

August 8, 2016

Mr. Frank A. McGuire, Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Letter Supporting Review of *Hassell v. Bird* (2016) 247 Cal.App.4th 1336;
CA Supreme Court Case No. S235968 (Petition for Review Pending);
Court of Appeal, First Appellate Dist., Case No. A143233;
San Francisco Superior Court Case No. CGC–13–530525.

Dear Chief Justice Cantil-Sakauye and the Associate Justices of the Court:

This letter is submitted on behalf of Xcentric Ventures, LLC (“Xcentric”). Pursuant to Rule 8.500(g) of the California Rules of Court, Xcentric respectfully urges the Court to grant review in *Hassell v. Bird*, Supreme Court Case No. S235968 (Petition for Review filed July 18, 2016).

I. Interest of Xcentric Ventures

Put simply, *Hassell* says that California courts may issue *ex parte* judgments/injunctions requiring websites to remove third party speech. Such relief is available even when the website operator was not a party to the underlying case, even when the website owner is not located in California,¹ and even when the website operator is otherwise entitled to absolute federal immunity from suit.

Unless reversed, this unprecedented ruling will have an immediate and drastic negative impact on website operators like Xcentric and many millions of Internet users nationwide. As explained herein, *Hassell* will have an especially profound effect on Xcentric due to its specific policies involving the preservation of third party speech.

Xcentric owns and operates www.RipoffReport.com (“Ripoff Report”). Founded in December 1998, Ripoff Report is one of the largest and oldest consumer complaint websites in existence. Ripoff Report’s website allows consumers to post free complaints (known as “reports”) about businesses and/or individuals who they believe have wronged them in some way. Any business or person who is the subject of a complaint may always respond, at no cost, to offer their side of the story.

¹ The case does not directly address this point, but in the short time since *Hassell* was decided, Xcentric (which is based in Arizona) has received numerous demands from California attorneys citing *Hassell* and demanding removal of content on that basis.

As of August 2016, Ripoff Report's website contains in excess of 2,000,000+ individual consumer reports and many tens of millions of responses, replies, rebuttals, and related comments. In terms of subject matter, reports span a nearly unlimited range of topics from complaints about automobile clubs² to allegations of misconduct by zoo staff³ and everything in between.

In its capacity as administrator of the Ripoff Report website, Xcentric works closely with all levels of federal, state, and local law enforcement, including, but not limited to, various state attorneys general, county attorneys, Homeland Security, the United States Justice Department, United States Secret Service, FBI, FTC, SEC, US Postal inspectors, and local police. Xcentric routinely provides law enforcement with evidence and information used to detect patterns of deceptive business practices, to locate victims, and to prosecute violations of consumer protection laws.

Despite providing a valuable public service, Xcentric has been the target of some occasional criticism due to some of its policies and practices. This criticism, as well as Xcentric's long history of litigation success, underscores the unusual importance of the issues raised in *Hassell*.

Specifically, since its inception nearly 20 years ago, Ripoff Report has employed a strict "non-removal" policy for reports. Pursuant to this general policy:

- Ripoff Report does not remove reports in response to legal threats;
- Ripoff Report does not remove reports for money;
- Ripoff Report does not permit authors to remove their own reports (authors can always *update* their reports to explain how the matter was resolved or provide other information about the situation); and
- Ripoff Report does not remove reports in response to court orders/injunctions.

The goal of this policy is simple—by refusing to remove reports, Ripoff Report creates a permanent record of disputes so the public can view a complete history of complaints, including information showing how the dispute was resolved. This policy furthers the important public purpose of giving consumers the "whole picture" including both truthful complaints *and* discredited ones. Both are worthy of protection, because "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279 n.19 (quoting Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15).

