



Technology & Intellectual Property

Legal Trends

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Section 230 of the Communications Decency Act

By Jonathan Frieden

As use of the Internet as a mode of communication increases, a growing number of companies and individuals find themselves forced to address false and unflattering comments posted to anonymous discussion boards. Unfortunately, a party harmed by defamatory statements posted to such forums may find it difficult to obtain redress. Section 230 of the Communications Decency Act affords broad protections to Web site operators who publish allegedly actionable statements and the identity of the anonymous poster of defamatory statements is often difficult to ascertain.

Section 230 was enacted to ensure that Web site operators, and other providers and users of "interactive computer services," would not be exposed to liability as "publishers" of any information provided by a third party. This immunity is effective in most contexts, though it does not affect the enforcement of Federal criminal statutes or certain intellectual property rights.

In the first appellate court decision interpreting the scope of Section 230, Zeran v. America Online, Inc., the Fourth Circuit Court of Appeals noted Congress's recognition of "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium" and reasoned that Congress intended to "encourage service providers to self-regulate the dissemination of offensive material over their services." Zeran, 129 F.3d at 330-31. The Court held that Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's rule. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." Later decisions have generally followed this analysis which grants broad immunity to Web site operators for content posted by third-parties.

Though a Web site operator that merely "publishes" content created by a third-party may generally rely on Section 230 immunity, a publisher who plays a role in creating that content may lose that protection. In fact, the Ninth Circuit Court of Appeals recently held that Section 230 protection does not apply where unlawful information is provided by Web site users in direct response to questions and prompts from the Web site operator. This decision appears to fly in the face of Zeran and has drawn significant criticism from legal commentators, who generally believe that Zeran's broad interpretation of Section 230 best fits the legislative intent of the statute.

Ultimately, the ability of a party to seek compensation for damages resulting from defamatory material published over the Internet is entirely dependant upon that party's ability to ascertain the identity of the party who posted the offending material. If that identity cannot be ascertained, the aggrieved party usually has no legal recourse.

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Protecting Trademarks Used on the Web

By Kevin Oliveira

In June, eBay announced its decision to end its \$25 million per quarter contract for AdWords on Google. While your company's Internet advertising commitment may not be that sizable, we are sure that your advertising plan includes Internet exposure at some level.

Internet exposure provides companies with instantaneous, national advertising. While it extends a company's ability to reach its customers, it also presents risks to company trademarks. There are several precautionary steps that companies with Internet advertising plans should take to protect those marks.

Registering trademarks before the U.S. Patent and Trademark Office creates a broad foundation of protection. Likewise, it is important to canvass the Web to see how competitors are using marks. A trademark enforcement program should also consider the following:

Meta tags are pieces of information placed in a Web site that are not visible to viewers, but pass information onto search engines, browser software, and other applications. They include meta keywords, meta description, and meta robots. In general, they work to drive up site traffic by increasing search rankings or helping to prominently place sites in search results. Most Web sites have meta tags, but controversy arises when a Web site places a competitor's trademarks in those meta tags.

Keyword advertising appears within search results as "sponsors," "sponsored sites," or "sponsored links." In practice, the purchaser of a keyword from Google, Yahoo, Windows Live or another search provider is almost always assured a prominent, special section to advertise in that is separated from the actual search results. By securing their prominence, they entice others to click through to those

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results instead of following the links in the search results. Each of the reputable search engines have policies that limit or prohibit the purchase of trademarks as keywords, but each rely upon trademark owners to notify them of competitors' violations.

Domain names can be used to redirect Internet users to competitors. Over the past ten years, companies have battled to secure domain names with references to their own trademarks, misspellings of trademarks, and the names of public and celebrity figures. Continued vigilance is necessary as new top level domains are introduced.

For these threats and others, we recommend that you become more informed of your competition in general and that you establish and implement a plan to monitor the Web, the trademark office, and state corporation commissions for ways in which your competitors may be adopting or infringing on your marks.

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