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**Does Your Website Put You at Risk?—
Liability Issues in Using Third Party Content:
Global Perspectives**

**An Address to the International Conference on
Innovative Information Technology Policy and E-Society
of the National Chengchi University**

**Taipei, Taiwan
November 14, 2003**

**by
James R. Maxeiner***

Imagine this scenario. Your organization operates a website. It provides an open forum for the exchange of ideas and experiences concerning the status and role of information technology and democracy development across local and national borders, particularly in the East Asia area. One day you receive a call from a lawyer who says that the lawyer's client is very upset about one of the postings to your website. The lawyer claims that the posting is using the client's trademark, or copyrighted text, or that the posting libels the client, or amounts to illegal hate speech. The lawyer demands that you immediately take down the posting or you will be sued or even criminally prosecuted.

And then comes the kicker. You ask: "Lawyer, where are you calling from?—Taichung?" He answers: "Why no ... " Now here you can fill in some distant, foreign place: Delhi, India; Victoria, Australia; Paris, France; Vienna, Austria.

A few weeks ago, the internet search engine company Yahoo got just such a call from the government of India. India had banned a group seeking a separate state for the Khasi people of the state of Meghalaya in northeastern India. India demanded that Yahoo block access to a separatist news group. Yahoo refused—this time—and India tried blocking on its own. Yahoo is no stranger to such requests.

In April 2000 Yahoo at its headquarters in Santa Clara, California, received a letter that stated "unless you cease presenting Nazi objects for sale within 8 days, we shall ... force your company to abide by [French] law." When Yahoo failed to comply, the letter writers served process on Yahoo in California and filed civil complaints against it in the Tribunal de

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Grande Instance de Paris for alleged violation of a French criminal statute barring the public display in France of Nazi-related "uniforms, insignia or emblems". At first, Yahoo made changes to its French site, but refused to change its U.S. offerings. In the end, however, rather than attempt to filter its sites for users in different countries, Yahoo banned such Nazi material from all of its sites.

Nor is Yahoo alone in finding itself liable abroad for third party information available through its website. From Australia in the Pacific to Austria in Europe content providers are encountering intercontinental liability. Last December, the High Court of Australia found Dow Jones subject to suit in Victoria for alleged libel in its Barrons publication, even though Barrons is not available in Australia other than over the American website. While that case did not involve third-party content, two Decembers before the Highest Court of Austria in Vienna found an Austrian web site provider liable for acts of unfair competition by a linked website located in the United States.

As a result of suits similar to these, the United States and other countries have adopted laws designed to protect persons against liability for third party information. One American commentator predicted earlier this year that market forces will force countries to move toward legal systems that either (a) completely shield internet service providers from such liability or (b) enable Internet service providers to shield themselves from most liability through reasonable, affordable self-policing.¹ So far that has yet to happen and, in any case, its utility will depend upon how broadly Internet service provider is defined.

This presentation examines some of the new laws that affect the liability risks faced by online service providers that rely in part or in whole on information posted or otherwise provided by third parties, both with respect to issues associated with liability for defamatory information and to infringement issues.

1. Introduction: Information Provider Liability Generally

Long before anyone imagined the Internet, intermediaries were subject to liability for the information they helped convey from sources to end users. While we think first of authors and publishers as the parties liable for information content and its distribution, other parties who do not origi-

¹ Justin Hughes, *The Internet and the Persistence of Law*, 44 *Boston College Law Review* 359, 384 (2003)

nate information but only facilitate its distribution, *e.g.*, bookstores, news services, etc., are subject to liability.

In the world of the Internet, most businesses of any size have a presence on the web. The Internet is quintessentially concerned with information. Most businesses must rely on others for at least some of the information they make available. Naturally they are concerned with the risks they face and would like to know whether there are steps they can take to reduce those risks.

In this presentation we are going to consider first the most important areas of liability for distribution of third party content. These laws predate the Internet and continue in force. We will then consider liability for third party content under the most important of those laws. Finally, we will consider how two relatively new federal laws, section 230 of the Communications Decency Act (“CDA”) and section 512 of the Digital Millennium Copyright Act (“DCMA”) change the law of liability for third party content, and will also examine a European counterpart. Along the way we will consider the risks intermediaries run and how practically both under the old law and the current law they may seek to reduce them.