² See <http://www.ripoffreport.com/r/Automobile-Club-Of-Southern-California/Santa-Ana-California-92799-5449/Automobile-Club-Of-Southern-California-tried-to-rip-me-off-harassed-me-over-the-telephon-1273743>

³ See <http://www.ripoffreport.com/r/Brookfield-Zoo/Brookfield-Illinois-60513/Brookfield-Zoo-Treatment-of-Disabled-Veterans-Brookfield-Illinois-1260785>

II. Reasons For Granting Review

A. *Hassell* Is Inconsistent With Controlling Federal Law

Taking the easiest issue first, but in reverse order, the final point discussed by the Court of Appeal in its decision was whether a judicial decree requiring a website operator to remove third party speech was prohibited by federal law, specifically the Communications Decency Act, 47 U.S.C. § 230(c)(1) (the “CDA”). Like the vast majority of courts, this Court has interpreted the CDA broadly, noting that the law was intended to protect the First Amendment by eliminating the “natural incentive [for website owners] to simply remove messages upon notification, chilling the freedom of Internet speech.” *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 54–55; *see also Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330 (noting, “Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”)

The CDA presents a controlling and completely dispositive issue of law in this case; one which the Court of Appeal applied incorrectly. Under a correct view of the law, the Court of Appeal should have found, as other courts have, that the CDA precludes any order which requires a website operator to remove third party speech.

This point is not novel. In fact, it is well-settled, both in California, *see Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 104 Cal.Rptr.2d 772 (agreeing CDA bars claims for injunctive relief), and elsewhere. *See Noah v. AOL Time Warner, Inc.* (E.D.Va 2003) 261 F.Supp.2d 532, 540 (holding, “Indeed, given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief. After all, in some circumstances injunctive relief will be at least as burdensome to the service provider as damages, and is typically more intrusive.”) (citing *Smith v. Intercosmos Media Group, Inc.* (E.D.La. Dec.17, 2002) 2002 WL 31844907 (holding § 230 provides immunity from claims for injunctive relief)).

Despite this, the Court of Appeal suggested: “Neither party cites any authority that applies section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider’s Web site.” *Hassell v. Bird* (2016) 247 Cal.App.4th 1336, 1363. This statement overlooks the fact that Xcentric litigated this exact issue in *Giordano v. Romeo* (2011) 76 So.3d 1100. In *Giordano*, the Florida appellate court affirmed a trial court’s order holding that the CDA does, in fact, *per se* prohibit courts from ordering website operators to remove third party speech, even if the speech is defamatory, and even if the website owner is a party to the proceeding; “the law on this issue is clear. Xcentric enjoys complete immunity from *any action* brought against it as a result of the postings of third party users of its website.” 76 So.3d at 1102 (emphasis added).

In *Hassell*, the Court of Appeal either failed to discuss this authority or simply ignored it, instead holding that the CDA did not apply because: “The removal order ... does not impose any liability on Yelp.” *Hassell, supra*, 247 Cal.App.4th at 1362 (emphasis added). This conclusion assumed—incorrectly—that the CDA only applies to efforts to impose monetary *liability* upon a website owner. Thus, so long as the plaintiff does not seek (initially) to impose monetary liability on a website owner, the Court of Appeal concluded the CDA is not implicated at all, even if the plaintiff’s later enforcement efforts (via contempt or other means) produce exactly that result—the imposition of monetary liability.

This erroneous holding directly conflicts with the CDA’s statutory text and with extensive authority wherein courts have consistently found the CDA does much more than safeguard website owners from “ultimate liability”; it also immunizes a website operator’s editorial choices such as whether to *remove* content:

We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content [S]ection 230 must be interpreted to protect websites **not merely from ultimate liability**, but from having to fight costly and protracted legal battles.

Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC (9th Cir. 2008) 521 F.3d 1157, 1174–75 (emphasis added); *see also Caraccioli v. Facebook, Inc.* (N.D. Cal. 2016) --- F.Supp.3d ----, 2016 WL 859863, at *7 (CDA bars cases “involving editorial inaction ...” such as failure to remove material.)

