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## 1999 John Marshall National Moot Court Competition in Information Technology and Privacy Law: Bench Memorandum, 18 J. Marshall J. Computer & Info. L. 181 (1999)

George B. Trubow

Ann Liebschutz

Maria Pope

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# MOOT COURT COMPETITION

## BENCH MEMORANDUM

**WHETHER THE PROVIDER OF AN ONLINE ARCHIVE OF  
PREVIOUSLY PUBLISHED INFORMATION CAN BE  
CONSIDERED THE PUBLISHER OF THAT INFORMATION, AS  
DEFINED BY 47 U.S.C. § 230(C), AND THEREFORE LIABLE  
FOR PUBLIC DISCLOSURE OF PRIVATE FACTS**

by GEORGE B. TRUBOW, ANN LIEBSCHUTZ, & MARIA POPE†

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Harry P. Wolf,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 99-404
	)	
v.	)	
	)	
HACKLIBRARY INC.,	)	
	)	
Defendant-Appellee.	)	

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† George B. Trubow is a Professor of Law and Director of *The Center for Information Technology and Privacy Law*, The John Marshall Law School. A.B., University of Michigan; J.D., University of Michigan. Professor Trubow chairs the annual John Marshall Moot Court Competition in Information Technology and Privacy Law. He is the Editor of a three volume treatise *PRIVACY LAW AND PRACTICE* (1987), and is the Co-Author of *PRIVACY: CASES AND MATERIALS* (1992). Additionally, Professor Trubow Chairs various American Bar Association committees, writes and speaks widely on information and privacy law, and advises state and federal agencies. Ann Liebschutz is the Administrative Editor of *The John Marshall Journal of Computer and Information Law*. B.A., Lake Forest College; J.D., The John Marshall Law School. Maria Pope is the Executive Production Editor of *The John Marshall Journal of Computer and Information Law*. B.A., Loyola University of Chicago; J.D., The John Marshall Law School; L.L.M. degree candidate in Information Technology law at The John Marshall Law School.

## I. INTRODUCTION

This is an appeal from the decision of the First District Court of Appeals for case number 99-01-CV-3PO. The Court of Appeals affirmed the decision of the Madison County Circuit Court, granting summary judgment in favor of defendant in *Harry P. Wolf v. HackLibrary Inc.*, but affirms on different reasoning than that of the lower court.<sup>1</sup>

There are two issues in this appeal. The first is whether an online archivist who saves and makes available a hacked web page is the information content provider, or is immune as an internet service provider under 230(c) of the Communications Decency Act.<sup>2</sup> The second issue on appeal is whether access to an archive containing the hacked web site is an invasion of privacy by public disclosure of private facts, or a mere reproduction of previously publicized newsworthy material.<sup>3</sup>

## II. STATEMENT OF THE CASE

The following facts are agreed upon by both parties.<sup>4</sup> ChiPost.com is the World Wide Web site of *The Chicago Post*, a daily newspaper.<sup>5</sup> The website contains headlines and articles from the *Post*, along with advertisements, community information, and other material.<sup>6</sup> On January 15, 1999, ChiPost.com was "hacked" by one or more persons who identified themselves as the "MP3 TERRORISTZ."<sup>7</sup> The hackers replaced the newspaper's web site with a single web page containing sexually explicit images and language, a rambling diatribe against copyright laws and intellectual property in general, and an angry denunciation of attorneys and executives in the music industry.<sup>8</sup>

The HTML source code for the hacked web page contained additional material which was encoded as comments and therefore not normally displayed by most web browsers.<sup>9</sup> This additional material (set forth in Appendix A) included condescending and critical statements about two prominent executives in the music industry, along with personal information pertaining to these executives.<sup>10</sup>

Bennett Sirius, ChiPost.com's system administrator, discovered the hack within three hours and immediately took the site offline in order to

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1. Record ("R") at 2.
  2. 47 U.S.C. § 230(c) (1996). *See* R2.
  3. *See* R3.
  4. *Id.*
  5. *Id.*
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *See* R3.
  10. *Id.*

restore its intended contents and to close the security hole which had made the hack possible.<sup>11</sup> The site normally receives thousands of visitors each hour, although no access statistics were kept during the period that the hacked version was online.<sup>12</sup>

