# Blogger's liability for third-party comments and content: A growing legal threat for bloggers or plaintiffs' lingering ignorance of the law?

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Speaker's Corner in London's Hyde Park has long been recognized as a free-wheeling forum where anyone could speak on any possible subject — running only the risk of being ridiculed by park regulars if the speaker's style (or subject) did not meet their approval.

To many, the Internet has become the new electronic version of the Speaker's Corner. Across the Internet, blogs and social media sites have established their own virtual soap boxes allowing members of the public to share their opinions, comments and content to anyone who surfs by. Not surprisingly, given the litigious nature of the U.S., many people who have been offended or criticized on blogs and Internet forums have taken their complaints to court.

## RECENT LITIGATION

To give a flavor of some of the legal risks associated with operating a blog open for public posting, one need look no further than two recent lawsuits.

On Aug. 1, 2011, well-known aviation attorney Arthur Alan Wolk filed a lawsuit against Reason.com, various Reason bloggers and certain anonymous commenters on the libertarian website.[1] The lawsuit was apparently filed in response to a Reason.com blog post relating to separate litigation that Wolk had initiated against another website.

Among the numerous allegations in Wolk's complaint, he claimed that anonymous commenters on Reason's website made defamatory and false statements of "heinous crimes," damaging his reputation. The lawsuit ultimately settled before trial — though, deciding it had enough of Wolk's lawsuits, Reason.com opted to disable third-party commenting for its blog post describing the settlement.[2]

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Another recent case involved conservative blogger Aaron Walker. On May 29 a Maryland state court judge entered a peace order against Walker (apparently resulting in Walker's arrest) based on comments Walker made on his blog site and Twitter account.[3] The comments in question concerned a person named Brett Kimberlin. While it is not entirely clear why the judge issued his peace order, Kimberlin stated in his petition seeking the order that "Mr. Walker is using his blog and Twitter account to incite others to attack me, and they have, with other vile comments, accused me of deplorable acts, and other false criminal acts."[4] Walker was able to have the peace order vacated on a *de novo* appeal on the grounds that his Internet activity did not constitute harassment.[5]

## POSSIBLE LEGAL CAUSES OF ACTION

There are a variety of claims that a plaintiff potentially could assert against blog operators based on third-party-posted comments and content. Just a few examples of such claims include:

- Defamation — Defamation exists where there is "(a) false and defamatory statement concerning another; (b) an unprivileged publication [of such statement] ... (c) fault amounting at least to negligence on the part of the publisher[.]"[6] Subject to certain legal defenses and safe harbors (discussed below), a blog operator could find itself subject to defamation claims based on third-party-posted comments.
- Invasion of privacy — There are a variety of privacy-related tort claims that can be asserted in connection with published comments. For example, a tortious violation of privacy can occur if a person publicizes a matter that places another party "before the public in a false light" provided that the "the false light in which" the complaining party was placed was "highly offensive to a reasonable person" and the publishing party "had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light" in which the complaining party would be placed.[7]
- Unlawful harassment — Certain U.S. states allow parties to obtain injunctions or restraining orders if they have been subject to unlawful harassment. These statutes can be somewhat vaguely defined to include civil or criminal liability for subjective conduct that alarms, annoys or harasses another.[8]
- Copyright infringement — Under Section 106 of the U.S. Copyright Act, a copyright holder holds certain exclusive rights with respect to its copyrighted works, including the right to reproduce,

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distribute and display the copyrighted work. Absent a legal defense or safe harbor, bloggers can be held liable for the actions of third parties who unlawfully post copyrighted material on bloggers' websites.

## POTENTIAL LEGAL DEFENSES

### *Section 230 of the Communications Decency Act*

The Communications Decency Act provides one of the most important legal protections available to website operators. Section 230(c)(1) expressly states 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 content provider."

The CDA further defines an "interactive computing service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." Under Section 230(f)(3) of the CDA, an "information content provider" is "any person or entity that is responsible ... for the creation or development of information."

A ruling by the 4th U.S. Circuit Court of Appeals, in *Zeran v. America Online*, was the first federal appellate decision interpreting the application of the CDA's immunity clause.[9] Kenneth Zeran brought a defamation action against America Online in connection with anonymous postings left on an Internet bulletin board. The postings advertised the sale of T-shirts featuring offensive slogans concerning the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. The posters indicated that people interesting in buying the shirts should call "Ken" at Zeran's home phone number. Predictably, Zeran received many threatening phone calls.

