



## Procedural Law and Elements of Litigation Strategy

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# Online Safe Harbors

## Two safe harbors for third-party content

- §230
  - Defamation and other state law claims
  - Applies automatically
- DMCA
  - Copyright infringement
  - Requires special set-up to use

## **§230 Safe Harbor**

## 47 U.S.C. §230

(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(1) TREATMENT OF PUBLISHER OR SPEAKER. — 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.

(2) CIVIL LIABILITY. — No provider or user of an interactive computer service shall be held liable on account of —

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

## 47 U.S.C. §230

"Protection for Good Samaritan blocking and screening of offensive material":

"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."

"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."

## Who is protected?

Any "interactive computer service" is protected.

"interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.

## Broad applicability

- "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.
- Not limited to special kinds of websites. Includes blogs, Twitter, consumer review sites, etc.

## Who is protected?

The original author of the defamatory or otherwise actionable content is not protected.

## What claims are barred?

Barred:

- Defamation
- Privacy torts
- Other state law civil claims

Not barred:

- Copyright
- Trademark
- Criminal law

Unclear:

- Right of publicity

## Bounds of immunity

Okay:

- Passively hosting 3d party content.
- Screening posts/comments prior to publication.
- Selectively removing posts.
- Selectively publishing posts.
- Encouraging third parties to submit.
- Edits that don't materially alter the meaning.

## Site operators shouldn't lose immunity by:

- Exercising traditional editorial functions, such as pre-screening, selectively deleting.
- Encouraging or paying third-parties for contributions.
- Editing material (unless the editing materially alter the meaning of the content).

# DMCA

DMCA

## DMCA Safe Harbor

- The safe harbor provisions at §512 are one of two of the most salient aspects of the Digital Millennium Copyright Act
- The other is the anti-circumvention provision.

## 17 U.S.C. §512(c)

### Administrative requirements:

- (1) designate an agent to receive takedown notices
- (2) adopt and communicate to users a copyright infringement policy
- (3) properly comply with a takedown when received

## 17 U.S.C. §512(c)

### Substantive requirements:

- You don't have actual knowledge that there is infringing content on your servers or know surrounding facts making the infringement apparent
- You don't receive any financial benefit directly attributable to the infringing activity, if you have the ability to control the activity
- You act expeditiously to remove or disable access to the infringing material upon obtaining actual knowledge or awareness of infringement or after getting a proper takedown notice



# Anti-SLAPP

Anti-SLAPP

## SLAPP

- “strategic lawsuit against public participation”
- Goal is not to win
- Goal is to silence critics

## SLAPP – frequent claims

- Defamation
- Invasion of Privacy
- Intentional Interference with Contract
- Intentional Interference with Prospective Economic Advantage
- Intentional Infliction of Emotional Distress
- Intellectual property (copyright, trademark)

## Anti-SLAPP

- Procedural law
- Designed to prevent the civil litigation system from being used to effectively silence critics, regardless of underlying merits

## Anti-SLAPP statutes

- California
- Colorado
- District of Columbia
- Florida
- Georgia
- Illinois
- Indiana
- Massachusetts
- Michigan
- New Jersey
- New York
- North Carolina
- Ohio
- Pennsylvania
- Texas
- Virginia
- Washington

## California Anti-SLAPP

- 425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

## California Anti-SLAPP

- 425.16. (b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

## California Anti-SLAPP

- Defendant must show that the plaintiff is suing because of an "act in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue."

## California Anti-SLAPP

- “any act in furtherance” covers any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

## Applicability online

- A publicly accessible website qualifies as a public forum.
  - Barrett v. Rosenthal, 146 P.3d 510, 514 n.4 (Cal. 2006)
- The website need not allow comments or have other interactivity with the public, so long as it is available to the public
  - Wilbanks v. Wolk, 121 Cal. App. 4th 883, 897 (Cal. Ct. App. 2001).

## Getting fees and costs

- With a few exceptions “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion”