is not the provider of the harmful statement(s).

Courts have interpreted Section 230 as creating a safe harbor that protects servers from liability for defamation, invasion of privacy, violations of the Lanham Act and wrongful-competition statutes.¹²

In a recent decision, *Universal Communications Systems Inc. v. Lycos Inc.*,¹³ the 1st Circuit absolved message administrators from defamation liability. Plaintiffs Universal Communication Systems Inc. and CEO Michael J. Zwebner sued alleged message-poster Roberto Villasenor Jr., Web service Lycos and its corporate parent Terra Networks S.A. because of allegedly false and defamatory postings made under pseudonymous screen names on the RagingBull.com financial message board operated by Lycos.

Relying on Section 230, the U.S. District Court for the District of Massachusetts dismissed the claims against Lycos and Terra Networks for failure to state a claim. The 1st Circuit affirmed those dismissals, "joining the other courts that have uniformly given effect to Section 230 in like circumstances."¹⁴

Section 230 is not an all-inclusive safe harbor, however, for it does not immunize providers from criminal responsibility

or liability for violations of intellectual property rights and the Fair Housing Act, postings viewable over the World Wide Web that give rise to defamation liability in other countries, and exposure for statements of the server's officers, agents, and employees.¹⁵

Serious uncertainty about potential liability remains. Liability under Section 230 may depend on whether the person who posts a message on the blog is an employee of the publisher — for example, a journalist who works for the New York Times — instead of an independent contractor or member of the public. As First Media Insurance Co. Vice President for Claims P. Blake Keating has suggested on his company's Web site, blog publishers can reduce their potential exposure to liability by adopting a set of policies similar to the Washington Post's guidelines. Those guidelines reserve the blog publisher's right to delete obscenities, personal attacks and other inappropriate entries, and even to block abusers from gaining access to the blog:

[S]ome fear the publisher would not readily escape liability if the columnist writes regularly for and, in the eyes of the public, is associated with the publisher. This leads to the invariable question of whether or not the publisher should edit the blog or if by doing so it might somehow assume legal liability it might not otherwise have. Experts are divided on this issue.¹⁶

Most blog site operators will seek to avoid any waiver of Section 230's safe harbor by refraining from editing blog postings, which leaves spite sites free of traditional editorial restraints.

Does the First Amendment Protect Spite Speech of a Personal Nature?

In addition to Section 230's safe harbor, the First Amendment provides important protections not only for the operators of Web sites but also for bloggers who post comments there. In *Reno v. American Civil Liberties Union*,¹⁷ the Supreme Court recognized that those who use the Internet are entitled to First Amendment protection:

From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates further than it could from any soapbox. Through the use of Web pages ... the same individual can become a pamphleteer.¹⁸

Bloggers, even anonymous ones, are entitled to full First Amendment protection.

Yet it is also important to acknowledge that the First Amendment does not safeguard defamatory speech, fraud, violations of intellectual property rights, criminal misconduct or invasions of privacy. As the U.S. District Court for the District of Arizona ruled last year in *Best Western International Inc. v. Doe*,¹⁹ “Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.”²⁰

Courts constantly confront the challenge of balancing First Amendment free-speech rights, including the right of individual bloggers to post comments anonymously on the Web. Before courts permit a defamation plaintiff or other litigant to use discovery to unmask the identity of an anonymous Internet blogger, they impose various tests that require, *inter alia*, for the plaintiff to make a *prima facie* case of defamation or other tortious misconduct that would survive a motion for summary judgment.²¹

Anonymous spite speech and equally vindictive blog postings by people who use their names may be offensive, obnoxious, culturally coarsening, and downright mean, but as long as those statements are true and concern matters of at least marginal public interest, those statements are speech entitled to First Amendment protection. Truthful postings about people who disregard traffic safety laws, hassle women walking down the street or fail to pay child support concern matters of public interest that occur in the public spotlight, for highways, public streets and courtrooms are not “private” locations (while false postings may invite the filing of a lawsuit seeking injunctive relief or money damages).

Ex-boyfriends who spread sexually transmitted diseases and nannies who abuse children can pose a real threat to public health and safety. The public interest encompasses a wide range of concerns, including matters some people prefer to keep private.

On June 25 in *Federal Election Commission v. Wisconsin Right to Life*,²² the Supreme Court discussed the broad scope of the First Amendment while analyzing how courts should balance competing constitutional interests:

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period Where the First Amendment is implicated, the tie goes to the

speaker, not the censor.²³

The freedom of speech ... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. ... [Courts] must give the benefit of any doubt to protecting rather than stifling speech.²⁴

The proper answer to spite speech, at least of the truthful variety, is neither censorship nor, in many cases, litigation.

Conclusion

With rare exceptions, Section 230 will protect the rights of Web site operators to run vindictive Web sites that allow people to strike back at those who have offended them. When the postings on those blog sites are truthful, concern matters of at least some public importance and do not invade privacy, violate criminal law or infringe copyrights, the First Amendment will protect the right of blog posters to engage in free speech — no matter how tawdry.

Most people who confront Web sites devoted to “getting back” at other people for social sins may find them entertaining at first, but will tire of the novelty of electronic trash talk. Folk wisdom suggests that one should not wrestle with a pig, both because the wrestler gets dirty and the pig likes the challenge. The best response to the venom and vitriol of spite speech is to ignore it.

