

August, 2009

***Barnes v. Yahoo!:* The 9th Circuit Pokes Another Hole In Section 230's Once-Ironclad Shield**

By David Mirchin, Adv.

www.meitar.com

Almost everyone has experienced a bad breakup, and perhaps more than a few of us are guilty, or have been a victim, of less than decent ways of getting back at a former significant other. It is less likely, however, that you have been subjected to the guerilla tactics giving rise to the 9th Circuit's recent opinion in *Barnes v. Yahoo!, Inc.*, a case that should be of concern not only to those at arms with disgruntled ex-significant others, but more importantly, to those in the business of providing internet services that allow for contributions by third parties, or user-generated content. The importance of this case is that websites may no longer be able to easily dismiss claims with respect to defamatory content on their site. The bottom line: websites must now be extremely careful that they carry through on any promises they make to post or remove third party content. This is because the 9th Circuit determined that websites could be liable for "contract liability" for failing to remove defamatory content if they promised to do so.

The Facts: Revenge

The case, on its face, concerns a now all-too-familiar set of facts: guy meets girl; guy secretly takes lewd photographs of girl; after breaking up, guy creates fake online profile in girl's name complete with lewd photographs, personal contact information and solicitations to engage in sexual acts with complete strangers, and finally, strangers repeatedly show up at girl's workplace expecting sex. Fortunately for internet service providers ("ISPs") like Yahoo! (and unfortunately for the girl), section 230 of the Communications Decency Act of 1996 ("Section 230") grants immunity from liability to "provider[s]...of an interactive computer service" for defamatory content posted to its websites by third parties, as well for any voluntary restrictions imposed by an ISP with respect to any third party content which it deems "obscene...or otherwise objectionable." This protection has systematically allowed ISPs to quickly dispose of defamation claims, without ever having to go to trial.

In *Barnes*, the 9th Circuit recognized the potential for a new loophole in Section 230 immunity, namely, "contract liability." Prior to bringing her claim, Ms. Barnes had made repeated attempts to contact Yahoo! in order to induce them to remove the fake profile from their site. After two months, Barnes finally received a call from Yahoo!'s Director of Communications, a Ms. Osako, who indicated to Barnes that she would "personally walk the statements over to the division responsible for stopping unauthorized profiles and they would

take care of it," a promise that was never fulfilled. Based on these facts, Barnes' complaint includes, in addition to a defamation claim, a claim for breach of contract, asserting that, in reliance on Ms. Osaka's promise, she took no further action (often referred to as "forbearance") with respect to either the profile or the "suitors" it had solicited.

What are the limitations of Section 230 immunity?

Aside from the issue of contract liability, the decision in *Barnes* provides a useful guide outlining the circumstances under which Section 230 immunity is available to ISPs (which is defined so broadly as to include almost all internet sites permitted uploading of user-generated content).

- **Section 230 protects ISPs against claims relating to defamatory content generated entirely by third parties.**
- **Section 230 protects ISPs against claims relating to their voluntary decisions to post, remove, edit, or decline to publish, third party content.** This protection will withstand even constitutional claims relating to the First Amendment's free speech guarantee. These decisions to include, or exclude, material on its website are at the heart of the "publishing" function, and thus, the ISP is immune from defamation claims arising from any such decisions.
- **Section 230 immunity is available for more than just "defamation claims."** As the court explains, "what matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." In other words, the protection afforded by Section 230 is not limited to defamation alone, but is available more generally to immunize ISPs from liability resulting from any sort of harm caused to a plaintiff as a result of third party content posted to their websites.
- **Section 230 immunity is available even if an ISP has received notice of defamatory content and fails to remove it.** Note that this is quite different from claims of copyright infringement. Under the Digital Millennium Copyright Act, an internet site must take down allegedly copyright infringing content in order to benefit from the safe harbor immunity from damages.
- **Section 230 immunity is available for both primary and secondary publishers (a.k.a. distributors).**

Why is Yahoo! exposed to contract liability?

Under the facts of this case, it seems logical that Section 230 would have afforded Yahoo! complete immunity from liability resulting from the lewd postings made by Barnes' ex-boyfriend. However, rather than dismissing Barnes' claim as barred by Section 230, the court proceeded to analyze the supposed promise of the Yahoo! employee to remove the lewd postings.

While United States contract law typically requires evidence of an offer, an acceptance, and consideration in order for an enforceable contract to be formed, the consideration requirement

can be circumvented in certain cases through a judicial doctrine known as "promissory estoppel." This doctrine allows courts to find an enforceable contract absent consideration where a claimant can prove that (1) a promise was made, (2) which the promisor, as a reasonable person, should have foreseen would induce the conduct of the type which occurred, and (3) that the claimant actually relied on the promise resulting in a substantial change in their position.

Based on the unfulfilled promise made by Ms. Osaka, the 9th Circuit held that Barnes' complaint alleged facts sufficient for a potentially valid breach of contract claim on the theory of promissory estoppel, even though no consideration was exchanged for Ms. Osaka's promise. Therefore, Yahoo! was unable to dismiss the claim quickly and cheaply at the beginning of a case, which until now, has been the huge benefit of Section 230 for websites.

What will such a breach of contract claim mean for Yahoo! and other ISPs?

Before the decision came down in *Barnes*, ISPs had little exposure to liability resulting from defamatory content posted to their sites by third parties. Such claims were easily dismissed and thus required only minimal time and money to successfully defend. Now that the 9th Circuit has permitted a breach of contract claim to go forward, several issues, both legal and practical, are raised.

