

4-1-2011

Choose Your Words Wisely: Affirmative Representation as a Limit on § 230 Immunity

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Recommended Citation

Jeffrey R. Doty, *Choose Your Words Wisely: Affirmative Representation as a Limit on § 230 Immunity*, 6 WASH. J. L. TECH. & ARTS 259 (2011).

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CHOOSE YOUR WORDS WISELY:
AFFIRMATIVE REPRESENTATIONS AS A LIMIT ON § 230
IMMUNITY

Jeffrey R. Doty^{*}
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CITE AS: 6 Wash J.L. Tech. & Arts 259 (2011)
<http://hdl.handle.net/1773.1/1034>

ABSTRACT

Since its enactment in 1996, § 230 of the Communications Decency Act has shielded Web site operators from liability arising out of third-party content. The statute preempts any claim that would treat the defendant as a “publisher” or “speaker” of that content, but recent cases suggest that a defendant’s own statements may constitute an independent source of liability beyond the scope of § 230. In Mazur v. eBay, a federal district court held that § 230 does not bar claims of fraudulent misrepresentation when a defendant has described a third party’s auctioning procedures as “safe.” More recently, the Ninth Circuit in Barnes v. Yahoo! allowed a promissory estoppel claim to proceed against a defendant that failed to remove defamatory material from its Web site after assuring the plaintiff it would do so. A third case, Goddard v. Google, suggests that the Barnes decision could support claims by third-party beneficiaries as well. This Article analyzes these recent developments, discusses their potential impact on representations in marketing and terms of use, and assesses the willingness of courts to consider more expansive fraud- and contract-based limitations on § 230 immunity.

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INTRODUCTION

Section 230 of the Communications Decency Act (CDA)¹ shields Web site operators from liability by barring causes of action that would treat them as the “publisher” or “speaker” of third-party content.² Courts have been willing to apply its provisions to virtually any kind of dispute involving third-party content.

However, a recent line of cases suggests that a Web site operator’s affirmative representations regarding its third-party content could create an alternative basis for liability to which § 230 does not apply. In *Mazur v. eBay*,³ a federal district court held that § 230 did not bar a claim of fraudulent misrepresentation, and in *Barnes v. Yahoo!*,⁴ the Ninth Circuit allowed a promissory estoppel claim to proceed on the grounds that it did not treat the defendant as a “publisher.” A more recent case, *Goddard v. Google*,⁵ suggests that the *Barnes* holding could support claims by third-party beneficiaries as well. These cases reveal that affirmative representations can give

¹ 47 U.S.C. § 230 (2006).

² See generally 4 RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY § 14:11 (4th ed. 2010).

³ *Mazur v. eBay Inc.*, No. 07-03967, 2008 WL 618988 (N.D. Cal. Mar. 4, 2008).

⁴ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

⁵ *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).

rise to liability if they amount to fraudulent misrepresentation or constitute an enforceable promise, creating potential pitfalls for online businesses with respect to marketing, customer service, and even user agreements.

This Article first provides an overview of § 230 and the early attempts by plaintiffs to establish liability without treating the defendant as a publisher. Next, the Article analyzes the recent cases that have begun to recognize a limit on § 230 immunity based on a defendant's own representations. The Article concludes by discussing how these decisions are shaping CDA jurisprudence and the implications for Web site operators.

I. A THREE-PART TEST FOR IMMUNITY

Section 230 was designed, in part, to allow Web site operators to voluntarily monitor their sites for offensive or obscene material without exposing themselves to liability for third-party content.⁶ The statute declares that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷

To determine whether a defendant is entitled to immunity, courts engage in a three-part analysis.⁸ First, the defendant must be a “provider or user of an interactive computer service.”⁹ This effectively encompasses all Web sites.¹⁰ Next, because the scope of § 230 extends only to third-party content, the defendant will not receive immunity if it is “responsible ... for the creation or development”¹¹ of the offending content. Finally, the cause of action must treat the defendant as the “publisher” or “speaker” of the

⁶ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

⁷ 47 U.S.C. § 230(c)(1) (2006).

⁸ *See, e.g., Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–22 (1st Cir. 2007).

⁹ 47 U.S.C. § 230(c)(1) (2006).

¹⁰ The Internet itself qualifies as an “interactive computer service,” and therefore, a defendant need only be a “user” of the Internet to satisfy the first prong of the test. Because every Web site operator is necessarily an Internet user, this requirement is rarely the subject of litigation. *See Batzel v. Smith*, 333 F.3d 1018, 1030–31 (9th Cir. 2003).

