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## Cyberlaw: Additional Developments

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## ADDITIONAL DEVELOPMENTS— CYBERLAW

### DEVELOPMENTS WITHIN THE COMMUNICATIONS DECENCY ACT

*47 U.S.C. § 230*

Section 230 of the Communications Decency Act provides immunity from liability for providers and users of an “interactive computer service” who publish information provided by others. The past two years has seen numerous interpretations of the statute, with several trends emerging.

Section 230 immunity has provided a powerful safe harbor for websites, protecting them from liability for their users’ torts. In many recent cases, plaintiffs’ claims that defendants were tortfeasors because they had materially contributed to the torts have been denied. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 260 (4th Cir. 2009) (affirming dismissal of plaintiff’s claims due to Section 230 immunity and holding that the mere possibility that defendant’s business rating website contributed to the creation or development of the allegedly defamatory content does not establish Section 230 immunity); *Phan v. Pham*, 105 Cal. Rptr. 3d 791, 795 (Ct. App. 2010) (affirming dismissal and holding that defendants who forwarded a defamatory email with their own non-defamatory introductory commentary did not materially contribute to the alleged defamation); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197–98 (N.D. Cal. 2009) (holding that defendant Google’s practice of suggesting recommended keywords for sponsored link advertisers does not make it a creator or developer of the resulting ads); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (same); *Finkel v. Facebook, Inc.*, 2009 N.Y. Misc. LEXIS 3021, at \*3 (N.Y. Sup. Ct. Sept. 15, 2009) (holding that defendant Facebook is immune from a defamation suit based on the ownership of defamatory content); *Novins v. Cannon*, 2010 WL 1688695, at \*2 (D.N.J. Apr. 27, 2010) (holding that defendants who have re-published a defamatory web posting or e-mail are protected by Section 230 immunity in online defamation suit).

However, Section 230 immunity has been denied in situations where defendants themselves allegedly committed torts instead of merely contributing to them and where plaintiffs have alleged promissory estoppel. *Barnes v. Yahoo!, Inc.*, 2009 U.S. Dist. LEXIS 116274, at \*9–11 (D. Or.

2009) (holding that Section 230 immunity does not bar a promissory estoppel claim based on reliance on defendant's promise to remove indecent profiles of plaintiff which had been posted by her former boyfriend); *Cornelius v. DeLuca*, 709 F. Supp. 2d 1003, 1023 (D. Idaho 2010) (holding that defendant's interactive computer service is not entitled to Section 230 immunity with regards to the statement posted by online forum moderator allegedly acting as a representative of defendant to control and edit the forum).

Furthermore, website operators' solicitation of offensive material has sometimes been fatal to Section 230 immunity. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200–01 (10th Cir. 2009) (rejecting Section 230 immunity and affirming summary judgment in favor of plaintiff, where defendant solicited third parties to provide illegal information to post on its website and sold telephone records and other various personal information). However, sometimes courts have held that solicitation is merely a factor for the jury to consider in deciding Section 230 immunity. *Doctor's Assocs., Inc. v. QIP Holder LLC*, 2010 WL 669870, at \*23–24 (D. Conn. 2010) (holding that whether defendants are responsible for creating or developing the contestant videos is an issue of material fact, given that plaintiff claims defendants solicited disparaging material and shaped the eventual content of the contestant videos). And yet in other cases, courts have found solicitation and inducement irrelevant altogether. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968–70 (N.D. Ill. Oct. 20, 2009) (granting the motion for judgment on the pleadings, holding that defendant's website has immunity for inducing prostitution postings by creating the Craigslist's erotic services category).

## DEVELOPMENTS IN PERSONAL JURISDICTION FOR ONLINE ACTIVITIES

In 2010, the Seventh and Ninth Circuits applied the “express aiming test” to online activities, making it easier for courts to exercise personal jurisdiction over the operators of websites in foreign jurisdictions.

In *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), John Tamburo, an Illinois resident and operator of a dog-breeding software business, alleged that individual Canadian and American defendants had engaged in tortious conduct by posting defamatory information about him on their websites and through “blast emails.” All of the defendants hosted and operated their websites outside of the forum state. The Seventh Circuit applied the “express aiming test” from *Calder v. Jones* and reversed the district court’s dismissal for lack of personal jurisdiction. Under *Calder*, a court evaluates the purposeful direction requirement of personal jurisdiction by looking at whether the defendant engaged in intentional conduct that was “expressly aimed” at the forum state with the defendant’s knowledge that the plaintiff would be injured in the forum state. In *Tamburo*, the Seventh Circuit found that the defendants “specifically aimed” their website postings and emails at Tamburo and his business in Illinois, and that they did so with the knowledge that Tamburo would suffer the “brunt of his injury” in the state. Even though the statements were not aimed solely at forum-state readers, the Seventh Circuit held that the web postings and the blast emails were aimed at a target in the forum state, and thus satisfied *Calder’s* express-aiming requirement.