HackLibrary Inc., a Marshall corporation, is the publisher of HackLibrary, a web site containing “hacker news and information”—primarily information about successful hacker exploits.<sup>13</sup> HackLibrary includes an archive where visitors can view copies of various hacked web sites.<sup>14</sup> The archive bears a disclaimer stating that the copies of hacked sites are made available solely for purposes of academic research and public information.<sup>15</sup> Advertising banners appear on most pages within HackLibrary, except for the hacked web site pages in the archive, and HackLibrary is financed by advertising revenues.<sup>16</sup>

The HackLibrary archive includes copies of more than two hundred different hacked web sites.<sup>17</sup> In some instances, HackLibrary’s own employees download a copy of a hacked site for inclusion in the archive; in other cases, the hackers themselves or other Internet users provide HackLibrary with a copy of the hacked site via e-mail (usually without identifying themselves to HackLibrary).<sup>18</sup> HackLibrary has no formal policy for determining which hacked sites to include in its archive, although only very minor sites are likely to be excluded.<sup>19</sup> Many Internet users who view hacked sites in HackLibrary’s archive find them by browsing the archive out of curiosity or academic interest, although others reach individual pages within the archive directly, often by means of a web search engine.<sup>20</sup>

There are several similar hacked-site archives on the web, including AntiOnline, Hacked Sites Dot Com, Hacker News Network, and 2600.<sup>21</sup> There is considerable overlap among these archives, but only HackLibrary includes a copy of the “MP3 TERRORISTZ” version of Chi-Post.com.<sup>22</sup> HackLibrary obtained the copy on January 15, 1999, and made it available in its archive on January 18, 1999.<sup>23</sup>

Harry P. Wolf is General Counsel for MoneyMusic, Inc., a prominent

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11. *See* R4.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* R4.

18. *Id.*

19. *Id.*

20. *See* R5.

21. *Id.*

22. *Id.*

23. *Id.*

publisher of popular music, also incorporated in the State of Marshall.<sup>24</sup> During the months following the hack, Wolf was repeatedly subjected to various forms of harassment.<sup>25</sup> He received numerous e-mail messages on his personal Lakeforestnet account and calls to his home telephone number at all hours of the night, the gist of which was roughly equivalent to the contents of the hacked ChiPost.com site.<sup>26</sup> In particular, the e-mail messages and telephone calls insulted Wolf and ridiculed his handling of his personal and financial affairs.<sup>27</sup>

In April 1999, Wolf learned that a copy of the hacked ChiPost.com site was still available on the web in the HackLibrary archive.<sup>28</sup> Wolf immediately informed HackLibrary of the harassment and asked that the copy of the hacked ChiPost.com site be removed from the archive, or that HackLibrary at least redact the references to him contained in the HTML source code, in order to reduce the likelihood that he would be subjected to further harassment.<sup>29</sup> HackLibrary responded that it was merely saving copies of sites that had already been publicly displayed on the web and refused to remove the hacked ChiPost.com site from its archive.<sup>30</sup>

Wolf brought suit against HackLibrary for invasion of privacy, alleging that he has suffered damages as a result of HackLibrary's public disclosure of private facts concerning Wolf.<sup>31</sup> HackLibrary subsequently moved for summary judgment on the following grounds: (1) under 47 U.S.C. § 230(c), HackLibrary cannot be treated as the publisher of hacked web sites created by other persons; and (2) the publication is not actionable as an invasion of privacy because the information was already publicly available and is the subject of legitimate public concern.<sup>32</sup>

The trial court granted the defendant's motion for summary judgment based upon Section 230(c), holding that HackLibrary was immune from liability as an interactive computer service provider.<sup>33</sup> The Appellate Court found Section 230(c) inapplicable; though it believed that HackLibrary was the provider of the materials that it selected for its archives, it affirmed the summary judgment on the grounds that the information had already been published. Accordingly, the claim failed to meet the required elements to establish a *prima facie* case for public dis-

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24. *Id.*

25. *Id.*

26. *See* R5.