In its ruling, the 4th Circuit noted that America Online fell within the CDA's definition of an interactive computing service and that the anonymous posters qualified as "information content providers" under the statute. Given those facts, the court ruled that while America Online published the allegedly defamatory third-party postings, it was not liable for defamation given Section 230(c)(1)'s grant of immunity to interactive computer service providers.

A plaintiff potentially could assert a variety of claims against blog operators based on third-party-posted comments and content, including defamation, intrusion of privacy, unlawful harassment and copyright infringement.

Bloggers should take comfort from the fact that the CDA will still generally provide them immunity from any tort claims (such as defamation or intrusion of privacy) arising from third-party comments. They should note, however, that Section 230(c)(1) of the CDA does not provide immunity for any website postings infringing another's intellectual property rights, nor does it provide immunity from violations of any federal criminal laws.

### *DMCA safe harbor*

Section 512 of the Digital Millennium Copyright Act provides various safe harbors from copyright infringement liability for online and Internet-related content — provided that certain steps are taken to ensure conformance to safe-harbor requirements.[10]

The safe harbor most applicable to website operators, the "stored content" safe harbor, is found in Section 512(c) of the DMCA. To qualify for this safe harbor, a website operator allowing third-party content posting:

- Cannot have actual knowledge that the third-party content is infringing.
- Must not be aware of any circumstances from which the infringing nature of the posted third-party content would be apparent.
- Must promptly remove third-party infringing content upon obtaining knowledge or notice of the infringing content.
- Must not receive any financial benefit from the infringing third-party content (to the extent the website operator can control the activity leading up to or associated with the posting of the infringing material).

In addition to the above requirements, bloggers wishing to obtain the benefit of the "stored content" safe harbor must provide the U.S. Copyright Office with contact information for a designated agent who can receive "take-down" notices related to infringing material. High-traffic commercial websites specializing in user-generated content (such as the Huffington Post) generally appear to comply with the designated-agent requirement of Section 512(c). Interestingly, many smaller websites appear not to have designated take-down agents (and, consequently, have lost the protection of the "stored content" safe harbor).

There is one final point bloggers should keep in mind in connection with the DMCA's "stored content" safe harbor. All DMCA safe harbors require that the party seeking safe-harbor protection implement a policy that provides for the termination of a user's site or service access if such user is a repeat infringer and notify users of such policy.

### *Anti-SLAPP statutes*

State anti-SLAPP laws are another potential tool that can protect bloggers (and commenters on blog sites). The acronym "SLAPP" stands for strategic lawsuits against public participation. As the name suggests, anti-SLAPP laws are designed to protect people from being sued in connection with their participation in matters of public concern.

California's anti-SLAPP law provides an example of the extremely broad reach of some of the state anti-SLAPP statutes.

**Bloggers checklist to ensure DMCA's "stored content" safe harbor**

- ☑ Notification of site users about policy to terminate site or service access for repeat infringers.
- ☑ No actual knowledge and no awareness of circumstances that third party posted infringing content.
- ☑ Prompt removal of infringing content, once notified
- ☑ No financial benefit from infringing content.

Under Section 425.16(b) of the California law, a cause of action that arises from the exercise of a civil defendant's "right of petition or free speech ... in connection with a public issue" is subject to a special motion to strike, unless the court determines that the plaintiff who asserted the cause of action is likely to prevail.

Section 425.16(e) of the California statute further notes that speech rights in connection with public issues include, among other things, written or oral statements made in a public forum in connection with an issue of public interest.

In *Ampex Corp. v. Cargle*, a California appellate court interpreted the application of Section 425.16 to anonymous website comments.[11] Ampex Corp. and its chairman brought a defamation action against Scott Cargle, a formerly anonymous poster, who had posted critical comments regarding Ampex's business practices on an Internet financial message board. In response, Cargle filed an anti-SLAPP motion.

In its ruling, and most importantly for bloggers, the court specifically held that "websites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum for purposes of Section 425.16."[12] The court also found that Cargle's comments regarding Ampex's business were on matters of public concern. Therefore, he was entitled to the benefit of California's anti-SLAPP statute.

**A blog's terms and conditions of use should notify third-party posters and content providers that:**

- By posting comments and content the posters acknowledge they have right to post the content and such content does not infringe any third party's copyrights or other intellectual property rights; they are granting the website operator a non-exclusive, worldwide, irrevocable, perpetual license to post such content; and such posted content does not otherwise violate any applicable laws.
- The posters' commenting and uploading privileges, as well as their website access, may be revoked at any time and for any reason, including, but not limited to, if the website operator becomes aware that the poster is uploading infringing content.
- They cannot post comments that defame, libel, harass or threaten others.
- They cannot use the website to otherwise violate the law (including by uploading child pornography or otherwise obscene materials).