In *Brayton Purcell, LLP v. Recordon & Recordon*, 606 F.3d 1124 (9th Cir. 2010), Brayton Purcell, a Northern California law firm specializing in elder abuse law, filed a copyright infringement suit against Recordon & Recordon, a Southern California law firm. Brayton Purcell maintained a website containing copyrighted information about its elder abuse practice. Recordon created its own website by copying information, verbatim, from Brayton Purcell’s site. Brayton filed its suit in the Northern District of California; Recordon sought dismissal for lack of personal jurisdiction or, alternatively, for improper venue. The district court denied Recordon’s motion. In affirming the district court’s ruling, the Ninth Circuit focused most of its analysis on *Calder’s* express-aiming test. The Ninth Circuit started with the observation that the “maintenance of a passive website alone cannot satisfy the express aiming prong.” However, the prong is satisfied if the defendant’s conduct in operating the website was expressly aimed at the forum. The Ninth Circuit found that Recordon engaged in “individualized targeting” by plagiarizing Brayton Purcell’s website verbatim, which placed the two law

firms in competition for the same customers. This conduct satisfied the express aiming test.

### INTERNET TAX DEVELOPMENTS

A Canadian court issued a judgment authorizing the Minister of National Revenue to require eBay Canada to provide information about high volume sellers ("PowerSellers") whose eBay account registration indicates a Canadian address. *eBay Canada Ltd. v. Canada (National Revenue)*, 2008 FCA 141. The required information includes names, contact information, and amount of gross annual eBay sales. The court dismissed eBay's appeal, reasoning that, even though information was stored on servers in the United States, eBay could easily access the information from anywhere in Canada.

The Direct Marketing Association won a preliminary injunction against Colorado House Bill 10-1193 on the grounds that the bill violates the *Commerce Clause*. *Direct Marketing Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2011 WL 250556 (D. Colo. Jan. 26, 2011). Colorado enacted HB 10-1193 in March 2010. The statute requires out-of-state retailers to disclose to the Colorado Department of Revenue the name, address, and purchase amounts of each Colorado customer and to notify Colorado customers of the customer's obligation to self-report use tax. On June 30, 2010, the Direct Marketing Association (DMA), a trade association of businesses that market products to customers via mail order, telephone, and the internet, filed a complaint for declaratory and injunctive relief on the grounds that the Act violates both the United States Constitution and the Colorado Constitution under the *Commerce Clause*, the *Right to Privacy*, and *Freedom of Speech*.

The court granted the preliminary injunction on two bases. First, the court explained there was a substantial likelihood that the DMA could demonstrate that the reporting requirement discriminated against out of state retailers by imposing notice and reporting obligations that are not imposed on Colorado retailers. Second, the court concluded that there was a substantial likelihood that the Act imposed improper and burdensome regulation of interstate commerce and that retailers are likely protected from such burdens under *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298 (1992). The court also concluded that the other equitable preliminary injunction factors weighed in favor of granting the injunction. The court did not address the privacy and First Amendment arguments in granting the preliminary injunction.

On October 25, 2010, the Western District of Washington granted Amazon.com's motion for summary judgment and ruled that the North Carolina Department of Revenue's ("DOR") request for detailed sales

information violated the First Amendment and the Video Privacy Protection Act. *Amazon.com LLC v. Lay*, No. C10-664-MJP, 2010 WL 4262266 (W.D. Wash. Oct. 25, 2010). Amazon.com's motion stemmed from a North Carolina Department of Revenue request for customer information during an ongoing dispute over Amazon's sales tax liability. Maintaining that it could not calculate Amazon's tax liability without the names and addresses of specific purchasers, the DOR repeatedly requested "all information for all sales to customers with a North Carolina shipping address." The DOR also refused to return data containing details of what users purchased, which had already been provided by Amazon, in exchange for more general data that would still allow tax liability determination.

The court held that the North Carolina Department of Revenue violated the First Amendment in its request that Amazon provide "all information as to all sales" because it would disclose customer identities and detailed information about the expressive content of their purchases. The court also characterized Amazon as a "video tape service provider" and ruled that disclosure of identifiable information would violate the Video Privacy Protection Act. The VPPA states that a video tape service provider may only disclose such information pursuant to a civil court order, upon a showing of compelling need, and only if the consumer is given notice and afforded the opportunity to appear and contest the claim.



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