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California Supreme Court refuses to require Yelp to remove defamatory content

Dawn Hassell and Hassell Law Group v. Ava Bird, Supreme Court of California, decision of 2 July 2018

In early July 2018, the Supreme Court of California ('the Supreme Court') ruled in *Hassell v. Bird*¹ that the online review site Yelp, Inc., cannot be compelled by a court to remove defamatory reviews posted to its site by a third-party user. In a plurality decision, the Supreme Court held that the Communications Decency Act 1996 ('CDA')² Section 230 prohibits courts from ordering Yelp to remove defamatory content posted on its site by third-party users. The Supreme Court reasoned that ordering Yelp to do so "could interfere with and undermine the viability of an online platform³." The holding of *Hassell v. Bird* appears to strengthen the protections of Section 230 for internet service providers, but it may raise more questions than it answers. Advocates of an open internet applaud the decision and have labelled it a win for service providers and internet users alike.

Background

In 1996, Congress passed the CDA to protect internet 'hosts' such as AOL from facing legal uncertainties regarding their liability for others' speech on hosted sites. In addition, Congress passed the CDA to remove disincentives for the development and use of technologies and 'Good Samaritan' practices that block and filter objectionable web content. Through the CDA, Congress would promote the continued development of the internet and interactive computer services. The CDA states that '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 provider⁴.' The CDA also precludes state law actions that are inconsistent with CDA protections, with limited exceptions.

In order for Section 230 to apply to an entity, the entity must be a provider or user of an interactive computer service and may not be an 'information content provider,' that is, '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 service⁵.'

Hassell v. Bird arose from an obscure 2012 slip-and-fall case. The plaintiff in that case, Ava Bird, hired Dawn Hassell's law firm to represent her. Hassell's representation of Bird apparently lasted 25 days, during which time Bird failed to respond to her lawyer's calls and emails and missed an important appointment. The representation terminated when Hassell sent Bird an email advising her to find another lawyer.

Fast forward a few months to when Bird posted a scathing review of Hassell's law firm on Yelp, accusing Hassell of incompetence⁶. A second review was later posted from a different account that Hassell claimed to also have been written by Bird⁷. In 2014, Hassell sued Bird for libel in California State court. Bird failed to respond to the summons or appear in court - apparently, she was never served with court papers - so a judge entered a default judgment

against Bird for more than \$550,000 in damages and costs. The trial court did not explain how it found the reviews to be defamatory. Further, even though Yelp was not a defendant in the case and had never been informed about the hearings, the trial court ordered Yelp to remove the ostensibly defamatory material. Finally, the trial court enjoined Yelp from allowing the accounts that allegedly posted the defamatory material to post any reviews in the future, whether about Hassell's firm or otherwise⁸. Yelp challenged the decision, but the lower court upheld its order⁹.

Yelp appealed the trial court's order to the California Court of Appeals¹⁰. The Court of Appeals was unsympathetic to Yelp's claims of unfairness, holding that Yelp was not a publisher and therefore had no right to a hearing related to the order to remove reviews¹¹. Further, the Court of Appeals held that because plaintiff had not sued Yelp directly, Section 230's broad immunity did not apply to the online review platform¹². Yelp appealed the Court of Appeals'

decision to the Supreme Court, arguing that it had First Amendment rights as a publisher, that it had a due process right to a hearing in connection with any order that targets speech on its website, and that the Supreme Court must preserve the integrity of the CDA. Yelp received support for its appeal from dozens of organisations and individuals, including non-profits, law professors, media organisations, and many other similarly situated online services, such as Reddit and Snap Inc.

Yelp's supporters argued that the Court of Appeal's reasoning threatened not only Yelp's publishing rights, but also any journalist's work - published or not - that quotes third-party individuals or information. Further, these *amici* argued that the Court of Appeals' holding threatened the First Amendment rights of individuals who comment on news articles or who provide online feedback regarding their interactions with businesses.

The California Supreme Court's decision

The Supreme Court of California reversed the Court of Appeals¹³. The decision was split 3-1-3: three justices on a plurality opinion, three justices (in two opinions) in dissent, and a swing-vote concurrence by Justice Leondra Kruger. The split fell along partisan lines: the three plurality judges were all appointed by Republicans, while the dissenting judges (including Judge Stewart, a California Court of Appeals Justice, sitting by designation) were appointed by Governor Jerry Brown (a Democrat).