27. *Id.*

28. *Id.*

29. *See* R6.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

closure of private facts.<sup>34</sup>

### III. ISSUES PRESENTED FOR REVIEW

Whether the provider of an online archive of previously published information can be considered the publisher of that information, as defined by 47 U.S.C. § 230(c), and therefore not within the Act's immunity.

Whether the information on the displayed hacked site constitutes a public disclosure of private facts, or a reproduction of already published and public newsworthy material.

### IV. BACKGROUND

#### A. INTRODUCTION TO THE INTERNET

One of the most frequently cited cases for an explanation of the Internet and definitions regarding various mechanisms used on the Internet is *ACLU v. Janet Reno*.<sup>35</sup> The Internet is described as a "giant network which interconnects innumerable smaller groups of linked computer networks . . . thus a network of networks."<sup>36</sup> In order to access the Internet, one may use a computer with a modem or a computer that is directly connected to a computer network that allows access to the Internet.<sup>37</sup> Various online services such as America Online, CompuServe and Prodigy offer nationwide computer networks that allow access to the vast amount of material within their own computer networks.<sup>38</sup> In addition, most of these online services allow for users to link to the larger resources of the Internet.<sup>39</sup> These online service providers are commonly referred to as Internet Access Providers.<sup>40</sup>

Once a person has gained access to the Internet, there are various means of "communication and information exchange over the network."<sup>41</sup> One of these methods includes remote information retrieval such as the World Wide Web ("the Web").<sup>42</sup> The Web is a "series of documents stored in different computers all over the Internet."<sup>43</sup> Many organizations and corporations, such as the Chicago Post, have "home pages"

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34. See R7.

35. 929 F. Supp. 824 (E.D. Penn. 1996) (providing an in-depth discussion on the Internet, although not fact specific to this case); *aff'd*, 521 U.S. 844 (1997).

36. *Id.* at 831. For additional information on how the Internet works, see *Shea v. Reno*, 930 F. Supp. 916 (S.D. N.Y. 1996); *U.S. v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998).

37. *ACLU*, 929 F. Supp. at 832.

38. See *id.* at 833.

39. See *id.*

40. See *id.*

41. *Id.* at 834.

42. *ACLU*, 929 F. Supp. at 834.

43. See *id.* at 836.

on the Web that are treated as one of these documents stored in different computers.<sup>44</sup>

In order to make the information available for most users, the Web uses a specific formatting language called the hypertext markup language ("HTML").<sup>45</sup> Thus, most programs that "browse" the Web have the capability of displaying HTML documents containing images and text.<sup>46</sup> In order to retrieve the document the user requests to view, browsers, such as Internet Explorer, or Netscape Navigator, transmit a request for that particular HTML document to the Web server.<sup>47</sup> When the document requested is received, the browser processes (or "translates") the HTML codes in the document and the results, which may include text, images, or sounds, are displayed.<sup>48</sup>

When ChiPost.com was hacked, the HTML codes were altered by the hackers, which resulted in different output than what was intended by ChiPost.com.<sup>49</sup> All the web browsers use basic HTML code and they display the content of that code by translating the code into readable information. When those who clicked on the hacked site for ChiPost.com received the translated document from the web browser, the output of the HTML source code did not display the offensive information which was put by the hackers in comments in the code.<sup>50</sup> The source code is available for the user to retrieve and translate him/herself as well, though normally they do not bother to do so. In this case, the additional comments that contained the offensive material regarding Harry Wolf were put in comments in the source code by the hackers and would not be displayed unless the user retrieved and translated the code.<sup>51</sup> Only the particular user would know whether the he/she had retrieved the code. The question here is not whether the offensive information had been displayed (the facts make it obvious that the comments had been read by many users), but whether the information had been seen on the defendant's archive rather than on the original hacked ChiPost site. Since liability, and not damages, is at issue here, the plaintiff does not need to show how many people viewed the archived site's source code in order to state a claim.