¹¹ *See* 47 U.S.C. § 230(f)(3) (defining “information content provider”).

content.¹² Claims that would hold the defendant liable in some other capacity are unaffected by § 230.¹³ It is this distinction that makes affirmative representations potentially problematic.

II. EARLY ATTEMPTS AT ESTABLISHING AN ALTERNATIVE BASIS FOR LIABILITY

To avoid treating the defendant as a publisher, plaintiffs have long sought to base their claims on actions by the defendant that go beyond a publisher's "traditional editorial functions,"¹⁴ thereby providing an independent basis for liability. For instance, in *Blumenthal v. Drudge*¹⁵ the plaintiff argued that AOL could be held liable for the defamatory material of co-defendant Matt Drudge because AOL had "affirmatively promoted Drudge as a new source of unverified instant gossip."¹⁶ The court nevertheless concluded that the language of § 230 clearly protected the decision to advertise third-party content.¹⁷ In *Schneider v. Amazon.com, Inc.*,¹⁸ a defendant had promised to remove certain offensive postings within two business days but failed to do so.¹⁹ Although the plaintiff argued that this promise constituted an independently enforceable obligation, the court determined that it fell within the scope of § 230 because the "purported breach—failure to remove the posting—[was] an exercise of editorial discretion."²⁰ Courts have also rejected arguments based on a defendant's failure to enforce standards of conduct set out in its membership agreement.²¹ As these early cases illustrate, plaintiffs

¹² 47 U.S.C. § 230(c)(1) (2006).

¹³ See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009) (denying immunity where defendant breached an independent contractual duty).

¹⁴ "Traditional editorial functions" include "deciding whether to publish, withdraw, postpone or alter content." See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹⁵ *Blumenthal v. Drudge*, 992 F. Supp 44 (D.D.C. 1998).

¹⁶ *Id.* at 51.

¹⁷ *Id.* at 52–53.

¹⁸ *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001).

¹⁹ *Id.* at 38–39.

²⁰ *Id.* at 42.

²¹ See, e.g., *Green v. Am. Online, Inc.*, 318 F.3d 465 (3rd Cir. 2003); *Morrison v. Am. Online, Inc.*, 153 F. Supp. 2d 930 (N.D. Ind. 2001).

have historically been unsuccessful at suing defendants for third-party material without also treating them as publishers.

III. FRAUDULENT MISREPRESENTATION IN *MAZUR V. EBAY*

The ruling in *Mazur v. eBay*, however, put Web site operators on notice that their own statements regarding third-party content could carry significant consequences. In *Mazur*, the defendant offered a service called Live Auctions, which allowed users to participate in formal auctions via the Internet as if they were physically there.²² Third-party auction houses conducted the auctions; eBay merely provided the service that allowed people to place bids at these auctions over the Internet.²³ On its Web site, eBay claimed that this service was “very safe,” that the live auctions involved “floor bidders,” and that the auctions were conducted by “reputable international auction houses” that were “carefully screened.”²⁴ Nevertheless, the plaintiff alleged that shill bidders²⁵ at the auction house caused her to overpay. She sued eBay, claiming that its statements regarding the live auctions amounted to fraudulent misrepresentation.

The court analyzed each of eBay’s assertions independently. It determined that eBay was entitled to immunity for its representation that the auction houses were “reputable” and “carefully screened.”²⁶ The court explained that “screening” auction houses is analogous to deciding what to publish, and is therefore a traditional editorial function shielded by § 230.²⁷ Furthermore, the words “carefully” and “reputable” indicate opinions, which are not actionable.²⁸

However, eBay’s assertions that the live auctions were “safe” and

²² *Mazur v. eBay Inc.*, No. 07-03967, 2008 WL 618988, at *1 (N.D. Cal. Mar. 4, 2008).

²³ On April 15, 2008, eBay announced that it would discontinue its Live Auctions service. *General Announcements*, EBAY.COM, (April 15, 2008), <http://www2.ebay.com/aw/core/200804151300402.html>.

²⁴ *Mazur*, 2008 WL 618988, at *8.

²⁵ “Shill bidding” is the practice of entering fake bids in order to drive up the price of an auction item.

²⁶ *Mazur*, 2008 WL 618988, at *9.

²⁷ *Id.*

²⁸ *Id.*

involved “floor bidders” at “international” auction houses were held to be actionable as affirmative representations.²⁹ According to the opinion, these statements went beyond traditional editorial discretion because they created “an expectation regarding the procedures and manner in which the auction is conducted.”³⁰ The court indicated that if eBay had made assurances of *accuracy*, it would have received immunity, as verifying accuracy constitutes a traditional editorial function.³¹ Assurances of *safety*, however, would fall outside the scope of § 230.³²

The court also determined that eBay’s disclaimers were ineffective for two reasons. First, they failed to negate either the assurance of safety or the implicit suggestion that eBay had investigated the auction houses.³³ Although eBay stated in its User Agreement that it had no control over the safety of the auctions and could not guarantee that the auction houses complied with applicable laws, “nothing [in the User Agreement] specifically state[d] that eBay [did] not guarantee that bidding in Live Auctions [was] safe.”³⁴ Second, eBay failed to demonstrate that the initial safety assurances were attributable to another source, such as user feedback.³⁵ As a result, users could not independently assess the veracity of the claim and were left to depend on eBay’s representations. Having made the statements on its own behalf, eBay could no longer rely on general disclaimers applicable to third-party conduct.

IV. CONTRACTUAL LIABILITY IN *BARNES V. YAHOO!* AND *GODDARD V. GOOGLE*

A defendant’s liability is not limited to fraud, however. A recent Ninth Circuit case demonstrates that affirmative representations can furnish the basis for liability under contract principles as well.

²⁹ *Id.* at *10.

³⁰ *Id.* at *12.

³¹ *See id.* *See also* *Milo v. Martin*, 311 S.W.3d 210 (Tex. App. 2010) (finding defendant not liable for the defamatory posts of users, despite assurances of accuracy found elsewhere on its Web site).

³² *See Mazur*, 2008 WL 618988, at *12.

³³ *Id.* at *10.

³⁴ *Id.* at *11.

³⁵ *Id.* at *10.

In *Barnes v. Yahoo!*,³⁶ the plaintiff discovered that her ex-boyfriend had created fake profiles under her name on a Yahoo! Web site.³⁷ Over the next two months, Barnes made four requests to have the profiles taken down, but Yahoo! never responded to any of them.³⁸ Finally, as local news prepared to broadcast a report on the incident, a representative from Yahoo! contacted Barnes and told her that she would “personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.”³⁹ Despite this assurance however, the profiles remained on the Web site until Barnes filed suit two months later, alleging promissory estoppel and negligent undertaking.⁴⁰

The court held that § 230 did not preempt a promissory estoppel claim arising out of the defendant’s promise to remove third-party content from its Web site.⁴¹ According to the opinion, such a claim would not seek to treat the defendant as a “publisher.”⁴² Instead, it was the defendant’s promise, and not its status as a publisher, that gave rise to liability.⁴³ The court did, however, hold that § 230 barred the plaintiff’s negligent undertaking claim, explaining that if the action the defendant undertook to do was “something [that] publishers do,” then the cause of action would seek to hold the defendant liable as a publisher.⁴⁴ In this case, the “duty” allegedly violated stemmed from Yahoo!’s conduct as a publisher—“the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles.”⁴⁵

The two claims differed in one important respect. “Undertake” is synonymous with the performance of the action; “[t]o undertake a thing ... *is* to do it.”⁴⁶ In contrast, one can promise to do something without actually doing it. Consequently, a defendant cannot be held

³⁶ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

³⁷ *Id.* at 1098.

³⁸ *Id.*

³⁹ *Id.* at 1098–99.

⁴⁰ *Id.* at 1099.

⁴¹ *Id.* at 1109.

⁴² *Id.* at 1107.

⁴³ *Id.*

⁴⁴ *Id.* at 1103.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1107.

liable for undertaking an editorial action, but it can be liable for breaking a promise, even if that promise was to undertake an editorial action.⁴⁷ The promise itself gives rise to a duty that is distinct from the conduct at hand.

A federal district court in *Goddard v. Google*⁴⁸ has since concluded that the rule in *Barnes* would also permit claims by third-party beneficiaries.⁴⁹ “Theoretically, intended third-party beneficiaries—whose rights under a contract are different from those of the contracting parties but still are legally cognizable—could invoke the distinction drawn in *Barnes* between liability for acts that are coextensive with publishing or speaking and liability for breach of an independent contractual duty.”⁵⁰ The plaintiff in *Goddard* was an Internet user who incurred fees after downloading purportedly “free” ringtones from a Web site that appeared as a “sponsored result” on the defendant’s search engine.⁵¹ The terms of Google’s advertising contracts required advertisers to disclose information about any fees they might charge.⁵² Because the advertisement that appeared on Google’s Web site lacked such information, the complaint alleged that Google had breached the terms of its advertising contracts.⁵³ The plaintiff claimed to be a third-party beneficiary of those contracts.⁵⁴

Though the court acknowledged the possibility of suits by third-party beneficiaries, it nonetheless dismissed the plaintiff’s claim, citing two flaws.⁵⁵ First, it was the advertisers, not Google, who promised to disclose information about fees and who subsequently broke that promise.⁵⁶ The contracts did not contain any promise by Google to enforce their terms or to remove noncompliant

⁴⁷ *See id.* (“Contract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication.”)

⁴⁸ *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).

⁴⁹ *Id.* at 1200.

⁵⁰ *Id.*

⁵¹ *Id.* at 1194, 1197.

⁵² *Id.* at 1199.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1200–01.

⁵⁶ *Id.* at 1201.

advertisements.⁵⁷ Second, even if Google had promised to police its Web site for noncompliant advertisements, there was no indication that the *promisees* (the advertising companies) had intended for the plaintiff to benefit from such a promise.⁵⁸ The plaintiff therefore did not qualify as a third-party beneficiary.⁵⁹

The contractual theory of liability that emerges from *Barnes* and *Goddard* is subject to two important limitations that distinguish it from the approach seen in *Mazur*. The *Barnes* court stressed that a promise must be clear and specific if it is to support a promissory estoppel claim: “[A] court cannot simply infer a promise from an attempt to de-publish of the sort that might support tort liability” under a theory of promissory estoppel.⁶⁰ The *Goddard* court explained that “general content policies” do not constitute a promise by the Web site to take any specific action with regard to third-party content.⁶¹ A general claim of safety, such as the one in *Mazur*, would likely fail to meet this specificity requirement.

The other critical distinction between the two theories is that, under *Barnes*, a potential defendant can avoid liability by simply disclaiming any intent to be legally bound.⁶² In contrast, the *Mazur* opinion would seem to limit the availability of disclaimers to situations where the Web site operator has either explicitly disavowed its own statements or clearly indicated that those statements are attributable to a source other than itself.

⁵⁷ *Id.* (“Neither agreement contains any promise by Google to enforce its terms of use or otherwise to remove noncompliant advertisements.”)

⁵⁸ *Id.* The court stated that Goddard might well be able to sue the advertisers for breaching their promise to abide by the Advertising Terms if she could demonstrate that Google had intended for her to be a beneficiary of that agreement.

⁵⁹ *Id.*

⁶⁰ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1108 (9th Cir. 2009).

⁶¹ *Goddard*, 640 F. Supp. 2d at 1201. It should be noted that although the *Barnes* court did not address whether the actual statement by the Yahoo representative would suffice for purposes of promissory estoppel, the *Goddard* opinion suggests that it would. “[T]he claim in *Barnes* ... rested on a promise that scarcely could have been clearer or more direct.” *Id.*

⁶² *See Barnes*, 570 F.3d at 1108.

V. STRATEGIES FOR MAINTAINING IMMUNITY

As a result of these developments, Web site operators run the risk of sacrificing § 230 immunity when they issue statements regarding their third-party material. However, a Web site operator may be able to minimize its exposure by taking certain measures.

When promoting a product or service, a Web site operator must have a clear understanding of the message being conveyed. If an affirmative representation tends to suggest that a particular harm will not occur in connection with that product or service, the Web site operator could be viewed as having voluntarily assumed responsibility for its third-party content.⁶³ Similarly, if a Web site operator imposes restrictions in its user agreement on the type of material that third parties can post, it might inadvertently assume a duty to enforce those standards by blocking or removing offensive material. Any statements to this effect should include language alerting users to the possibility that nonconforming content may appear on the site.⁶⁴

The form of the representation warrants particular attention. Anything phrased as a promise or assurance has the potential to bind the Web site operator, so companies should instruct their employees to avoid making such statements to outside parties. Because representations of fact are actionable, Web sites should consider phrasing that would tend to indicate an opinion. Along the same lines, it may be helpful to insert language into a representation that relates back to an editorial function. The *Mazur* court indicated that a plaintiff could not sue a Web site for commenting on its own publishing activities, as doing so would treat the defendant as a publisher.⁶⁵

To avoid falling victim to the contractual theories of liability

⁶³ Eric Goldman, *eBay Denied 230 Defense for Its Marketing Representations--Mazur v. eBay*, TECHNOLOGY & MARKETING LAW BLOG (Mar. 13, 2008), http://blog.ericgoldman.org/archives/2008/03/ebay_denied_230.htm.

