

# Free Speech on the Internet - 2019

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# Topics

- \* The limits on free speech:
  - \* Defamation
  - \* Crimes
  - \* Fighting words
  - \* Privacy
  - \* IP
  - \* Ethics for lawyers

... or, more interestingly...

- \* Stacy Parks Miller
- \* Revenge porn
- \* Twitter wars
- \* Devin Nunes' Cow

# What Is Libel?

Remember first year Torts?

# False Statement

- \* Statement must be 'fact' – not 'opinion'
  - \* Sometimes a fuzzy line
- \* Common test: Is it capable of being proven one way or another?

# James Woods

- \* Tweets:

- \* “So-called #Trump ‘Nazi’ is a #BernieSanders agitator/operative?”

- \* Note the question mark – Court finds the Tweet was therefore not a ‘statement of fact’

- \* Compare: hyperbole/joking

# Another recent example



# Guess who tweets about an ex

- \* “...A total con job, playing the Fake News Media for Fools (but they know it)!“
- \* Stormy sues – claim this defames her
- \* Court: nope, just rhetorical hyperbole - "'extravagant exaggeration [that is] employed for rhetorical effect.’“



# Mature reactions follow



“Horseface”



“Tiny”

# Published by Defendant

- \* At common law, both the writer and the person/entity who publishes are liable

# Of and Concerning Plaintiff

- \* Must identify plaintiff sufficiently so reader understands who is being defamed
  - \* No such thing as “group” libel

# Meaning is defamatory

- \* Injures plaintiff's reputation

# The Smartest Man in the World



# The “Pedo” Tweet

- \* Clearly identifies plaintiff/rescuer
- \* POP QUIZ: Any doubt about whether “pedo” is defamatory?
- \* So what’s the defense?

# Defendant acted culpably

- \* Negligent or worse

# In the absence of privilege

- \* Most common –
  - \* Employment context provides a conditional privilege
  - \* Litigation – in pleadings, or in testimony



# With some degree of fault

- \* At least negligence
- \* “Actual Malice”

# How does this change on the Internet?

Key: The First Amendment is not built in to the Internet

# “Published by Defendant”

- \* Common law: Both the writer and publisher are liable
- \* How many times is something “published” when it’s posted, linked to, forwarded?

# Meaning is defamatory

- \* Injures plaintiff's reputation
- \* What can injure a reputation is geo-tagged

# In the absence of privilege

- \* Location-specific rules don't work very well on the Internet

# Internet-Defamation Case Law - Phase One

\* Cubby v. CompuServe



\* Stratton-Oakmont v. Prodigy

**prodigy.com™**

# Internet Defamation, Phase Two

Communications Decency Act §230(c)

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 provider.



If you're creating content, you can  
be liable

“Ripoff Report”

## NO EFFECT ON CRIMINAL LAW

- \* Nothing in this section shall be construed to impair the enforcement of ... obscenity.... sexual exploitation of children... or any other Federal criminal statute.

# NO EFFECT ON INTELLECTUAL PROPERTY LAW

- \* Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

# STATE LAWS OK... EXCEPT WHEN THEY AREN'T

- \* Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.
- \* 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.

# **NO EFFECT ON COMMUNICATIONS PRIVACY LAW**

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986... or any similar State law.

# Who's protected? Who's not?

## **(3) INFORMATION CONTENT PROVIDER**

The term "information content provider" means 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 service.

# Creator of content can be liable

- \* Just because you're an ICS doesn't mean you're out of the woods
- \* You may not be liable for content created by others, but you can be liable if you've created some content

# Where's the line? How little can you do to “create content” and still face possible liability?

- \* Craigslist – sued for carrying illegal ads
- \* Held: immune (7<sup>th</sup> Circuit)
  - \* People who created illegal ads are responsible
  - \* Medium that merely carries the ads is not



# Roommates.com – the anti-Craigslist

- \* Drop-Down Menus = no immunity
- \* Drop-downs are “asking illegal questions”
- \* “By categorizing, channeling and limiting the distribution of users’ profiles, Roommate provides an additional layer of information that it is ‘responsible’ at least ‘in part’ for creating or developing.”

# Roommates.com – the denouement

- \* Second appeal – defendant wins
- \* BUT in the meantime, “Jones v. The Dirty” defendant denied summary judgment, citing original 9<sup>th</sup> Cir. Ruling
- \* 6<sup>th</sup> Circuit reverses

# Crystal Cox: Blogger? Journalist? Blackmailer?

- \* Is a blogger entitled to “media” First Amendment and Oregon law defenses?
- \* Jury verdict \$2.5 million
- \* Reversed on appeal

# Hard Case #1 – Zeran

- \* Fake e-mail promotion offering T-Shirt following OK City bombing
- \* Features Zeran's name and number
- \* Zeran has nothing to do with it
- \* Calls and abuse pour in
- \* Zeran requests that AOL remove the message
- \* Message reappears, as does abuse

# Is AOL Liable for Defamation?

- \* Yes under common law, since publisher/distributor was jointly liable with author
- \* Not any more – pre-emptive Federal Law immunizes ISP

# Thanks, Section 230 (c)

- \* Zeran v. America Online
- \* Blumenthal v. America Online
  - \* Doe v. America Online
  - \* DiMeo v. Tucker Max

# Libel Online - The Global Forum

- \* The chance to be sued anywhere
- \* Foreign suits over domestic speech - very different standards
- \* What is defamatory over there?
- \* What are your defenses?
- \* What are they going to do about it?

