

# Two decisions confirm federal protection for website owners

By Thomas R. Burke

California publishers watching the California Supreme Court's handling of *Barrett v. Rosenthal* and the lawsuit filed in Illinois against Craigslist have reason to be optimistic in the wake of resolution of these cases.



Both rulings, by two different courts, including the California Supreme Court, Section 230 of the Communications Decency Act of 1996 challenged federal immunity for content posted by third parties confirming the longstanding expansive protection granted by the law to Internet service providers

For newspaper publishers, these decisions make it clear that publishers enjoy federal immunity against claims for libel and invasion of privacy when they publish content provided by third parties (e.g., those not employed by the newspaper) on their websites, even if the identical content would be the basis of a lawsuit if it appeared in print.

Section 230 protects any "interactive computer service" – broadly defined to include Internet service providers like America Online as well as owners of other interactive websites – by protecting them from claims such as libel or invasion of privacy based on content posted online by third parties. The federal law states: "No publisher or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section."

Since the enactment of Section 230 more than a decade ago, plaintiffs nationwide have unsuccessfully sued website owners for content third parties posted on their websites, even when owners knew of the defamatory or offending work and failed to remove it. But in 2004, a California appellate court cast doubt on the scope of protection intended by Congress, finding the statute did not immunize an individual defendant sued for third-party content she received in an email from someone she did not know and posted to an Internet forum. The California

Supreme Court reversed the decision this past November, rejecting the lower court's attempt to change settled law.

In *Barrett v. Rosenthal*, the California Supreme Court reversed the First District Court of Appeal's new interpretation of Section 230, applying the statute to an atypical fact pattern.

The plaintiffs, operators of a website devoted to exposing health fraud, sued an individual defendant who reposted messages from the website in a discussion group, alleging they had warned her that the messages contained false and defamatory information. Ignoring the weight of nationwide precedent, the San Francisco appellate court found Section 230 immunity hinges on whether the defendant was "on notice" of the unlawful material. In *Rosenthal*, the California Supreme Court overturned the decision, noting four fatal flaws in the Court of Appeal's approach:

- First, it would subject service providers who received notice that content was defamatory only for maintaining this content, not removing it, which would chill speech by provoking widespread removal of online postings.
- Second, the standard would deter providers from actively screening the content of the material posted on its service, against the express intent of Congress when it enacted Section 230.
- Third, such notice-based liability would give third parties a cost-free means of manufacturing claims.
- Finally, a decision otherwise would encourage forum shopping, given nationwide precedent favoring immunity.

The California Supreme Court also rejected the plaintiffs' argument that the individual was a "distributor," not a "publisher," reasoning that she was a "secondary publisher." By its decision in *Rosenthal*, the California Supreme Court joined the vast majority of courts in the country that have recognized the broad immunity provided by Section 230.

Similarly, an Illinois federal district court recently found that Section 230 immunized Craigslist from alleged violations of the Fair Housing Act on the basis that the website allowed third party posting of discriminato-

ry housing advertisements. Plaintiffs in the suit cited several postings soliciting renters on the bases of race, religion, sex, familial status and national origin. Craigslist.com moved to dismiss the action, arguing that under Section 230, third party users are responsible for their own content. Although the court expressed concern regarding broad interpretation of the statute thus far, the court still granted immunity, reasoning that liability would subject Craigslist.com, an interactive service provider, to liability as a publisher under the Fair Housing Act.

The recent *Rosenthal* and *Craigslist.com* decisions are a welcome legal sign for publishers who increasingly feature third-party content on their websites. As the federal law stands today, the *Rosenthal* and *Craigslist.com* decisions confirm the broad availability of this federal immunity.

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