Few, if any, of the specific legal issues information service providers face in providing information on the Internet are new. Most are old issues that have assumed new or different importance because the Internet has changed the quantity, speed and geographic scope of information distribution. A few examples of how the Internet has changed things quickly come to mind. “Public information” that was available only when looked up in a courthouse is now much more public when it can be consulted online. Republication of articles, which was a common practice in early 19th century magazines, takes on a whole different scope when the number of articles republished goes from dozens to millions. International distribution which before the Internet was unusual is now the rule.

A particularly important practical change in Internet publication is that frequently the information service provider is often the easiest defendant to locate and the one with more resources to pay a judgment (“deep pocket”).

2. Liability for Third Party Content as an International Issue

The Internet makes liability for third party content an international issue. Every posting on the World Wide Web is an international one, since every posting is available in almost every country on earth.

International distribution of information is not new. Information has gone global for centuries. Plaintiffs have long brought claims not only in the country where a publication is printed, but in other countries where the publication is distributed and where other parties suffer injury. But until recently it was relatively rare for a publication to be circulated in significant numbers outside its home country. Now, with the advent of the Internet, it is not only no longer rare, it is the rule.

Worldwide distribution poses nightmare-like risks, namely:

- Jurisdiction anywhere in the world
- Differing legal requirements in different jurisdictions

The World Wide Web is less than ten years old yet, as we have already seen, there are cases involving liability, including intermediary liability, for Internet distribution.

Life would be simpler for information providers if the law of a single nation, say the country of origin, exclusively governed their publications. Last year, in Australian case I mentioned, the *Wall Street Journal* argued that Internet information providers should be subject only to the law of their home servers. It contended that publishers can comply with the law of one jurisdiction, but cannot reasonably be expected to comply with the laws of one hundred jurisdictions. The High Court of Australia rejected the argument.

As much as producers of goods, software and information would like a single country rule, particularly in the area of information such a regimen seems unlikely. The Law Commission of England and Wales perceptively observed only a few months ago:

Jurisdictions not only differ in the way that they view defamation: they also believe strongly in their own interpretation of the right to freedom of expression. It is therefore an area which is particularly likely to generate culture clashes.²

The Law Commission found the international choice of law problem “intractable.” Perhaps someday, rather than applying a country-of-origin rule, there might be a single global rule for the Internet, but that day

² LAW COMMISSION, DEFAMATION AND THE INTERNET: A PRELIMINARY INVESTIGATION, SCOPING STUDY NO. 2, December 2002, 34, at ¶ 4.34.

seems far off. For the foreseeable future, information providers must live with the possibility that their publications on the Internet may subject them to liability in any jurisdiction where the Internet is accessible.

3. Types of Liability: Information Acquisition and Distribution

Information providers typically are information intermediaries. They acquire information from third parties, when they do not create it themselves, and then they distribute that information to others. Liability for the information arises principally in one of two ways: either the right to distribute the information is imperfect or the content of the information is harmful to others.

a. Information Acquisition

When is an intermediary liable to others who have superior rights in the information? Principal areas of law of concern include:

- Copyright
- Trademark
- Database Protection
- Data Protection/Privacy

Information providers have a number of ways to protect themselves against liability when faced with claims of inadequate rights to information. These are both practical and contractual:

- Deal with reputable sources
- Limit the quantity of information distributed
- Require proof of permissions to use copyrighted material & trademarks
- Require contractual indemnities from suppliers

Where an information provider undertakes an obligation to publish the information of a third party, it should also take care to reserve in the license agreement its right to take down information that another party contends is infringing or otherwise objectionable.

b. Distribution of Information

When is an information provider subject to liability for harm resulting from distribution of information? Principal areas of law of concern include:

- Libel/Defamation
- Competition Law
- Trademark Law
- Inaccurate Information: Tort and Contract Claims
- Fraud
- Criminal Liability for Obscenity/Hate Material
- Privacy/Data Protection

Of these, defamation has historically has been the principal concern in using third party content for most information providers. Competition and trademark law claims have been a distant second. The other potential bases of liability have not been of as great concern in the context of intermediary distribution of third party information. Information providers generally are not subject to liability for information that is merely inaccurate.³ Where fraud or potential criminal activity is at stake, the intermediary has not been the first target. Privacy and data protection present new issues. Thus this presentation focuses on defamation, competition and trademark claims.

Information providers have a number of ways to protect themselves from liability for the content of the information they distribute:

- Review the information
- Restrict circulation of the information
- Use contracts with recipients to limit liability

As with questions of right to publish, cautious information providers that undertake commitments to publish third party information should be sure to reserve for themselves a right to remove from circulation publications that are challenged as objectionable.