The Court of Appeal’s decision in *Hassell* further ignores the plain text of 47 U.S.C. § 230(e)(3) which describes the CDA’s protective scope as much broader than a mere shield to liability; “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.” *See also Doe ex rel. Roe v. Backpage.com, LLC* (D. Mass. 2015) 104 F. Supp. 3d 149, 154 n.4 (holding, “immunity under section 230 is not only an affirmative defense [to liability], but also the right to be immune from being sued.”) (citing *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1125, *Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1357, and *Ricci v. Teamsters Union Local 456* (2d Cir. 2015) 781 F.3d 25, 28); *see also Backpage.com, LLC v. Cooper* (M.D. Tenn. 2013) 939 F. Supp.2d 805, 822 (rejecting argument that CDA is only a defense to liability).

As this authority provides, and as this Court noted a decade ago in *Barrett*, one of the CDA’s most critical functions is to protect website owners even when they refuse to remove content upon notice or demand: “Notice-based liability for service providers would allow complaining parties to impose substantial burdens on the freedom of Internet speech by lodging complaints whenever they were displeased by an online posting The United States Supreme Court has cautioned against reading the CDA

to confer such a broad power of censorship on those offended by Internet speech.” *Barrett* 40 Cal.4th at 57; *see also Obado v. Magedson* (D.N.J. 2014) 2014 WL 3778261, at *5 (holding CDA applied to Xcentric’s refusal to remove content, because “§ 230 immunity extends to the service provider’s decisions about how to treat potentially objectionable material ...” therefore “Defendants cannot be held liable for failing to withdraw any of the alleged defamatory statements, just as they cannot be found liable for ‘deciding’ to publish any such statements ...”), *aff’d* (3d Cir. 2015) 612 Fed.Appx. 90.

These rules do not change simply because a court determines the speech in question is false and thus arguably outside the scope of First Amendment protection. This is so because the core purpose of the CDA is to promote all forms of online speech; “Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.” *Batzel* 333 F.3d at 1027–28. Accordingly, the CDA applies even where the offending content is unlawful; “There is no provision in the CDA that limits its application to suits involving constitutionally protected material. Reading such an exception into the statute would undermine its purpose.” *GoDaddy.com, LLC v. Toups* (2014) 429 S.W.3d 752, 759, review denied (Nov. 21, 2014).

To be sure, in *Barrett* this Court rightly expressed genuine concern about the CDA potentially ““licens[ing] professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity.”” 40 Cal.4th at 61 (quoting *Batzel, supra*, 333 F.3d at 1038). Some other courts have shared that view, while ultimately accepting their limited role in trying to fix Congressional policy choices; “If it was an unintended consequence of the CDA to render plaintiffs helpless against website operators who refuse to remove allegedly defamatory content, the remedy lies with Congress through amendment to the CDA.” *Global Royalties, Ltd. v. Xcentric Ventures, LLC* (D.Ariz. 2007) 2007 WL 2949002, *4; *see also Noah*, 261 F.Supp.2d at 539 n.5 (observing, “Plaintiff argues that providing ISPs immunity ... is bad policy. Yet, it is not the role of the federal courts to second-guess a clearly stated Congressional policy decision.”)

The Court of Appeal’s decision in *Hassell* clearly conflicts with controlling federal law and policy as set forth in the CDA. On that basis alone, this Court should grant review and reverse the lower court’s contrary holding.

B. *Hassell* Is Inconsistent With Existing California Privilege Law

Entirely separate and apart from the CDA, *Hassell* creates another major conflict with existing California law. This is so because *Hassell* allows a court to require a website owner to remove speech from the Internet, yet the court proceeding, records, and statements contained therein (which contain the same challenged speech) may themselves be freely published online with impunity. Indeed, the Court of Appeal’s

decision below (which quotes the defamatory speech *verbatim*) has been designated for publication and is currently published on the California Judicial Branch's website: <http://www.courts.ca.gov/opinions/documents/A143233.PDF>

This odd result cannot stand because it is flatly inconsistent with long-standing principles of California law.