Potential legal defenses available to bloggers for conduct of third-party posters include Section 230 of the Communications Decency Act, the Digital Millennium Copyright Act's safe harbor, state anti-SLAPP statutes and the First Amendment.

### *First Amendment*

The First Amendment of the U.S. Constitution also provides a level of protection for bloggers. For instance, parties seeking to enjoin websites from publishing harassing or threatening materials should keep in mind First Amendment cases like *Brandenburg v. Ohio*. Under *Brandenburg*, a state actor cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite such action."[13]

Given court holdings that the First Amendment's free-speech guarantee applies to online content,[14] *Brandenburg* will provide some protection to bloggers in connection with harassing or threatening comments contained on their websites. Indeed, in the case of *Kimberlin v. Walker* discussed at the outset of this article, a Maryland court expressly relied on *Brandenburg* in overturning the original peace order enjoining Walker from blogging about Kimberlin.[15]

Of course, despite *Brandenburg*, bloggers should be aware that they can still suffer legal repercussions for third-party threatening comments posted on their site.

In the case of *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA*, Claire MacDonald, an employee of an animal testing laboratory, successfully obtained a temporary restraining order in a California court against a website operated by Stop Huntingdon Animal Cruelty USA, an animal rights organization.[16]

The TRO was awarded on the basis of a series of anonymous entries on the SHAC USA website that listed MacDonald's address, called her a puppy killer and animal abuser, described protests and harassment that had been carried out by activists at her house, threatened more harassment, and noted that the police would be too slow to respond. The court found the third-party comments posted on the website constituted credible threats of violence.[17]

## CONCLUDING THOUGHTS

Bloggers who enable public commenting on their websites should take basic precautions to minimize their legal risks (see box). None of these steps will completely eliminate a blogger's legal risk, but they should help ensure that the blogger enjoys the benefits of applicable legal safe harbors. WJ

## NOTES

[1] *Wolk v. Reason.com,* No. BC466477, *complaint filed* (Cal. Super. Ct., L.A. County Aug. 1, 2011).

[2] Posting of Jacob Sullum to Hit & Run blog, http://reason.com/blog/2011/09/19/update-on-arthur-alan-wolks-la (Sept. 19, 2011).

[3] Posting of David Hogburg to Capital Hill blog, http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/7166-brett-kimberlin-hearing-aaron-walker-handcuffed- (May 29, 2012).

[4] Interim Peace Order at 7, *Kimberlin v. Walker,* No. 0601SP019792012 (Md. Dist. Ct., Montgomery County May 19, 2012), *available at* http://www.scribd.com/doc/94374117/Brett-Kimberlin-s-Petition-for-Peace-Order-5-19-12-OCR.

[5] Trial Transcript at 41-42, *Kimberlin v. Walker,* No. 8526D (Md. Cir. Ct., Montgomery County July 5, 2012), *available at* http://www.scribd.com/doc/102362407/Kimberlin-v-Walker-Hearing-7-5-12-OCR.

[6] Restatement (Second) of Torts, § 558 (1977).

[7] *Id.* at § 652E.

[8] For instance, Section 527.6 of the California Code of Civil Procedure allows people who have been subject to "harassment" to obtain temporary restraining orders to stop the harassing behavior. The California statute defines harassment to include a "willful course of conduct ... that seriously alarms, annoys or harasses the person, and that serves no legitimate purpose." Another example of state anti-harassment laws can be found in Section 3-805 of the Maryland Criminal Law Code. That statute criminalizes the malicious use of electronic communications made "with the intent to harass, alarm or annoy" another.

[9] 129 F.3d 327 (4th Cir. 1997).

[10] 17 U.S.C. § 512 (2011).

[11] 128 Cal. App. 4th 1569 (Cal. Ct. App., 1st Dist. 2005).

[12] *Id.* at 1576.

[13] 395 U.S. 444, 447 (1969).

[14] *United States v. Cassidy,* 814 F. Supp. 2d 574, 582 (D. Md. 2011) ("online speech is equally protected under the First Amendment").

[15] Order Granting Motion to Stay, *Kimberlin v. Walker,* No. 8526D (Md. Cir. Ct., Montgomery County June 25, 2012), *available at* http://www.scribd.com/doc/98202984/Order-Granting-Stay.

[16] *Huntingdon Life Sci. v. Stop Huntingdon Animal Cruelty USA,* 129 Cal. App. 4th 1228, 1256-1259 (Cal. Ct. App., 4th Dist. 2005).

[17] *Id.* at 1240-42.