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44. *See id.*

45. *See id.*

46. *See id.*

47. *See Memorandum of the U. S. in Support of Petition for an Order to Show Cause, U.S. v. Microsoft Corp., No. CIV.A. 94-1564, 1997 WL 656528, at \*4 (D.D.C. Oct. 20, 1997).*

48. *See id.*

49. *See R3.*

50. *See id.*

51. *See id.*

## B. SECTION 230(C) REQUIREMENT FOR IMMUNITY

Section 230(c) of the Communications Decency Act of 1996 states as follows:

“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.”<sup>52</sup>

The interactive computer service is defined by Section 230(f)(2) of the Act as the following:

“Any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”<sup>53</sup>

The information content provider is defined by Section 230(f)(3) of the Act as follows:

“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.”<sup>54</sup>

The present case involves a tort claim of invasion of privacy by public disclosure of private facts. Section 230(c) comes into play as HackLibrary’s defense.<sup>55</sup> If HackLibrary can establish that it is not the information content provider, but merely a provider of an interactive computer service, the statute would successfully bar the claim. One of the purposes of Section 230(c) of the Communications Decency Act of 1996 was to overrule any precedents “which have treated such providers and users as publishers or speakers of content that is not their own. . . .”<sup>56</sup> This included overruling *Stratton Oakmont, Inc. v. Prodigy Services Co.*, where the court held the defendant Prodigy liable as a publisher of defamatory material.<sup>57</sup>

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52. 47 U.S.C. § 230(c)(1) (1996).

53. *Id.* § 230(f)(2).

54. *Id.* § 230(f)(3).

55. In *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Penn. 1996), *affd*, 521 U.S. 844 (1997), the court struck down certain provisions of the Communications Decency Act of 1996 on First Amendment grounds, but the sections of the Act involved in this case were not affected.

56. H.R. CONF. REP. No. 104-458, at 194 (1996).

57. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup.Ct. May 24, 1995). In *Stratton*, the plaintiffs sued Prodigy, an interactive service provider, for defamatory comments that were posted by an unidentified party on one of Prodigy’s bulletin boards. *Id.* The court held that the strict liability standard usually applied to original publishers of defamatory material also applied to Prodigy. *Id.* The court reasoned that Prodigy acted like an original publisher and a distributor because it actively participated in the screening and editing of the messages posted on its bulletin boards, as well as controlling content on its service. *Id.*



Plaintiff will argue that HackLibrary is not immune as a mere user of an interactive computer service under Section 230(c), but rather fits the definition of the information content provider because it provided the information from the hacked site once that site was taken down.<sup>58</sup> There are two important precedents that bear on this case; the first is *Blumenthal v. Drudge*, where the court accepted Section 230(c) as a bar to a defamation tort claim against Drudge and AOL, an interactive computer service provider.<sup>59</sup>

In *Blumenthal*, the defendant Drudge had a license agreement with AOL to make defendant's column, the Drudge Report, available to all America Online's ("AOL") clients.<sup>60</sup> The terms of the contract included a flat monthly royalty payment of \$3000 to Drudge from AOL.<sup>61</sup> During the term of the license, Drudge wrote a defamatory column pertaining to the plaintiff and made it available to AOL clients in accordance with the license agreement.<sup>62</sup> Under the agreement, Drudge was responsible for creating, editing, updating and managing the report.<sup>63</sup> The applicable part of that case involves the interactive service computer provider's (AOL's) motion for summary judgment based on Section 230(c).<sup>64</sup> The defendant AOL conceded that Drudge, the original author and co-defendant, was an information content provider and that AOL qualified as an interactive computer service under the Act.<sup>65</sup> But the plaintiff alleged that AOL served as an information content provider, as well.<sup>66</sup> While the court said, ". . . Section 230 does not preclude joint liability for the joint development of content . . .," it upheld America Online's (AOL) motion for summary judgment under 230(c), because AOL did not edit or contribute to the column, and was "nothing more than a provider of an interactive computer service on which the Drudge Report was carried."<sup>67</sup>

The second case is *Zeran v. AOL*, where a third party posted a false and offensive hoax advertisement about plaintiff Zeran on an AOL bulletin board.<sup>68</sup> After an abundance of angry and threatening calls to his home, Zeran discovered the message and informed AOL, who took the posting down, but refused to post a retraction.<sup>69</sup> Over the next four days, other postings were placed on AOL bulletin boards by the unidentified

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58. 47 U.S.C. § 230(c), (f)(3).

59. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C. Cir. 1998).

60. *Id.* at 47.

61. *Id.*

62. *Id.* at 46.

63. *Id.* at 47.

64. *Id.*

65. *Blumenthal*, 992 F. Supp. at 49-50.

66. *Id.* at 50.

67. *Id.*

68. *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

69. *Id.* at 329.

third party, and news of the postings were broadcast over the radio.<sup>70</sup> Zeran continued to notify AOL of the subsequent postings and the harassment, and its only response was to inform him that the account of the individual posting the messages would soon be closed.<sup>71</sup> Zeran argued that Section 230(c) only immunizes an interactive service provider, but is inapplicable to the liability of a distributor.<sup>72</sup> Zeran claimed that since he notified AOL of the defamatory postings, it is liable as a distributor, and not immune as the publisher under 230(c).<sup>73</sup> Zeran was using the term “distributor” to refer to such intermediaries as bookstores and newsstand operators.

The *Zeran* court said,

...once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which 230 specifically proscribes liability—the publisher role.<sup>74</sup>

In effect, the court said that AOL was both a publisher and a service provider and thus was within the immunity that the act provided. The court was undertaking to expand the Section to provide immunity to service providers who had notice of offensive content because “notice liability” would impose a burden on them in two ways: (1) “. . .they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not,” and (2) “More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits” by simple notice of alleged defamatory content.

Wolf may argue that unlike AOL in *Zeran*, HackLibrary refused to take down the information after receiving notice of its defamatory content, and Wolf is not seeking to impose a duty by the service provider to actively monitor and prevent such postings.<sup>75</sup>

Wolf may also argue that under *Blumenthal*, HackLibrary would qualify as an information content provider because it consciously selected the hacked site for inclusion in its archive based upon a subjective evaluation of its content and continued to republish it after being advised of its problematic nature. Further, the information would not continue to be available but for defendant’s archive.

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70. *Id.*

71. *Id.*

72. *Id.* at 331.

73. *Id.* at 332.

74. *Zeran*, 129 F.3d at 332-333.

75. *See* R6.

## C. RIGHT TO PRIVACY

1. *History of Right to Privacy*

In 1890, Samuel D. Warren and Louis Brandeis introduced the legal theory of a right to privacy in a law review article entitled *The Right to Privacy*.<sup>76</sup> In this article, Warren and Brandeis drew parallels between property rights, such as copyrights, and an individual's right to privacy,<sup>77</sup> which they characterized as an individual's "right to be let alone."<sup>78</sup> Warren and Brandeis discussed the threat that technology posed to one's right to privacy.<sup>79</sup> They noted that "numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house tops."<sup>80</sup> Note that the newly-invented technology that alarmed them was the camera.

Dean William Prosser subsequently classified privacy as comprising four distinct torts: intrusion upon seclusion, public disclosure of private facts, false light portrayal in the public eye, and appropriation of one's image or likeness.<sup>81</sup> Prosser's classification of privacy rights was adopted by the Restatement (Second) of Torts.<sup>82</sup> Harry P. Wolf alleges public disclosure of private facts.

2. *Public Disclosure of Private Facts*

To be liable for the tort of public disclosure of private facts, one must give "publicity to a matter concerning the private life of another."<sup>83</sup> In addition, the matter that is publicized must be "highly offensive to a reasonable person" and not of "legitimate concern to the public."<sup>84</sup> There is a distinction between publication and publicity.<sup>85</sup> Publicity requires

76. See Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

77. *Id.* at 213 ("The principle which protects personal writings and other productions of the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.").

78. *Id.* at 195.

79. See *id.* (referring to the invention of the camera as a new and potentially threatening technological advancement because of the inherent intrusiveness of capturing one's image).