³ See Uniform Computer Information Transactions Act § 404(b)(1) (no implied warranty with respect to “published informational content”).

c. **Intermediary Liability: Intermediaries' Relationship to Information**

Liability issues for use of third party content frequently turn on the relationship of the intermediary information provider to the information. At the one extreme, the intermediary may be a "mere conduit". It may be a postal or courier service delivering a circular or a phone company providing the telephone line for conversation. In these cases, the intermediary has no knowledge of the content of the information and little opportunity to affect its distribution. At the other extreme, the "intermediary" may itself commission the creation of the work and control its content. In the former case, the intermediary furnishes nothing more than a technical distribution; in the latter, the "intermediary" information provider makes the information its own. In between are intermediaries with varying degrees of knowledge of the information and control over it.

4. **Defamation**

American defamation law distinguishes:

- Primary publishers
- Distributors, i.e., bookstores, libraries, news distributors
- Mere conduits, i.e., telephone company, post office

Primary publishers are subject to liability standards similar to those of authors. At common law, liability for defamation was liability without fault: it was sufficient for a plaintiff to show that defendant published a false and defamatory statement. Today publishers are held to a fault based standard. When publishers rely on third party content; they are not liable for that content if they were justified in relying on the third party source. Plaintiffs must show some level of negligence. Thus primary publishers are in a position to protect themselves by reviewing the works they publish.

Mere conduits, on the other hand, have neither knowledge of nor ability to control content of information. They are not generally subject to liability for defamation.

Distributors may be subject to liability, but only if they know or have reason to know of the defamatory nature of the information. Unlike

primary publishers, distributors are not required to know the contents of the information they distribute. However, once they learn of the defamatory nature of information, they may be held liable if they continue to distribute it.

5. Liability for Unfair Competition and Trademark Claims

Competition law holds intermediaries liable using the concept of contributory deceptive marketing. Persons may be held liable for deceptive marketing by third parties where they “directly and substantially” assist the party making the representation. Thus printers, publishers, and suppliers can be liable for the deceptive content of the information of others. However, their liability for third party content is limited to appropriate injunctive relief unless they knew that the information was likely to deceive or reasonably ought to have known that.

Distributors are liable as principals if they command the conduct or if they “fail[] to take reasonable precautions against the occurrence of the third person’s conduct in circumstances in which that conduct can be reasonably anticipated.”⁴

Intermediary liability for trademark infringement is similar to that for deceptive marketing. It is based on the concept of contributory infringement. Persons may be held liable for trademark infringement where they make improper use of trademarks on behalf of others. Thus printers, publishers, and suppliers can be liable for trademark infringement by others. However, their liability for third party content is limited to “appropriate

⁴ See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, THIRD, UNFAIR COMPETITION (1995) §§ 7 – 8:

§ 7 Contributory Liability of Printers, Publishers, and Other Suppliers

(1) One who, by supplying materials or rendering services to a third person, directly and substantially assists the third person in making a representation that subjects the third person to liability to another for deceptive marketing under the rules stated in § 2-6 is subject to liability to that other for contributory deceptive marketing.

(2) If an actor subject to contributory liability under the rule stated in Subsection (1) acted without knowledge that the actor was assisting the third person in making a representation likely to deceive or mislead, the actor is subject only to appropriate injunctive relief.

§ 8 Contributory Liability of Manufacturers and Distributors

One who markets goods or services to a third person who further markets the goods or services in a manner that subjects the third person to liability to another for deceptive marketing under the rules stated in § 2-6 is subject to liability to that other for contributory deceptive marketing if:

- (a) the actor intentionally induces the third person to engage in such conduct; or
- (b) the actor fails to take reasonable precautions against the occurrence of the third person’s conduct in circumstances in which that conduct can be reasonably anticipated.

injunctive relief⁷ unless they knew or ought to have known that the improper trademark use was intended to deceive.