⁶⁴ For further suggestions on drafting user agreements, see Eric Goldman, *Lori Drew Conviction Reflections, Part 3 of 3: Lessons for Cyberlawyers Drafting User Agreements*, TECHNOLOGY & MARKETING LAW BLOG (Dec. 16, 2008), http://blog.ericgoldman.org/archives/2008/12/lori_drew_convi_2.htm.

⁶⁵ *Mazur v. eBay Inc.*, No. 07-03967, 2008 WL 618988, at *9 (N.D. Cal. Mar. 4, 2008).

developed in the *Barnes* and *Goddard* cases, one should always disclaim any intent to be legally bound. This is especially important when the Web site is providing assistance or otherwise responding to user requests. Furthermore, if the Web site is contracting with another party, such as an advertiser, the contract should specify that no one other than the contracting parties is intended to be a beneficiary of the agreement.

As the *Mazur* case illustrates, however, Web site operators will not always be able to protect themselves through the use of disclaimers. The court made it clear that if it is to be effective at all, a disclaimer must *specifically negate* the affirmative representation,⁶⁶ although given the court's manifest hostility toward their use,⁶⁷ it is doubtful that disclaimers would ever be effective under the *Mazur* standard.

Whenever possible, a Web site will want to attribute a representation to some source other than itself. For example, the *Mazur* court indicated that eBay would have been entitled to immunity had its assertion of safety been made on the basis of user feedback, rather than its own independent assessment.⁶⁸ Web sites can avoid responsibility by indicating that the representation originated elsewhere. If, on the other hand, a particular statement represents an assertion by the Web site itself, the threat of litigation can be minimized by disclosing the basis for these assertions or the criteria used to reach a particular conclusion. This allows users to evaluate the claims for themselves.

VI. A NEW DIRECTION FOR CDA JURISPRUDENCE?

Given the highly fact-dependent nature of their holdings, it is unlikely that these recent decisions will appreciably alter the balance

⁶⁶ See *id.* at *10–11.

⁶⁷ The court determined that eBay's disclaimers were ineffective despite language such as "We have no control over the quality, safety, or legality of the items advertised" and "You will not hold eBay responsible for other users' actions or inactions, including things they post." See *id.* at *10, n.9; *12. Citing the fact that eBay "burie[d the] disclaimer in a User Agreement" and possessed "superior bargaining power," the court stated that it would deny eBay's motion to dismiss if the affirmative representation and the disclaimer were contradictory. *Id.* at *13.

⁶⁸ *Id.* at *10.

of power in § 230 disputes. However, while these cases—*Mazur*, *Barnes*, and *Goddard*—represent developments at the margins, they may nevertheless reflect a conscious effort by the judiciary to prevent an already generous grant of immunity from expanding further. When it came to their publishing activities, Web site operators once faced virtually no threat of liability, but a more nuanced application of § 230 creates new avenues for plaintiffs to explore. The idea that immunity can be lost by “affirmatively promoting” content, ultimately rejected in *Blumenthal*, has gained traction in the wake of *Mazur*. Whereas *Schneider* had extended immunity to contract claims if the breach resulted from an exercise of editorial discretion, *Barnes* now imposes liability under virtually identical facts. Even a contract between a Web site and an advertiser may create enforceable rights in other parties under the reasoning of *Goddard*. Plaintiffs are sure to test the limits of these emerging theories in future cases.

CONCLUSION

Although § 230 of the CDA preempts any cause of action that would treat the defendant as a “publisher” or “speaker” of third-party content, recent cases demonstrate that suits premised on a Web site operator’s own statements do not necessarily fall within this category. As a result of *Mazur v. eBay*, *Barnes v. Yahoo!*, and *Goddard v. Google*, affirmative representations regarding third-party content may now serve as an independent source of liability if they amount to fraudulent misrepresentation or constitute an enforceable promise. These developments will affect how Web sites can market third-party content, interact with users, and form agreements with other parties.

PRACTICE POINTERS

- Although § 230 provides protection against liability arising out of third-party content, Web site operators remain fully responsible for the accuracy of their statements *regarding* that content.
- Section 230 provides no defense to binding contracts created under the theory of promissory estoppel, even when the statement giving rise to the obligation revolves around third-party content.
- Disclaimers may be sufficient to protect a Web site operator

against promissory estoppel claims, but they are unlikely to protect against claims of fraudulent misrepresentation.

- Web site operators can reduce the threat of litigation by either explaining the basis for their affirmative representations or attributing them to another source.