80. *Id.* at 195.

81. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

82. See RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1977).

83. *Id.* § 652D (1977).

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public.

*Id.*

84. *Id.*

85. See *id.*

that the matter is made public generally and not merely published to a third party or small group of people.<sup>86</sup> The facts must be disclosed to enough people “that it is certain to become public knowledge.”<sup>87</sup> The truth of the facts published is not a defense to this privacy tort.

HackLibrary may argue that the information in the archive is targeted to a specific group—people interested in academic research.<sup>88</sup> HackLibrary may also contend that the advertising banners are purposely left off the hacked web site pages because the archive is not aimed at the public in general.<sup>89</sup>

A fact is deemed to be private if it has never been in “the public domain,”<sup>90</sup> which includes documents that are required to be kept for public examination.<sup>91</sup>

HackLibrary may contend that it is not liable because the information in its archive had been previously published on the ChiPost site or was already available to the public. For example, court records are public records whether in divorce or bankruptcy court.<sup>92</sup> The information related to his home address, e-mail account, and phone number may also be argued as public record because that information can be obtained through public sources.<sup>93</sup>

Finally, Wolf will argue that the personal facts involved here are not of legitimate concern to the public in general. HackLibrary will assert that they are newsworthy.

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86. RESTATEMENT (SECOND) OF TORTS §§ 652D (1986). See also WILLIAM PROSSER, *THE LAW OF TORTS* 810 (1971). It is not a public disclosure “to communicate the fact to the plaintiff’s employer, or to any individual, or even to a small group.” *Id.*

87. RESTATEMENT (SECOND) OF TORTS §§ 652D cmt. a (1977).

88. See R4. See, e.g., *Porten v. University of San Francisco*, 64 Cal. App.3d 825 (1976) (holding that the release of plaintiff’s school grades to the scholarship and loan commission did not amount to a public disclosure because it was not released to the public in general); but see *Kinsey v. Macur*, 107 Cal. App.3d 265 (1980) (holding that the release of copies of a letter containing private facts to twenty people was a public disclosure).

89. See R4.

90. Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 151 (1997) (construing *Kilgore v. Younger*, 640 P.2d 793 (Cal. 1982)); *Howard v. Des Moines Register*, 238 N.W.2d 289 (Iowa 1979); *Harris v. Easton Publ’g Co.*, 483 A.2d 1377 (Pa. Super. 1984).

91. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494 (1975). In *Cox*, the court allowed the newspaper to publish the name of a rape victim because the name was part of a public record. *Id.* at 472. As the court notes, “[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff’s life which are matters of public record . . .” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652D, cmt. C (Tent. Draft No. 13, Apr. 27, 1967)).

92. See, e.g., *Alarcon v. Murphy*, 201 Cal.App. 3d 1 (1988) (holding that the issuance of a divorce decree was a matter of public record and therefore disclosure could not amount to invasion of privacy).

93. See Appendix A.

### 3. *Newsworthiness Defense*

The First Amendment protects the publication of private facts that are considered to be "newsworthy," or in other words, "of legitimate concern to the public."<sup>94</sup> In *Cox Broadcasting Corp. v. Cohn*,<sup>95</sup> the plaintiff brought an action of public disclosure of private facts against the owner of a television station that broadcast the name of his daughter, a deceased rape victim.<sup>96</sup> The court noted that the publication of private facts tort claim raised a struggle between privacy rights and the First Amendment.<sup>97</sup> Although the court held that liability may not be imposed when it is a disclosure of facts found in public documents, the court "impliedly concedes that the press may be liable, in certain circumstances, . . . [for] disclosures not arising from public documents."<sup>98</sup>