Distributors are liable as principals if they command the conduct or if they “fail[] to take reasonable precautions against the occurrence of the third person’s infringing conduct in circumstances in which the infringing conduct can be reasonably anticipated.”⁵

6. Liability for Copyright Infringement

Intermediaries are held to higher standards under the American Copyright Act than they are under the other laws just discussed. They are subject to strict liability, vicarious liability and contributory infringement liability.⁶

a. Strict Liability

Innocent infringement is not a defense to charges of infringement. It is only a ground to reduce the damages awarded.⁷ Thus, in a famous case,

⁵ See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, THIRD, UNFAIR COMPETITION (1995) §§ 26 – 27:

§ 26 Contributory Infringement by Printers, Publishers, and Other Suppliers

(1) One who, on behalf of a third person, reproduces or imitates the trademark, trade name, collective mark, or certification mark of another on goods, labels, packaging, advertisements, or other materials that are used by the third person in a manner that subjects the third person to liability to the other for infringement under the rule stated in § 20 is subject to liability to that other for contributory infringement.

(2) If an actor subject to contributory liability under the rule stated in Subsection (1) acted without knowledge that the reproduction or imitation was intended by the third person to confuse or deceive, the actor is subject only to appropriate injunctive relief.

§ 27 Contributory Infringement by Manufacturers and Distributors

One who markets goods or services to a third person who further markets the goods or services in a manner that subjects the third person to liability to another for infringement under the rule stated in § 20 is subject to liability to that other for contributory infringement if:

- (a) the actor intentionally induces the third person to engage in the infringing conduct; or
- (b) the actor fails to take reasonable precautions against the occurrence of the third person’s infringing conduct in circumstances in which the infringing conduct can be reasonably anticipated.

⁶ For a current review of third party liability for copyright infringement, see M. Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367 (2002).

⁷ [Where] the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for

Cosmopolitan magazine was held liable for copyright infringement when it published excerpts of a book without knowing that the excerpts included a passage plagiarized from a copyrighted work.⁸

b. Vicarious Liability

The Copyright Act does not expressly address the issue of liability for the acts of others, but courts have held parties vicariously liable who knew of the infringement and who profited from it. Famous examples are so-called “dancehall” cases where dancehalls hire bands as independent contractors that perform copyrighted songs without permission. On the other hand, “landlords” of such premises historically have not been liable for infringement brought about by their tenants. In one recent case, however, the Ninth Circuit relaxed the element of control required and held the operator of a flea market vicariously liable for infringement by a tenant who sold bootleg records. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

c. Contributory Infringement

Likewise the Copyright Act does not prescribe liability for contributory infringement, but courts have imposed it in some cases. Liability requires that the defendant have had knowledge of the infringement and induce or contribute to the infringing activity. *See Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159 (2nd Cir. 1971).

7. Liability for other Grounds: The Provider’s Lot Before 1995

In the early 1990s on the eve of the commercialization of the Internet, American information providers could use third party content with reasonable confidence that for most purposes, so long as they exercised due care in selecting it and had no reason to believe that the material involved was deficient, they could distribute it subject only to an appropriate injunction if their judgment should prove wrong. While copyright did not provide quite the same level of legal comfort, it offered practical com-

believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was [acting for various non-profit educational entities]. Copyright Act § 504(c)(2).

⁸ *De Acosta v. Brown*, 146 F.2d 408 (2nd Cir. 1944) [with a famous dissent by Learned Hand].

fort through care in dealing with one's sources and through the real-world realization that suits for *de minimis* infringements were unusual.

8. American Protections for Third Party Providers

a. CDA Section 230

i. Origin of Section 230

Section 230 of the Communications Decency Act ("CDA") gives "interactive computer service" providers immunity for certain of their acts in furnishing information. Subsection (c) provides: "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."

Section 230 was a swift Congressional response to the decision of a New York trial court in the case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 310063/94, 1995 N.Y. Misc. LEXIS 229, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995). In *Stratton Oakmont* a third party had posted defamatory statements about the plaintiff to a Prodigy computer bulletin board. The Court found that Prodigy exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper, namely liability without fault. It found that Prodigy, because of the extent of its control, was not subject to the standard applicable to distributors such as bookstores and libraries, that are liable for defamatory statements of others only if they knew or had reason to know of the defamatory statements. The court underscored, however, that its decision was specific to the facts of Prodigy's own bulletin board: "Let it be clear ...", it said, "[c]omputer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates."