Notes

- ¹ See <http://technocrati.com/about/> (July 19, 2007).
- ² Patrick Robben, “A Primer for Business Lawyers,” *BUS. L. TODAY* 43, 47 (May/June 2006).
- ³ *Id.*
- ⁴ See, e.g., Garth T. Yearick, “Legal Blogs Evolving Into Valuable Tool for Lawyers,” 32(1) *LITIG. NEWS* 3 (Nov. 2006) (discussing the uses of “blawgs”); John Caher, “N.Y. Courts Adopt Moderated Version of Lawyer Ad Rules,” *N.Y. L.J.* (Jan. 8, 2007); Eric Turkewitz’ New York Personal Injury Law Blog, at www.newyorkpersonalinjuryattorney-blog.com/2007/01/is-my-family-photograph-ethical.html.
- ⁵ Rachel Davis, “Trends: Striking Back at Bad Drivers; Would-Be Road Ragers Are Expressing Their Anger Online,” *FLA. TIMES-UNION* (Jacksonville) (Jan. 23, 2007), at C-1.
- ⁶ Eric M. Weiss, “‘You’re an Idiot,’ And Other Festive Holiday Greetings,” *WASH. POST* (Nov. 20, 2006), available at <http://washingtonpost.com/wp-dyn/content/article/2006/11/19/AR2006111900905.html>.
- ⁷ *Id.*

⁸ Tracy Swartz, "The Wide World of Cyber Snitching," CHICAGO TRIB. (May 31, 2007), RedEye Ed., available at <http://redeye.chicagotribune.com/news/red-053107-snitch-main,0,7675656.story>.

⁹ See <http://www.dontdatehimgirl.com/>.

¹⁰ Davis. See also William Douglas, "Black Attorney Slammed on DontDateHimGirl.com Files Suit Against the Site," BlackNews, available at <http://www.blackamericaweb.com/site.aspx/bawnews/attorney-suit907> (Sept. 6, 2006).

¹¹ See Bus. WIRE, "Lawsuit Dismissed Against Popular Social Networking Site," available at <http://www.thefreelibrary.com/Lawsuit+Dismissed+Against+Popular+Social+Networking+Site-a0161804094>. (April 10, 2007).

¹² See, e.g., *Zeran v. AOL*, 129 F.3d 327, 524 U.S. 937 (1998) (Section 230(c)(1) "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service" and intermediate-service-provider liability would have an "obvious chilling effect"); *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003) (dating-service provider immunity for false dating profile); *Ezra et al. v. America Online*, 206 F.3d 980, 531 U.S. 824 (2000) (immunity for erroneous stock information); *Doe v. MySpace*, No. 1:06-cv-00983-SS (W.D. Tex. Feb. 13, 2007) (server immunity for claims of negligently failing to prevent sexual assaults of minors and failing to verify the ages of site users); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-53 (D.D.C. 1998) (immunity from liability for the Drudge Report's controversial political content); *Delfino v. Agilent Technologies*, 145 Cal. App. 4th 790 (2006) (immunity for an employer who provides employees with Internet access through company computers); *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006) (individual-user immunity for distribution of defamatory statements); *Gentry v. eBay Inc.*, 99 Cal. App. 4th 816, 830 (2002) (immunity from claims "asserted by persons alleging harm caused by content provided by a third party").

¹³ No. 06-1826 (1st Cir. Feb. 23, 2007).

¹⁴ *Id.*, copy of the Feb. 23, 2007, opinion, at *3. See also, e.g., *Zeran v. Am. Online*, 129 F.3d 327, 330-31 (4th Cir. 1997) (noting the "obvious chilling effect" that intermediate-service-provider liability would create).

¹⁵ 47 U.S.C. § 230(e)(1) (criminal) and (e)(2) (intellectual property). See, e.g., *Perfect 10 v. CCBill*, 481 F.3d 751 (9th Cir. May 31, 2007); *Fair Housing Council of San Fernando Valley v. Roommate.com*, CV-03-09386-PA (9th Cir. May 15, 2007) (no safe harbor for Fair Housing Act liabilities and, presumably, for other violations of the Civil Rights Act); *Gucci America v. Hall & Assocs.*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001) (no immunity for contributory liability for trademark infringement).

¹⁶ P. Blake Keating, "Avoiding Blog Liability," MEDIA INSIGHTS Iss. 11, available at <http://www.firstmediainc.com/insights.html> (Jan. 2007).

¹⁷ 521 U.S. 844 (1997).

¹⁸ *Id.* at 853 and 870.

¹⁹ 2006 WL 2091695 (D. Ariz. 2006).

²⁰ *Id.* at *3. See also *In re Subpoena Duces Tecum to America Online Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), at *5. See generally Jennifer Meredith Liebman, "Recent Developments: Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures," 2006 U. ILL. J. L. TECH. & POL'Y 343 (Fall 2006).

²¹ See, e.g., *McMann v. Doe*, 460 F. Supp. 2d 259, 265-67 (D. Mass. 2006) (discussing the case law requiring that the plaintiff seeking disclosure of the anonymous Web site operator's identity and the statements "turned lives upside down" and "be afraid, be very afraid" to prove his invasion of privacy claims, and dismissing the suit for failure to state a diversity claim in federal court); *Doe v. 2thMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *Best Western*, 2006 WL 2091695; *John Doe No. 1 v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (employing a summary judgment standard); *Dendrite v. Doe*, 775 A.2d 756, 760-761 (N.J. Super. Ct. App. Div. 2000).

²² Nos. 06-969 and 06-970, 127 S.Ct. 2652 (U.S. June 25, 2007).

²³ *Id.*

²⁴ *Id.*

David A. Furlow is a senior partner in the Houston office of **Thompson & Knight**, where he handles a practice that involves First Amendment and commercial speech, signage cases, and insurance defense. A former Harris County assistant district attorney and a practicing attorney for 23 years, he is the 2006-2007 chair of the American Bar Association's media, defamation and privacy law committee.