- ***Potential for Increased legal fees.*** After *Barnes*, it is probable that nearly all plaintiffs bringing defamation claims against ISPs for third party content will concurrently bring breach of contract claims. This is especially likely because courts reviewing a motion to dismiss must accept as true the allegations of a complaint. Thus, a well drafted complaint alleging facts sufficient to state a breach of contract claim will almost always withstand a motion to dismiss. While such claims may, at the end of the day, be difficult to prove—because plaintiffs must prove they substantially changed their position in reliance on the website's promises—they nonetheless have the potential to drastically increase the legal fees necessary to defend in such actions.
- ***Uncertain measure of damages.*** Courts are divided on how damages are to be measured in promissory estoppel cases. Since Yahoo! has already removed the defamatory content from its site, a court order mandating its removal would afford Barnes no remedy. Thus, the lower court may require that Barnes show some actual damages, such as expenditures she might have made in order to fend off solicitations resulting from the fake profile while awaiting its promised removal. Although less likely, punitive damages are sometimes available in contract claims where the plaintiff can prove a willful breach of contract, as plaintiff will argue in *Barnes*. We can only speculate as to what the measure of damages would be should Barnes' claim prevail.
- ***Likelihood of Forum shopping.*** Given that *Barnes* will only serve as binding precedent in the 9th Circuit, it is likely that future plaintiffs will seek the 9th Circuit (which includes California and other Western states) as the forum in which to bring their claim.

My view: Major flaws in the courts reasoning...

The reasoning through which the court reached its holding in *Barnes* is, in my view, seriously flawed. By enacting Section 230, Congress established a regime whereby websites are not to be held liable for defamatory content posted to their site by third parties. The *Barnes* court injected into its analysis a misplaced doctrine of contract law that arguably has no place in Section 230 jurisprudence. As discussed above, the doctrine of promissory estoppel requires that plaintiff's reliance on the promise resulted in a substantial change in their position. It is difficult, if not impossible, to see how Ms. Barnes substantially changed her position as a result of Ms. Osaka's promise.

Barnes is thus the second case in as many years to seriously undermine a website's immunity from defamation claims. In 2008, the 9th Circuit's ground-breaking decision in *Fair Housing Council of San Fernando Valley v. Roommates.com*, held that Section 230 did not immunize the website Roommates.com from liability for drafting and posting questionnaires that sought information from those using the site about their roommate preferences. These questionnaires sought information about the preferred sexual orientation of the prospective roommate, and were used to create member profiles. In *Roommates.com*, the questionnaires were at least created by the website, so there was some justification for holding them liable. In *Barnes*, however, the fake profile was not created by Yahoo!, so the court is imposing potential contractual liability for what is essentially a publishing decision—whether to post or remove the fake profile.

The court thus puts the form of the complaint—as a contract claim—over the intent of Section 230's safe harbor provision. This decision essentially makes every statement made by a customer service representative actionable on the theory of promissory estoppel. The likely, and unfortunate, result is that that websites will now be less responsive to user requests as they will be instructed by their lawyers not to make any statements or promises in dealing with requests to remove even the most inappropriate content.

How does section 230 differ from comparable laws in the European Union and Israel?

To put this case in an international perspective, Section 230, even after *Barnes* and *Roommates.com*, still provides more protection against defamation claims than the laws in the European Union and Israel. In 2000, the European Union issued Directive 2000/31/EC on Electronic Commerce (the "Directive"), which, like Section 230, protects ISPs from liability for defamatory content posted by third parties. Unlike Section 230, however, the Directive adopts a "notice and take down" approach, meaning that ISPs are afforded immunity from liability for the storage of defamatory third party content only if they remove such content upon receipt of notice.

In Israel, too, websites cannot simply ignore defamatory postings. A series of cases, including *Boshmitz v. Aronowitz*, a 2007 case involving extreme claims against a veterinarian who ran a monkey farm for research purposes, has set the standard that ISPs must act reasonably under the circumstances. When the postings are extreme in tone, and it is neither expensive nor time-consuming to do so, a moderator of a forum is obligated to remove the postings. Otherwise, the website could be liable for the defamatory postings of third parties.

Summary and Recommendations for Compliance

In light of the *Barnes* case, we suggest that your website take the following steps to maintain immunity under Section 230:

- ***Don't make any promises.*** The court points out, in no uncertain terms, that it would have been very easy for Yahoo! to avoid contract liability in this case. The opinion indicates that Yahoo! "need only disclaim any intention to be bound" in order to avoid being held to their word in future cases. There are several ways by which Yahoo! might have set forth such a disclaimer, some or all of which may be prudent for ISPs to consider incorporating into their business practices. Our recommendations include:
 - advise personnel not to make promises to customers;
 - in the event a promise is unavoidable, provide personnel with specific language to be used to disclaim any intention to be bound;
 - display a prominent disclaimer on customer service websites and on the bottom of customer service e-mails that "any statements made include no promises of action on which you should rely";
 - play a prerecorded disclaimer before incoming calls are transferred to customer service personnel.
- ***Don't turn third party content into first party content.*** ISPs can be liable where they take affirmative action to select, edit or modify third party content, thus converting such content into so-called first party content. Therefore, we recommend that such actions be avoided where possible in order to avoid the exploitation of loopholes in Section 230 immunity by would-be plaintiffs.

<p>David Mirchin heads the Information Technology and Licensing Department of Meitar. He teaches Internet Law at the Interdisciplinary Center Law School in Herzliya. He may be contacted at dmirchin@meitar.com or +972-3-610-3199.</p>
