

In a Divided Opinion, California Supreme Court Squashes End Run around CDA Immunity That Sought to Compel a Non-Party Online Platform to Remove Defamatory Content

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In a closely-followed dispute, the California Supreme Court vacated a lower court order, based upon a default judgment in a defamation action, which had directed Yelp, Inc. (“Yelp”), a non-party to the original suit, to take down certain consumer reviews posted on its site. ([Hassell v. Bird](#), No. S235968, 2018 WL 3213933 (Cal. July 2, 2018)). If the plaintiffs had included Yelp as a defendant in the original suit, such a suit would have likely been barred by Section 230 of the Communications Decency Act (“CDA” or “CDA Section 230”); instead, the plaintiffs adopted a litigation strategy to bypass such legal immunities. In refusing to allow plaintiff’s “creative pleading” to avoid the CDA, the outcome was a win for online companies and platforms that host user-generated content (“[A Case for the Internet](#),” declared Yelp).

In *Hassell v. Bird*, plaintiffs obtained a default judgment against defendant Bird for defamation and required her to remove certain offending reviews she allegedly posted on Yelp. The judgment also contained an order requiring Yelp, a non-party, to remove Bird’s defamatory reviews from its site. Apparently not satisfied with the evidentiary showing at the default proceeding, Yelp refused to take down the reviews at issue. Yelp did represent, however, that Bird could comply with the court order by removing the offending reviews herself at any time. Yelp then filed a motion to vacate the judgment, arguing that to the extent the removal order was aimed at it, the injunction violated Yelp’s due process rights and was barred by CDA Section 230. Yelp also argued that it had a protected First Amendment interest in the publication of the reviews, apart from Bird’s own interest, that had not been adjudicated.

The lower court denied Yelp's motion and held that the injunction against Yelp was proper because Yelp was aiding and abetting Bird's violation of the injunction by, among other things, allowing the reviews to remain posted on the website. The California Court of Appeal [affirmed](#), on different grounds, finding the trial court had the power to fashion such relief and that such an order (or violation of an order) would not impose "liability" on Yelp as a publisher of third party speech.

On appeal, the California Supreme Court was asked to consider the validity of the removal order, entered upon a default judgment, as it directs Yelp to remove certain consumer reviews from its website. The Court reversed the judgment to the extent it required Yelp to remove the challenged reviews or subsequent comments of the reviewers.

"The question here is whether a different result should obtain because plaintiffs made the tactical decision not to name Yelp as a defendant. Put another way, we must decide whether plaintiffs' litigation strategy allows them to accomplish indirectly what Congress has clearly forbidden them to achieve directly. We believe the answer is no."

"In this case...Yelp is inherently being treated as the publisher of the challenged reviews, and it has not engaged in conduct that would take it outside section 230's purview in connection with the removal order. The duty that plaintiffs would impose on Yelp, in all material respects, wholly owes to and coincides with the company's continuing role as a publisher of third party online content."

According to a plurality of the court, plaintiff's legal remedies lie solely against Bird and cannot extend (even via an injunction) to Yelp. Deciding the appeal on CDA grounds, the plurality did not take up the due process issues over when a non-party can be compelled to comply with an injunction. Yet, this holding is not the entire story.

Indeed, this case divided the California Supreme Court as the justices, over the course of 102 pages, wrote varying opinions that wrestled with the scope of CDA immunity against the backdrop of the problem of online defamation: three justices in the plurality wrote to reverse the lower court's injunction based on the CDA; one concurring justice agreed the injunction against Yelp was invalid, but on due process grounds and contended that Yelp should have a meaningful opportunity to be heard on the propriety of the injunction against it (yet still appeared to agree with a fair amount of the plurality's CDA analysis); and three justices dissented, arguing that Yelp had no CDA immunity from the removal order and that the order did not violate due process.

One of the more interesting issues debated among the justices was under what circumstances is CDA immunity triggered in the litigation context, namely, whether Section 230 only bars actions that subject covered providers to liability (as opposed to post-judgment injunctive relief whose non-compliance might subject providers to potential contempt sanctions). Under CDA Section 230(e)(3): "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." The plurality rejected the plaintiffs' argument that Yelp could not claim CDA immunity because no "cause of action" had been alleged directly against it as a defendant, and that subjecting Yelp to a post-judgment injunction would not amount to the imposition of "liability." In the court's view, Section 230(e)(3) "does not expressly demand that a cause of action always must be alleged directly against an Internet intermediary as a named defendant for the republisher to claim immunity under the statute," and injunctions such as the removal order can place substantial litigation burdens on online platforms.

The concurring justice agreed the removal order should be vacated, but based on due process grounds (not the CDA):

“Yelp is not a party to this litigation, and the courts’ power to order people to do (or to refrain from doing) things is generally limited to the parties in the case. Although there are qualifications to the rule, there is no exception that permits the sort of order we confront here: an order directing a nonparty website operator to remove third party user content just in case the user defaults on her own legal obligation to remove it. Before Yelp can be compelled to remove content from its website, the company is entitled to its own day in court.”

Still, the concurring justice, in dicta, expressed some agreement with the plurality’s CDA analysis (“Although I believe it is unnecessary to reach the section 230 question, I agree with the plurality opinion’s conclusion given the particular circumstances of this case: Even if it were permissible to issue an injunction against Yelp solely because it once permitted Bird to post her reviews and has the ability to remove them, the proceedings would be barred by section 230.”).

The *Hassell* dispute is not the first time a litigant sought to compel a platform (and non-party) to take down user content. For example, we [wrote about a similar litigation strategy in 2010](#) in a dispute involving post-judgment efforts to compel consumer gripe site Ripoff Report, a non-party to the suit, to remove defamatory postings based upon the theory that by continuing to host the content, Ripoff Report was aiding and abetting the enjoined parties in violating the injunction. On appeal, the Seventh Circuit affirmed that Ripoff Report could not be compelled under Fed. R. Civ. P. 65 to remove the content because they were not in “active concert or participation” with the defendants merely because it entered into an agreement prior to the suit to host their content; the appeals court also ruled that merely having the technical capability to remove the content does not render its failure to do so aiding and abetting. (See [Blockowicz v. Williams](#), 630 F.3d 563 (7th Cir. 2010)). Deciding the case on procedural grounds, the Seventh Circuit, unlike the California Supreme Court in *Hassell*, sidestepped the CDA.

While *Hassell* is a victory for online publishers that host user content, the California Supreme Court opinion was divided and we will have to wait to see how the decision is interpreted by future courts and relied on by parties on both sides of disputes concerning objectionable third-party postings. Given that the plurality opinion did not take up the due process issues, we will also have to wait for further clarification from the Court about its position on when a litigant may bind a non-party online publisher with a takedown order (a position that is important as many web platforms are based in California). Beyond the legal issues, the members of the Court expressed sympathy about the challenges individuals face to secure removal of defamatory material from the web – and indeed, despite CDA immunity, individuals still have legal remedies against the posters of such content. Moreover, in general practice, most websites will voluntarily take down material that has been deemed defamatory by a court (though in this case, Yelp had concerns with the sufficiency of the default judgment), so perhaps we will not see another case with the same procedural circumstances.

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