# How Far Does §230 Immunity Reach?

- \* The “any law relating to intellectual property” exception
  - \* Meaning what?
- \* Right of publicity not barred – close enough to IP for D NH (FriendFinder)
- \* Voicenet case – no state criminal law prosecutions of ISP for content created by others
- \* Perfect 10 – 9<sup>th</sup> Cir. – only Federal IP qualifies



# Defamation law adapts to the Web

- \* Just because it's online doesn't make it a statement of fact
- \* Just because it's on the web doesn't make it true
- \* If there is a 'talk radio' doctrine, there must be a 'comments' doctrine

# Congressman Sues Cow

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

DEVIN G. NUNES )

Plaintiffs, )

v. )

TWITTER, INC., )  
ELIZABETH A. "LIZ" MAIR, )  
MAIR STRATEGIES, LLC, )  
"DEVIN NUNES' MOM" )  
[@DevinNunesMom] )  
"DEVIN NUNES' COW" )  
[@DevinCow] )

Defendants. )

Case No. \_\_\_\_\_

**TRIAL BY JURY  
IS DEMANDED**

## COMPLAINT

Plaintiff, Devin G. Nunes, by counsel, files the following Complaint against defendants, Twitter, Inc. ("Twitter"), Elizabeth A. "Liz" Mair ("Mair"), Mair Strategies, LLC ("Mair Strategies"), "Devin Nunes' Mom" (@DevinNunesMom) and "Devin Nunes' cow" (@DevinCow), jointly and severally.

# You won't believe this...

10. Defendant, “Devin Nunes’ cow”, a person who, with Twitter’s consent, created and maintains an account on Twitter (@DevinCow) for the sole purpose of attacking and defaming Nunes. [<https://twitter.com/devincow?lang=en>]. @DevinCow has 1,204 followers.<sup>17</sup> Like Devin Nunes’ Mom, Devin Nunes’ cow engaged a vicious defamation campaign against Nunes that lasted over a year. Devin Nunes’ cow has made, published and republished hundreds of false and defamatory statements of and concerning Nunes, including the following: Nunes is a “treasonous cowpoke”;

# Two days later...



**Devin Nunes' cow**  
@DevinCow

Hanging out on the dairy in Iowa looking for the lil' treasonous cowpoke.  
TheRealDevinCow@gmail.com

@ United States

**Tweets** 8,346   **Following** 1,552   **Followers** 356K   **Likes** 17.5K

**Tweets**   **Tweets & replies**   **Media**

📌 Pinned Tweet

 **Devin Nunes' cow** @DevinCow · 4 Feb 2018  
Replying to @The\_Roni

Nunes' farm has over a million dollars in revenue each y  
subsidies. Here's the data:

What about the bad guys?

# Mugshot sites

Section 230 as a business model

# Mugshots.com

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Arthur-Lovington Junior/Senior High School Principal Brian Hatfield has been charged with two counts of domestic battery in Champaign County. Hatfield is accused of domestic battery with physical contact and domestic battery leading to bodily harm in an incident that occurred in Urbana in the early hours of Jan. 21 ...

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Available

# Revenge porn

- \* Girls With Low Self Esteem online
  - \* Extortion Gone Wild



# Copyright to the rescue?

- \* Garcia v. Google – The Innocence of the Muslims

# Yelp

- \* Opinions = armpits
- \* What if it's more than that?



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Categories: [Carpet Cleaning](#), [Carpeting](#) [\[Edit\]](#)

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Alexandria, VA 22314

*Serving Alexandria and surrounding area*

(703) 836-1111

[hadeedcarpet.com](http://hadeedcarpet.com)

**Hours:**

Wed-Sat 7 am - 7 pm

**Accepts Credit Cards:** Yes

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**Oxi Fresh** ★ ★ ★ ★ ★ 8 reviews

Yelp Ad



**Rebecca M.** said: "After getting a recommendation from a friend and doing a little online research, I was pumped to try Oxi Fresh carpet cleaning. Who hasn't experienced the wonders of Oxyclean-style products at home so why not try them on the floors at..." [read more »](#)

[Reviews \(16\)](#)

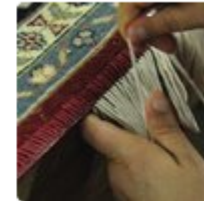
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VIRGINIA :

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

HADEED CARPET CLEANING, )  
INC. )  
3206 Duke St., )  
Alexandria, VA 22314 )

Plaintiff, )

v. )

Case No. 12003401

JOHN DOE #1 )  
Whereabouts unknown )

JOHN DOE #2 )  
Whereabouts unknown )

JOHN DOE COMPANY )  
Whereabouts Unknown )

Defendant. )

COMPLAINT

COMES NOW, Hadeed Carpet Cleaning, Inc. ("Hadeed Carpet"), by counsel, to demand judgment against the Defendants, John Doe #1, John Doe #2 and John Doe Company, and states as follows:

The Parties

FILED  
CLERK OF COURTS  
CITY OF ALEXANDRIA  
2012 JUL -2 P 3:51  
BY EDWARD SEHONIAN, CLERK  
DEPUTY CLERK



# Pennsylvania's Test

## Pilchesky v. Gatelli

- Notice
- Sufficient Evidence for Prima Facie Case
- Affidavit of Good Faith and Necessity
- Balancing Test

Backpage – how hard cases  
make bad law

# SOSTA/FESTA

- \* Totally unnecessary
- \* Likely unconstitutionally vague
- \* Actually harmful to sex workers



# Professional Responsibility

- \* Stacy Parks Miller – Centre County DA
- \* Texts about trials
  - \* With Judges
- \* Creates Facebook page as “Britney Bella”
  - \* “to facilitate the self-identification of sellers of illegal and highly dangerous drugs...”
- \* PA Supreme Court suspends Miller for one year and a day

# Predicting the future

(your mileage may vary)

Thank you.