TOP STORY

Original Tweets Only: Retweeters Not Liable for Defamation

By Josephine M. Bahn – December 9, 2022

Only the original creators of digital content can be held liable for defamatory statements, not the re-posters of slanderous posts. The court in *Banaian v. Bascom* held that persons who reshared original content should not be held to the same standard as those who originally created the content. In so doing, the court analyzed a portion of the Communications Decency Act (CDA) in determining that the statute's plain meaning safeguards all re-posters of content that other authors first create and share.

ABA Litigation Section leaders believe the court's approach to handling the definition of "user" under the CDA strays from the commonly held understanding of the word and is out of touch with the practical realities of the digital age. Litigation Section leaders suggest that an overhaul of the CDA may be necessary to avoid a judicial interpretation that can be antithetical to the realities of digital content creation.

Students Reshare Posted Defamatory Statements

The origins of *Banaian* occurred when a student at a local New Hampshire high school hacked the middle school's website and altered a teacher's profile. The edited profile likened the teacher to a "sexually pe[r]verted" individual who was "desirous of . . . sexual liaisons with" students and parents. As is common in social media, a second student took a picture of the altered website and tweeted the image on Twitter. More students followed and retweeted the salacious content on their own profiles through the reshare function on Twitter.

The teacher sued the subsequent retweeters of the hacked profile, claiming that she was subject to extensive ridicule from the entire school and later suffered financial, emotional, physical, and reputational harm because the reshared post was so widely distributed. The trial court dismissed the teacher's libel claims against the secondary content sharers.

The CDA Protects Resharers of Defamatory Content

On appeal, New Hampshire Supreme Court affirmed and reasoned that the teacher's lawsuit was precluded by a portion of the CDA. Under 47 U.S.C. § 230, "[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." The court explained that Twitter was an

interactive computer service because it was an "information service, system, or access software that provide[d] or enable[d] computer access by multiple users to a computer server." Because Twitter users share content to multiple users, the court reasoned that it fell within the definition of an interactive computer service.

The *Banaian* court then considered the term "user" and whether any of the resharers of the original post were "users" under the CDA. The teacher argued that any "person who knowingly retweet[ed] defamatory information" should not be considered a user of an interactive computer service because the CDA was designed to protect Internet Service Providers (ISPs) from defamation liability. The teacher further argued that the legislative history failed to provide any reasoning that Congress intended to provide the same kind of sweeping ISP immunity to individual accounts on a social media website, but rather was intended to include libraries, colleges, computer coffee shops, and companies who provided access points for consumers at the beginning stages of the internet.

The *Banaian* court disagreed, holding that the CDA's language makes clear that "individual users [were] immunized from claims of defamation for retweeting content that they did not create." The court adopted the reasoning of cases from California and the Eastern District of Virginia. In the matter before the California Supreme Court, the California court held that Congress did not intend to grant immunity to internet service providers differently than the users who share on its individual platform. In the Eastern District of Virginia case, the court reasoned that someone who forwarded an email of content that was posted online was likewise immune from liability under the CDA's definition of "user."

What's in a User?

Section leaders suggest that the *Banaian* court's argument concerning the word "user" is the opposite of the common dictionary understanding. Paula M. Bagger, Boston, MA, cochair of the Section's Commercial & Business Litigation Committee, thinks the court should have considered whether the common dictionary meaning led to a result at odds with the CDA. "If the court had more expansively considered whether the statute was ambiguous, it would have turned to the legislative history, which would have certainly confirmed what the title and statements of policy suggest," opines Bagger. "The CDA does not provide defense to the retweeters under these facts," she adds.

Making Room for Additional Reform?

Section leaders also counsel that while the *Banaian* court's interpretation of the CDA may be correct, it likely also means that the statute needs to be revisited. "If the individuals had orally repeated what they had read on the internet, they would be subject to a defamation suit. Why should they be protected if they typed (or tweeted) rather than spoke?," asks Aaron Krauss, Philadelphia, PA, member of the Section's Book Publishing Board. Regardless of whether internet or internet companies still need the protection as provided under the CDA, reform is needed regarding how individual users should or should not be protected in the future, Krauss notes.

Josephine M. Bahn is an associate editor for Litigation News.

Hashtags: #FirstAmendment #LawTwitter

Related Resources

- Jonathan W. Lounsberry, "Twitter Not Liable for Defamatory Posts," *Litigation News* (July 28, 2021).
- Jeff Hermes, "Section 230 as a Gatekeeper: When Is an Intermediary Liability Case Against a Digital Platform Ripe for Early Dismissal?" *Litig. J.* (Mar. 1, 2017).
- Jenna A. Hudson, Website Immunity Under the Communications Decency Act," *Prods. Liab. Litig.* (Oct. 16, 2015).
- Charles D. Tobin, "Freedom of Speech: Indecent Attacks on the Communications Decency Act?" *Litig. J.* (Spring 2015).