Notwithstanding the court's reminder that Prodigy had chosen to exercise greater editorial control, the court's decision was widely seen as encouraging Internet service providers not to monitor the contents of bulletin boards, since by so doing, they might become subject to the strict liability standard applied to publishers rather than the knowledge standard applicable to distributors. Such a development was contrary to the purpose of the Communications Decency Act ("CDA"), which was then under consideration in Congress, and which sought to limit circulation to minors of indecent material. Congress reacted to the *Stratton-Oakmont* decision by adding section 230 to the CDA. When the Supreme Court overturned the Communications Decency Act as unconstitutionally vague in *Reno v.*

American Civil Liberties Union, 521 U.S. 844, 874 (1997), it did not invalidate section 230.

ii. Structure of Section 230

Section 230 is titled: “Protection for private blocking and screening of offensive material.” It consists of six subsections. Subsection (a) contains findings by Congress concerning the value of the Internet and of the Internet’s promotion of a “true diversity of political discourse.” Subsection (b) sets out the policy of the United States to promote the development of the Internet and user control of content. Subsection (f) gives definitions of some of the terms used in the law. Subsections (c), (d) and (e) contain the substantive provisions of the law.

Subsection (c), which contains the immunity provisions, is titled: “Protection for “Good Samaritan” blocking and screening of offensive material.” Paragraph 230(c)(1) is the provision that has been most relied on to protect information providers. It states: “Treatment of publisher or speaker. 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.” Paragraph 230(c)(2), headed “civil liability”, states that “no provider or user of an interactive computer service shall be held liable on account of action taken to restrict access to or availability of material that the provider or user considers to be obscene”

Subsection (d) requires interactive computer service providers to furnish new subscribers with information about the commercial availability of parental control protections.

Subsection (e) states that the section 230 shall have no effect on criminal laws, intellectual property laws, and communications privacy law, or on “any State law that is consistent with this section.” On the other hand, subsection (d) provides that “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

iii. Interpretation of Section 230

Congress adopted section 230 as a response to the decision in *Stratton Oakmont*. Courts might readily have limited application of section 230(c)(1) to the specific issue in *Stratton-Oakmont*, namely, that an Internet service provider that provides a bulletin board available for third party postings should not be treated as a publisher under libel law. Such a provider

might still be liable as a distributor if, for example, it knowingly published a defamatory statement. Such an interpretation would have been consistent with the language and purpose of the statute, namely, to facilitate a obscenity control by service providers of the content of bulletin boards without exposing them to publisher liability.

Instead, however, in most cases decided to date, both federal and state courts have given section 230 an expansive application. In particular:

- They have generously defined “interactive computer service” to include not only Internet service providers who furnish access to the Internet, but to other providers of means of access to the Internet and to Internet websites generally.
- They have extended 230(c)(1) immunity to a range of causes of action beyond defamation, including competition law claims.
- They have extended 230(c)(1) immunity to defendants who have not only passed on third party content to others, but have themselves acquired rights in it and have even commissioned the content.
- In the area of contributory trademark infringement, however, courts have refused to grant section 230(c) immunity. They have held that trademark claims are outside the grant of immunity as intellectual property law claims under section 230(e)(2).

The Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc.*, 129 F. 3d 327 (4th Cir. 1997) started interpretation of section 230 off on a broad course. There the Court rejected the plaintiff’s argument that section 230(c)(1) was designed merely to preclude liability for interactive computer service providers as “publishers” and did not affect their liability for defamation as “distributors”. The plaintiff contended, that since he had informed America Online of the libel and AOL had failed to act, it should be liable as a distributor. The Fourth Circuit rejected the argument and held that “distributor” liability is a mere subset of “publisher” liability under section 230(c)(1) and therefore likewise subject to the act’s immunity. According to the court, once a distributor receives notice of a possibly defamatory posting, it is thrown into the role of a traditional publisher.

α. Interactive Computer Service

i. **Immunity for parties that provided computers to access Internet:**

- Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (2001) (public library)
- PatentWizard Inc. v. Kinko's, 163 F. Supp. 2d 1069 (D.S.D. 2001) (copy shop)

ii. **Immunity for sites available on Internet not offering access services**

- *Schneider v. Amazon Inc*, 108 Wn. App. 454 (2001) (posting to book review bulletin board maintained by online book-seller)
- *Marczewski v. Law*, 122 F. Supp. 2d 315 (D. Conn. 2000) (individual's chatroom)
- In a pair of California cases, the online auction firm eBay was simply assumed to be an interactive computer service. See *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002); *Stoner v. eBay, Inc.*, 2000 Extra LEXIS 156, 56 U.S. P.Q.2d (BNA) 1852 (2000).