Specifically, under both the First Amendment and by California statute, the public enjoys a broad right to access court proceedings. *See* Cal. Code Civ. P. § 124 (with only narrow exceptions, “the sittings of every court shall be public.”) The public also enjoys a broad privilege to publish information contained in court records, even when those records contain defamatory statements. *See J-M Manufacturing Company, Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 98, 201 Cal.Rptr.3d 782, 791 (holding California’s statutory fair report privilege, Civ. Code § 47(d), bars defamation and trade libel claim based on publication of information contained in court records), *review denied* (July 27, 2016); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (explaining, “At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.”)

California law has thus long provided that once information is placed into the public record by incorporating it in a pleading or court order—as occurred here—that information is privileged and can, with certain limits not applicable here, be freely published online.

The Court of Appeal’s decision in *Hassell* necessarily conflicts with this rule. This is so because although the court determined that one website—Yelp.com—must remove certain speech from its website, anyone else may freely publish exactly the same statements either as part of a report about the case, or simply by republishing the pleadings and orders issued by the court. Indeed, this has already occurred. *See, e.g.,* <http://caselaw.findlaw.com/ca-court-of-appeal/1738164.html> (quoting, *verbatim*, the same speech which Yelp has been enjoined from publishing); https://scholar.google.ca/scholar_case?case=17639079783834545670 (same).

Thus, purely as a practical matter, based on existing California legal principles treating court records and information about legal proceedings as privileged speech, an injunction or any other type of order requiring a website to remove third party speech necessarily and automatically becomes a self-defeating paradox. In such a case, the enjoined website could comply with the injunction by “removing” the original speech, but the same website (or any others) could then immediately republish a copy of the court’s order (or a fair summary thereof) containing exactly the same speech with complete impunity.

This reality of modern litigation has not gone unnoticed by other courts in analogous circumstances. For example, the Sixth Circuit Court of Appeals recently noted (in a case arising from Google’s allegedly misleading publication of information contained in court records), filing a lawsuit in an attempt to remove online speech can backfire. Because so many court records are now indexed and republished online, each new lawsuit produces a quasi-metastatic effect, inadvertently yet foreseeably causing the production of more links for the plaintiff’s name,⁴ which may or may not be helpful:

In most respects, [the plaintiff] O’Kroley didn’t accomplish much in suing Google and the other defendants. He didn’t win. He didn’t collect a dime. And the search result about “indecency with a child” remains publicly available. All is not lost, however. Since filing the case, Google users searching for “Colin O’Kroley” no longer see the objectionable search result at the top of the list. Now the top hits all involve this case (there is even a Wikipedia entry on it). So: Even assuming two premises of this lawsuit are true—that there are Internet users other than Colin O’Kroley searching “Colin O’Kroley” and that they look only at the Google previews rather than clicking on and exploring the links—it’s not likely that anyone will ever see the offending listing at the root of this lawsuit. Each age has its own form of self-help.

O’Kroley v. Fastcase, Inc. (6th Cir. 2016) --- F.3d ----, 2016 WL 3974114, *2 (finding lawsuit based on publication of statements in court records was barred by the CDA).

For better or worse, because court records are public and privileged, attempting to use a court order or injunction to remove online speech is like trying to extinguish a fire by smothering it with gasoline. Given that reality, it is simply not possible for *Hassell* to co-exist peacefully alongside either the First Amendment or the existing open court system required by California law.

C. *Hassell* Misapplied Existing Law Regarding The Scope Of Injunctive Relief Against Non-Parties

Finally, the Court of Appeal also erred by recognizing, but then disregarding, the well-settled principle that injunctions are not binding on the *whole world*; as a general rule they extend only to the parties. Of course, injunctions can sometimes extend to certain third parties such as aiders, abettors, and the like, which the court concluded was applicable in this situation. That conclusion was error.