The California Supreme Court disagreed with the lower courts' holdings that the removal order did not directly threaten Yelp with liability. Instead, the California Supreme Court recognised that Hassell's litigation strategy offered an 'end-run' around laws protecting internet platforms - a strategy that could be duplicated a hundredfold by plaintiffs¹⁴. By way of explanation, if Hassell sued Yelp directly for the defamatory content that Bird allegedly posted, the trial court would have dismissed the case, as Yelp took no part in creating the content and would therefore have been protected by Section 230. Instead, Hassell, apparently assuming that any judgment and related injunction against Bird could later be enforced against

Yelp, sued only Bird, the party who engaged in the defamatory acts. The Court wrote, "[...] we must decide whether plaintiffs' litigation strategy allows them to accomplish indirectly what Congress has clearly forbidden them to achieve directly. We believe the answer is no¹⁵."

The California Supreme Court also held that, because Section 230 applied to Yelp even though it was not a party to the original suit, Yelp did not have to remove the defamatory content¹⁶. The Supreme Court found that when an internet service provider continues to display a user's defamatory content after a court issues a judgment against the user, such an act does not constitute 'aiding and abetting' under California law¹⁷. Moreover, the Supreme Court found that CDA immunity continues to apply to the internet service provider even after issuance of such an order¹⁸.

The Supreme Court appeared to find that ordering a third-party platform owner to assist in removing defamatory content would undermine the purpose of the CDA¹⁹. The Court concluded that the language of the law "conveys an intent to shield Internet intermediaries from the burdens associated with defending against state-law claims that treat them as the publisher or speaker of third party content, and from compelled compliance with demands for relief that, when viewed in the context of a plaintiff's allegations, similarly assign them the legal role and responsibilities of a publisher qua publisher²⁰." Thus, Section 230 shielded Yelp from liability in this instance.

Justice Goodwin Liu dissented, arguing that the lower courts only ordered Yelp to remove defamatory material, and did not assign any liability to Yelp itself for that material²¹. Justice Mariano-Florentino Cuéllar also dissented, stating that the near-absolute immunity the plurality awarded to Yelp is "categorical absolutism written in invisible ink²²." By this, he meant that such immunity is not found in the text of Section 230 itself.

Yelp applauded the plurality's decision, saying that "online publishers in California can be assured that they cannot be lawfully forced to remove third-party speech through enterprising abuses of the legal system²³." Counsel for the defamed law firm, however, called the opinion

"an invitation to spread falsehoods on the internet without consequence²⁴." *The Associated Press* reported that the firm is considering appealing the California Supreme Court's decision to the United States Supreme Court²⁵.

Discussion

The California Supreme Court's opinion raises important questions for internet service providers going forward. What if the online platform was the only party that could remove the defamatory content? What circumstances would give rise to aiding and abetting liability for an online platform in a defamation case? The Supreme Court's opinion is silent on these issues.

Perhaps most importantly, however, the lack of consensus among the California Supreme Court justices raises questions about the precedential weight of this case. Justice Kruger's swing-vote concurrence largely agreed with the plurality's opinion:

"I agree with the plurality opinion that even if it were permissible to enter an injunction against a nonparty website operator based solely on its past decision to permit the defendant to post content on its website, the operator would be entitled to section 230 immunity in that proceeding..."

"I agree with the plurality opinion's conclusion given the particular circumstances of this case: Even if it were permissible to issue an injunction against Yelp solely because it once permitted Bird to post her reviews and has the ability to remove them, the proceedings would be barred by section 230..."

"The question is instead whether the injunction necessarily holds Yelp legally responsible for, or otherwise authorizes litigation against Yelp solely because of, its editorial choices. As the case comes to us, I agree with the plurality opinion that the answer to that question is yes...²⁶"

Justice Kruger, however, also expressed concern about the "broad sweep" of Section 230 immunity, citing a 2006 California case that mentioned the "troubling consequences" of that immunity²⁷. Furthermore, Justice Kruger speculated about direct liability for internet service

continued

providers on different facts, stating: “But section 230 does not bar a cause of action solely because the result might be a court order requiring the provider, as the publisher of the posting in question, to take steps to remove it²⁸.”

Finally, the Supreme Court’s opinion is noteworthy in that, though it discussed due process, it failed to clearly resolve the applicability of constitutional due process to Yelp. Further, it failed to discuss the First Amendment implications of a court ordering the removal of user-generated online reviews. Finally, the Supreme Court failed to address whether and when a non-party can be bound to an injunction.

Key takeaways

Perhaps the most important takeaway for online businesses that facilitate user reviews is to remain vigilant, as the parameters of Section 230 constantly are shifting. In order to invoke Section 230 immunity, online service providers must be careful not to involve themselves in the content. In other words, consistent with the

intent of Congress in enacting Section 230, providers must not participate in ways that could be interpreted as them being the content-creator or ‘speaker’ rather than just the host.