β. **Third Party Content**

Immunity granted notwithstanding claims that interactive computer service had made the publication its own:

- *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (defendant AOL paid author \$36,000 pursuant to a license agreement that retained right to require reasonable changes to content, and "affirmatively promoted" the information)
- *Schneider v. Amazon Inc*, 108 Wn. App. 454 (2001) (defendant Amazon retained the right to edit content of book reviews posted to site and received a license to redistribute the review worldwide)

γ. **Causes of Action**

i. **Immunity from State Competition Law Claims**

Gentry v. eBay, Inc., 99 Cal. App. 4th 816 (2002) (state competition law required auctioneers to provide certificate of authenticity)

Stoner v. eBay, Inc., 2000 Extra LEXIS 156, 56 U.S. P.Q.2d (BNA) 1852 (2000) (state unfair business practices laws)

Schneider v. Amazon Inc, 108 Wn. App. 454 (2001) (interference with business expectancy)

ii. **Immunity from Negligence Claims**

Green v. America Online (AOL), 2003 U.S. App. LEXIS 750 (3rd Cir. 2003) (negligent transmission of a “punter” signal designed to halt and disrupt recipient computer)

Doe v. America Online, Inc., 783 So.2d 1010, 1013-17 (Fla. 2001) (negligent distribution of child pornography)

Schneider v. Amazon Inc, 108 Wn. App. 454 (2001) (negligent misrepresentation)

Gentry v. eBay, Inc., 99 Cal. App. 4th 816 (2002) (negligent misrepresentation of safety of items offered for sale)

iii. **No Immunity from Trademark Claims**

Under subsection 230(e)(2) “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” Section 230 does not state whether the Trademark Law is an intellectual property law. For some laws, the Trademark Law, which is based on the Commerce Clause of the Constitution and not on the Patent and Copyright Clause, which serves distinct and different purposes, is not classified as an intellectual property law. Two cases have denied section 230 immunity in trademark claims:

Gucci America Inc. v. Hall & Assoc., 135 F. Supp. 2d 409 (S.D.N.Y. 2001)

Ford Motor Co. v. GreatDomains.com Inc., No. 00-CV-71544-DT (E.D. Mich. Sept. 25, 2001).

iv. **Assessments of Section 230 Immunity**

“[C]ourts have interpreted the CDA’s provisions broadly, limiting ISP liability in circumstances far removed from its roots in defamation. ...

In sum, federal and state courts alike have applied 230 liberally and without qualification. CDA jurisprudence is, if nothing else, predictable.”⁹

“[E]ssentially ... an absolute immunity for ISPs in third-party Internet defamation suits [I]t has left no incentive for ISPs to monitor or edit their content”¹⁰

The Law Commission of England and Wales observed of the *Zeran* decision applying section 230:

It gives very little weight to the protection of reputation. *Zeran* suffered real harm. The implication is that even if the ISP had ignored his requests completely, they would have incurred no legal liability towards him.¹¹

B. Digital Millennium Copyright Act (DMCA)

i. Origin of Section 512

The Digital Millennium Copyright Act of 1998 was an omnibus law that made substantial changes in many parts of American copyright law including, for example, to implement new World Intellectual Property Organization treaties. Title II, 17 U.S.C. § 512, provides “safe harbors” for service providers when faced with claims of copyright infringement.

ii. The Structure of Section 512

As much as CDA section 512 is simple and expansive, section 512 is complex and narrowing. The drafting technique of section 512 is to identify very specific situations in which service providers that comply with certain conditions, shall be relieved of some, but not all, liability. Thus where CDA provides immunity, section 512 provides only limitations of liability.

Subsections (a) to (e) of section 512 set out five specific safe harbors for different Internet-related activities. Subsections (f) through (k) provide general rules that implement the safe harbors: subsection (f) sanctions persons who misrepresent in implementing the safe harbors that material is infringing; subsection (g) governs liability for removing infringing material; subsection (h) authorizes issuing subpoenas to identify infringers;

⁹ J. Band & M. Schruers, Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act, 20 CARDOZO ARTS & ENT. L. J. 295, 296, 300 (2002).

¹⁰ S. Patel, Note: Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?, 55 VAND. L. REV. 647, 678 (2002).

¹¹ LAW COMMISSION, DEFAMATION AND THE INTERNET: A PRELIMINARY INVESTIGATION, SCOPING STUDY NO. 2, December 2002, 17, at ¶ 2.54.

subsection (i) implements the conditions for eligibility for the safe harbors; subsection (j) provides rules for injunctions under the safe harbors; and subsection (k) furnishes definitions.

