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Libel Suit Dismissed Against Online Booksellers for Book Descriptions

Section 230 of the Communications Decency Act provides immunity

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A federal district court has ruled that Barnes & Noble, Amazon and Books-A-Million cannot be held liable for allegedly defamatory statements published on their websites in book descriptions supplied by a print-on-demand publisher. *Parisi v. Sinclair*, --- F.Supp.2d ---, 2011 WL 1206193 (D.D.C. March 31, 2011).[1] The case represents a helpful precedent for e-commerce websites and Internet publications under Section 230 of the Communications Decency Act (CDA). The case also sets a high "fault" standard in defamation claims against booksellers in connection with their distribution of books. The full opinion can be found here.

Case background

The case revolves around a self-published book by defendant Larry Sinclair entitled *Barack Obama & Larry Sinclair: Cocaine, Sex, Lies & Murder*. Plaintiff Daniel Parisi sued Sinclair for defamation and other related torts in the United States District Court for the District of Columbia, contending that the book contains defamatory statements about him and his website, Whitehouse.com. Parisi also sued online booksellers Barnes & Noble, Amazon, and Books-A-Million on two grounds: first, for distributing the book and second, for an allegedly defamatory statement appearing on their display pages for the book on their websites. On Barnes & Noble's website, for example, the allegedly defamatory sentence appeared in identical paragraphs under the headlines "From the Publisher" and "Synopsis." The book descriptions were sent to the three booksellers by Lightning Source, the print-on-demand service chosen by Sinclair to print his book.

Books-A-Million moved to dismiss the case under Rule 12(b)(6), and Barnes & Noble and Amazon filed a pre-discovery motion for summary judgment. The booksellers argued that Section 230 of the CDA, 47 U.S.C. § 230, immunizes them from tort liability for publishing third-party content in book descriptions on their websites. Further, with respect to Parisi's claim against them for distribution of Sinclair's book, the booksellers argued that Parisi could not establish actual malice.

The decision

On March 31, 2011, Judge Richard J. Leon granted the motions and dismissed the claims against the booksellers in their entirety. The court ruled that Section 230 immunized all three booksellers from liability for the book descriptions because Parisi had failed to present any evidence or properly allege that the booksellers were "information content provider[s]" for the content in question. With respect to Books-A-Million, the court emphasized the deficiency of the factual allegations in the complaint, noting that the plaintiffs "fail to allege that [Books-A-Million] was involved with the creation or development of the promotional statements" and rejected the conclusory allegation that the bookseller "made and published" them. On Barnes & Nobles' and Amazon's summary judgment motion, the court found that there was no issue of fact regarding whether the booksellers had created or developed the allegedly defamatory product descriptions. Since all the evidence demonstrated that Lightning Source had supplied the content, which was then uploaded by Barnes & Noble and Amazon, dismissal was proper.

Notably, the court flatly rejected the plaintiffs' argument that "CDA immunity should be withheld because [the booksellers] adopted the promotional statements as [their] own." The court noted the absence of case law supporting the plaintiffs' position and instead focused solely on who had supplied the contested copy. The court reasoned that it would dampen the "vibrant and competitive free market of ideas on the Internet" if courts were required to engage in a "fact-based analysis of if and when a defendant 'adopted' particular statements." Few cases address this point directly, so this ruling is likely to be influential. If this analysis is followed in future cases, it could encourage greater flexibility in how websites operate, potentially allowing greater integration of user-generated and third-party content with websites' own content.

The court noted that Section 230 of the CDA did not immunize the bookseller defendants for their distribution of Sinclair's book but dismissed Parisi's distribution claims by accepting Barnes & Noble's argument that plaintiffs, who were concededly public figures, had failed to adequately plead and provide evidence of actual malice. While only a few courts have addressed the level of "fault" applicable to book distributors in public figure cases, the court held that in such cases, a plaintiff must demonstrate actual malice in a high-level employee at the time of initial distribution. The court rejected the plaintiffs' arguments that Barnes & Noble had knowledge of the defamatory content because the plaintiffs' lawyer sent in-house counsel a copy of the draft complaint and a demand letter several months after

publication, or because customer reviews appearing on Barnes & Noble's website allegedly gave it constructive notice that the book was defamatory. The court held these two allegations could not establish actual malice because D.C. Circuit precedent regarding book publishers holding that actual malice must exist at the time of publication should apply equally to book distributors. The court also dismissed the notion that actual malice could be based on the "notoriously sensational or scandalous" nature of the book, observing that "the character and content of the publication" at issue is a "constitutionally impermissible evidentiary basis for a finding of actual malice." Finally, the court rejected arguments that actual malice could be based on the general assertions that Sinclair and his publisher were not "reputable" or on blog posts by Sinclair and others describing communications with low-level Barnes & Noble employees.

Takeaways

- Courts can decide Section 230 immunity on a motion to dismiss and will apply the *Iqbal*[2] standard to dismiss claims without factual allegations plausibly suggesting that the defendant created or developed the content in question.
- E-commerce sites and other Internet publishers may not need to expressly distinguish their own content from that of their users or other third parties to enjoy Section 230's protection. The critical criteria appears to be whether the content was in fact created by the website or by a third party.
- In defamation cases in the D.C. Circuit against booksellers for distribution of books regarding public figures, actual malice may not be based on post-distribution demand letters or customer reviews, the allegedly "sensational or scandalous" nature of the book, or communications with low-level employees.

FOOTNOTES

1 Linda Steinman, Joanna Summerscales and Rory Eastburg of Davis Wright Tremaine represented Barnes & Noble in *Parisi v. Sinclair*.

2 *Ashcroft v. Iqbal*, 565 U.S. --, 129 S.Ct. 1937 (2009) requires factual "amplification [where] needed to render the claim *plausible*." *Iqbal*, 129 S. Ct. at 1944 (emphasis in original). "Threadbare recitals of the legal elements, supported by mere conclusory statements, do not suffice to state a cause of action." *Id.* at 1949.