In some instances, courts have rejected websites’ Section 230 arguments when the websites were deemed to have designed categories or questions that related to illegality. For example, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*²⁹, the Court of Appeals for the Ninth Circuit denied Roommates.com’s Section 230 immunity argument to Fair Housing Act of 1968 claims. The Ninth Circuit reasoned that Roommates.com’s ‘drop-down’ menu obligated users to answer questions regarding gender and sexual orientation. In essence, rather than just host content created by others, Roommates.com created questions that lead to the claims in the case³⁰.

Congress recently amended the CDA by enacting the Allow States and Victims to Fight Online Sex Trafficking Act of 2018 (‘FOSTA’). Under FOSTA, online

service providers may be held liable for knowingly permitting sex trafficking. Some sites, such as Craigslist, have stopped hosting personal ads out of concern that the sites could be liable under FOSTA. By virtue of the fact that Congress felt compelled to amend the CDA to reach sex traffickers, online service providers should take some comfort in Section 230’s continued immunity coverage for other claims relating to users’ content.

It should be noted that an online service provider is not barred from voluntarily removing content. In practice, we have had some success when asking a website host to delete or redact defamatory content.

Thus, whether one is an online service provider or a party seeking removal of content, another option is to request redactions or deletions. Under the CDA, the host should not be liable for taking these ‘good samaritan’-type actions, and most website terms of use generally advise that the website operator may, but is not required to, remove content.

1. 420 P.3d 776 (Cal. 2018).

2. 47 U.S.C. § 230.

3. *Id.* at 791.

4. 47 U.S.C. § 230(f)(3).

5. *Id.*

6. Specifically, Bird allegedly stated the following regarding Hassell’s firm in Bird’s Yelp review: (1) “to save your case, STEER CLEAR OF THIS LAW FIRM!”; (2) “the hassell law group didn’t (sic) ever speak with the insurance company either, neglecting their said responsibilities and not living up to their own legal cont[r]act!”; (3) “nor did they bother to communicate with me, the client... AT ALL!”; (4) “then, she dropped the case because of her mother and seeming lack of work ethic.” (5) “basically, dawn hassell made a bad situation worse for me.”; (6) “she will probably not do anything for you, except make your situation worse.”; (7) “[The Hassell Law Group] neglect[ed] their said responsibilities and [did not live] up to their own legal contract!” (Spelling, syntax, and capitalisation in original.)

7. Hassell alleged that after Hassell did not respond a hostile email from Bird, Bird created a fake Yelp identity using the pseudonym “J.D.” from Alameda, CA. Hassell alleged that Bird, using her newly created Yelp username, published a second Yelp review on 6 February 2013, in which Bird stated, among other things, that she “Did not like the fact that they

charged me their client to make COPIES, send out FAXES, POSTAGE, AND FOR MAKING PHONE CALLS about my case!!! Isn’t that your job. That’s just ridiculous!!! They Deducted all those expenses out of my settlement.” (Spelling, syntax, and capitalisation in original.)

8. See *Hassell v. Bird*, 203 Cal. Rptr. 3d 203, 210–11 (Ct. App. 2016) (recounting procedural history).

9. *Id.* at 212–13.

10. *Hassell v. Bird*, 203 Cal. Rptr. 3d 203 (Ct. App. 2016).

11. *Id.* at 220–22.

12. *Id.* at 225–27.

13. *Hassell v. Bird*, 420 P.3d 776 (Cal. 2018).

14. *Id.* at 792; see also *id.* at 788–89.

15. *Id.* at 788.

16. *Id.* at 790–93.

17. *Id.* at 790. “California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability may [...] be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person’s own conduct, separately considered, constitutes

a breach of duty to the third person.” *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 171 Cal. Rptr. 3d 548, 566–67 (Ct. App. 2014), as modified (27 May 2014) (citations and quotation marks omitted).

18. *Id.* at 790–93.

19. See *id.*

20. *Id.* at 791.

21. *Id.* at 803 (Liu, J., dissenting).

22. *Id.* at 811 (Cuéllar, J., dissenting).

23. Aaron Schur, A Case for the Internet: *Hassell v. Bird*, Yelp (2 July 2018), <https://www.yelpblog.com/2018/07/a-case-for-the-internet-hassell-v-bird>.

24. Associated Press, Yelp can’t be forced to remove negative posts, California Supreme Court rules, NBC News (2 July 2018 7:51 PM), <https://www.nbcnews.com/tech/social-media/yelp-can-t-be-forced-remove-negative-posts-california-supreme-n888496>.

25. *Id.*

26. *Hassell*, 420 P.3d at 794, 800, 801 (Kruger, J., concurring).

27. *Id.* at 801 (Kruger, J., concurring).

28. *Id.* (Kruger, J., concurring).

29. 521 F.3d 1157 (9th Cir. 2008).

30. Ultimately, Roommates.com was found not to have violated the Fair Housing Act.