The safe harbors protect four types of activity: (a) conduit; (b) caching; (c) posting; and (d) linking; and one type of service provider, (e) non-profit educational institutions. In this discussion, we will limit our consideration to the (c) posting and (d) linking safe harbors as those activities are most relevant to operating sites featuring third party content.¹²

The posting and linking safe harbors are fairly similar. In both cases, a qualified person meeting the definition of service provider is relieved of monetary damages for copyright infringement if the person does not know or have reason to know that material is infringing, does not receive a financial benefit directly attributable to the infringement, and upon notice of infringement responds “expeditiously” to remove the material. In order to receive this limitation of liability for hosting, but not for linking, the person must register with the Copyright Office. To qualify for either limitation of liability providers must meet certain conditions of eligibility.

α. Definition of Service Provider

To qualify as a service provider must be “a provider of online services or network access, or the operator of facilities” 17 U.S.C. § 512(k)(1)(B). This definition includes not only Internet access, but also e-mail, chat room and web page hosting services.

β. The Posting Safe Harbor

Subsection (c) is titled “Information residing on systems or networks at direction of users.” Its paragraph (1) provides that: “A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that

¹² The conduit safe harbor is available only to a narrowly defined group of service providers that corresponds largely to Internet access providers and does not relate to “featuring third party content. See 17 U.S.C. 512(k)(1)(A) (“As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.”) Caching is available to the same group of service providers as for posting and linking, but is less relevant to featuring third party content. Finally, the higher education safe harbor in (e) is *sui generis* and not of general relevance.

resides on a system or network controlled or operated by or for the service provider” It then continues to require that the service provider meet four conditions:

A. the service provider has no actual knowledge and no reason to know of the infringement and if it obtains knowledge of infringement acts expeditiously to remove infringing material;

B. “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity;”

C. upon notification of a claimed infringement responds expeditiously to remove the allegedly infringing material; and

D. the service provider has registered with the Copyright Office a designated agent to receive such notices as in C.

γ. The Linking Safe Harbor

Subsection (d) is titled “Information location tools.” It parallels the posting safe harbor of (c) with respect to “the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link” As with the posting safe harbor, the service provider must not know of the infringement, must not receive a financial benefit from it, and must act expeditiously against it when notified of it. Unlike the posting safe harbor, the linking safe harbor does not require registration with the Copyright Office.

δ. Conditions for Eligibility

Both the linking safe harbor and the posting safe harbor, however, are subject to further conditions. Subsection 512(i)(1) requires as conditions of eligibility that the service provider:

“(A) has adopted and reasonably implemented and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures [to identify or protect copyrighted works].”

iii. Interpretation of Section 512

α. Contributory Infringement

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

ALS Scan, Inc. v. RemarQ Communications, Inc. 239 F.3d 619 (4th Cir. 2001)

Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082 (C.D. Cal. 2000)

β. Vicarious Infringement

Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082 (C.D. Cal. 2000)

CoStar Group v. Loopnet, Inc., 164 F. Supp. 2d 688 (D. Md. 2001)

iv. Assessments of Section 512

Court interpretation of section 512 has been criticized as “parsimonious” especially when compared to a “generous” reading of CDA section 310.¹³ Courts are seen as having had “a difficult time determining exactly what is required of service providers ... [and are] erring on the side of granting too much copyright protection.”¹⁴ Yet section 512 itself prescribes a very difficult route to liability limitation that only a few will be able to travel.

Two American critics pointedly contrast the breadth of CDA immunity and the narrow scope of DMCA liability limitations. They attribute the difference largely to politics. “It is not surprising that Congress drafted the CDA’s safe harbors more broadly than the DMCA’s. After all, the content community was far better organized than likely victims of defamation, and thus it was far better situated to lobby against broad safe harbors for ISPs.”¹⁵

¹³ J. Band & M. Schruers, Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act, 20 CARDOZO ARTS & ENT. L. J. 295, 320 (2002).

¹⁴ R. Gutierrez, Save the Slip for the Service Providers: Courts Should Not Give Short Shrift to the Safe Harbors of the Digital Millennium Copyright Act, 36 U.S.F.L. REV. 907 (2002).

¹⁵ J. Band & M. Schruers, *supra*, 20 CARDOZO ARTS & ENT. L. J. at 320.