⁴ This is often referred to as the “Streisand Effect” which is defined as follows: “The Streisand effect is the phenomenon whereby an attempt to hide, remove, or censor a piece of information has the unintended consequence of publicizing the information more widely, usually facilitated by the Internet.”
https://en.wikipedia.org/wiki/Streisand_effect (last visited August 8, 2016).

Once again, Xcentric has litigated this exact issue under essentially identical facts. See *Blockowicz v. Williams* (7th Cir. 2010) 630 F.3d 563. In *Blockowicz*, as in *Hassell*, the plaintiff obtained a default judgment declaring that certain online speech was false and defamatory. In *Blockowicz*, as in *Hassell*, the plaintiff requested and received an order requiring the defamatory speech to be removed. In *Blockowicz*, as in *Hassell*, the website owner was not a party to the underlying proceeding and thus had no opportunity to defend any aspect of the case.

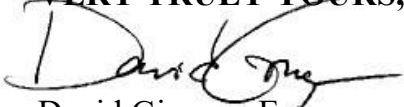
In *Blockowicz*, the plaintiff demanded that the affected website owner (Xcentric) comply with the default judgment and injunction by removing the challenged speech. As Yelp did here, Xcentric refused. However, contrary to the result here, the district court in *Blockowicz* agreed with Xcentric and held that as a non-party, Xcentric was not bound by the court's injunction and thus could not be forced to comply with it. See *Blockowicz v. Williams* (N.D.Ill. 2009) 675 F.Supp.2d 912, 916 (explaining, "The court is sympathetic to the Blockowicz's plight; they find themselves the subject of defamatory attacks on the internet yet seemingly have no recourse to have those statements removed from the public view. Nevertheless, Congress has narrowly defined the boundaries for courts to enjoin third parties, and the court does not find that Xcentric falls within those limited conscriptions based on the facts presented here.")

On appeal, in a carefully reasoned and unanimous decision, the Seventh Circuit Court of Appeals affirmed. Ultimately, the court explained "the fact that Xcentric is technologically capable of removing the postings does not render its failure to do so aiding and abetting. Xcentric's ... mere inactivity is simply inadequate to render them aiders and abettors in violating the injunction." *Blockowicz, supra*, 630 F.3d at 568.

Despite these virtually identical factual and legal issues, the *Hassell* court only mentioned *Blockowicz* in a single passing sentence. See *Hassell, supra*, 247 Cal.App.4th at 1365. Even more unfortunately, the Court of Appeals cited *Blockowicz* only as support for an entirely different point (that the CDA is not implicated by these facts; a point which the *Blockowicz* court neither considered nor discussed as the case was resolved on other grounds).

III. Conclusion

As explained above, the issues raised in *Hassell* are both exceptionally important, and they were wrongly decided. This Court should therefore grant review and reverse in order to secure uniformity of these decisions and to settle these important questions of law. Cal. R. Ct. 8.500(b)(1).

VERY TRULY YOURS,

David Gingras, Esq.

PROOF OF SERVICE

1013A(3) C.C.P. Revised 5/1/88

STATE OF ARIZONA)
) **ss.**
COUNTY OF MARICOPA)

I am employed in the County of Maricopa, State of Arizona. I am over the age of 18 and not a party to the within action. My business address is 4802 E. Ray Road, #23-271, Phoenix, Arizona 85044.

On August 8, 2016 I served the foregoing document described as:

Amicus Letter of Xcentric Ventures, LLC

on the interested parties in this action by placing:

[X] a true and correct copy –OR [] the original document

thereof enclosed in sealed envelopes addressed as follows (see service list):

[X] BY MAIL:

[] I deposited such envelope in the mail at Phoenix, Arizona. The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Phoenix, Arizona in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of Arizona that the above is true and correct.



Service List

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