9. A Look Abroad: The EU's E-Commerce Directive

As we have noted, the issue of intermediary liability for third party content is an international one. A detailed examination of foreign approaches is beyond the scope of this presentation. Here we look briefly only at one principal foreign attempt to address the problem: the European Union's "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)" [hereafter, "E-Commerce Directive" or simply, "Directive"].¹⁶

As is the case with EU directives generally, the E-Commerce Directive is a direction to Member States of the European Union to adjust their laws to conform to the Directive. It is not itself directly applicable law.

With respect to the topics discussed in this presentation the E-Commerce Directive has two principal measures:

- A country-of-origin rule; and
- Limitations of liability certain kinds of activities.

Article 3 adopts a country-of-origin rule designed to permit a service provider to orient itself on the laws of the EU jurisdiction in which it is located and to relieve it of an obligation to observe the laws of all Member States.¹⁷ At this point, however, it is more aspiration than reality. It is subject to many exceptions, e.g., copyright and consumer protection laws.

Like the analogous provision in the DCMA, the EU E-Commerce Directive provides a limitation of liability and not immunity as such. Like the DCMA it permits injunctions even while shielding providers from damage claims. Unlike the DCMA provision, which is limited to liability under copyright law, the E-Commerce Directive applies to laws generally. With the exception of linking, which the Directive deliberately leaves open, the Directive applies only to certain specific kinds of activity, namely:

- "mere conduit" (Article 12);
- "caching" (Article 13); and,

¹⁶ OC L 178, 17 July 2000.

¹⁷ See generally Gerald Spindler, *Das Gesetz zum elektronischen Geschäftsverkehr – Verantwortlichkeit der Dienstleister und Herkunftslandprinzip*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2002, 921.

- “hosting” (Article 14).

In the context of today’s discussion, limitations of liability for acting as a “mere conduit” and for “caching” are of limited relevance. Hosting, on the other hand, offers more possible benefits. What constitutes “hosting,” however, remains undefined. It may include conducting a web-based e-mail service, newsgroups, or home pages, but probably does not include information aggregating.¹⁸ Standing in the way of an expansive interpretation of hosting is language in the preamble of the Directive that states that all of the exemptions from liability are “of a mere technical, automatic and passive nature” where the service provider “has neither knowledge of nor control over the information which is transmitted or stored.”¹⁹

The “hosting” limitation of liability is already narrower than some pre-Directive limitations. Instead of it protecting the service provider with respect to third-party content, the Directive applies only to information “stored at the request of a recipient of the service.” Limitation of liability for hosting is subject to the condition that (a) the provider not have actual knowledge or reason to know of the illegal activity or (b) upon obtaining knowledge act “expeditiously” to remove access to the information. Article 15, however, states that Member States shall not condition these limitations of liability on a general obligation to monitor.

10. Conclusion

While both the United States and the European Union have taken steps to improve protections for service providers who utilize third party content, these protections are still being tested and are of uncertain benefit and some impose burdensome qualifying conditions. For the near future service providers should carefully assess their risks under existing defamation, competition, trademark and copyright law and takes such steps as they are able—both practical and legal—to minimize those risks. While they can

¹⁸LAW COMMISSION, DEFAMATION AND THE INTERNET: A PRELIMINARY INVESTIGATION, SCOPING STUDY NO. 2, December 2002, 10, at ¶ 2.24. (calling the Directive “far from comprehensive” and noting that it does not apply even to aggregating information. It observed that the Directive does not even protect hyper-linking which, may the Commission noted, be subject to liability under English common law. The Commission referenced a 19th century case, *Hird v. Wood*, 38 S.J. 234 *1894, in which a defamatory placard was alongside a road. There was no evidence of who had placed the placard. Defendant, however, sat by it all day, smoking his pipe, and pointing it out to passers-by. The Court of Appeal found a publication and liability.)

¹⁹ *Id.* at 6 (Preamble ¶ 42).

hardly learn the laws of all the nations of the world, if they have reason to believe that their information is likely to resonate in a foreign country, they would do well to consider the risks under the laws of that country.

APPENDIX—Section 230 of the CDA

§ 230. Protection for private blocking and screening of offensive material

(a) Findings. The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy. It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. 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.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

(d) Obligations of interactive computer service. A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act [[47 USCS § 223](#) or 231], chapter 71 (relating to obscenity) or 110 (relating to

sexual exploitation of children) of title 18, United States Code [[18 USCS §§ 1460](#) et seq. or §§ 2251 et seq.], or any other Federal criminal statute.

(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.