In *Gilbert v. Medical Economics Co.*, the court affirmed the district court's grant of summary judgment in a medical malpractice case by applying the newsworthiness defense.<sup>99</sup> In an attempt to "properly balance the freedom of the press against the right of privacy," the court noted that "every fact disclosed in an otherwise truthful newsworthy publication must have some substantial relevance to a matter of legitimate public interest."<sup>100</sup> In the publication at issue, the plaintiff argued that including her picture, psychiatric history, and marital life were not relevant to the newsworthy topic of policing failures in the medical profession.<sup>101</sup> To determine if the facts are newsworthy, the court said that there must be either an "independent newsworthiness or any substantial nexus with a newsworthy topic."<sup>102</sup> The court found that these facts were relevant because her marital life and status, as well as her psychiatric history, were substantially connected to the subject of the article and linked to the underlying cause of the alleged malpractice.<sup>103</sup>

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94. *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (interpreting *Times, Inc. v. Hill*, 385 U.S. 374 (1967) and *Campbell v. Seabury Press*, 614 F.2d 1122 (5th Cir. 1980)).

95. 420 U.S. 469 (1975).

96. *Id.* at 490.

97. *Id.* at 489.

98. Dendy, *supra* note 90, at 154.

99. 665 F.2d 305 (10th Cir. 1981).

100. *Id.* at 308.

101. *Id.*

102. *Id.* at 309.

103. *Id.*

## APPENDIX A

## COMMENTS CONTAINED IN HACKED VERSION OF CHIPOST.COM

POWER BACK TO THE PEOPLE. END THE STEALING OF PUBLIC PROPERTY FROM THE PUBLIC DOMAIN BY HARRY WOLF, GENERAL COUNSEL OF MONEYMUSIC, INC., AND CAREY SMITH, FOUNDER AND EXECUTIVE OFFICER OF MONEYMUSIC, INC.

MUSIC BELONGS TO THE PEOPLE AND THESE EVIL CAPITALISTS ARE MAKING INSANE AMOUNTS OF MONEY BY PROHIBITING YOUNG ARTISTS FROM DEVELOPING THEIR OWN CREATIVE MUSIC. MR. WOLF AND MR. SMITH HAVE USED THEIR POWER TO PREVENT NEW ARTISTS FROM PUBLICIZING THEIR MUSIC BY CLAIMING PRIOR OWNERSHIP OF THEIR WORK BY COPYRIGHTS OF SIMILAR WORKS. AS A RESULT, THREE SEPARATE, YOUNG STRUGGLING ARTISTS ARE BURIED IN COURT'S COSTS AND DAMAGES OWED TO THIS FAT LABEL COMPANY AND ITS FAT CAT EXECUTIVES. HOW CAN ONE OWN MUSIC THAT HAS NEVER EXISTED BEFORE?

IT'S TIME TO TAKE MATTERS INTO OUR OWN HANDS AND LET THESE EVIL CAPITALISTS KNOW WHAT'S RIGHT! LETS GET HARRY AND CAREY!

SINCE MR. HARRY WOLF IS UNDER THE FALSE IMPRESSION HE CAN CONTROL WHAT LEGALLY BELONGS IN THE PUBLIC DOMAIN VERSUS WHAT SHOULD BENEFIT HIS POCKET BOOK, WHY DON'T THE PUBLIC LET HIM KNOW HOW WE THINK! ALLOW US TO FACILITATE YOUR FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH. YOU CAN REACH OUR UNLOVED COPYRIGHT ATTORNEY/THIEF OF THE PUBLIC'S MUSIC AT:

MR. HARRY P. WOLF  
2120 GREENBAY ROAD  
LAKE FOREST, IL 60045  
HOME PHONE #: 847-555-0712  
HOME EMAIL: HPWOLF@LAKEFORESTNET.COM  
BORN: APRIL 4, 1951  
SOCIAL SECURITY #: 078-05-1120

AND FOR OUR FAVORITE FOUNDER AND CHIEF EXECUTIVE OFFICER OF MONEYMUSIC, INC., WE MUST EXPRESS OUR FEELINGS TO THE MAN WHO STARTED IT ALL. PLEASE CONTACT THE FAT CAT BOSS AT:

MR. CAREY J. SMITH  
123 LAKE ROAD

EVANSTON, IL 60202

HOME PHONE #: 847-555-4957

HOME EMAIL: CJSMITH@SUBURBNET.COM

BORN: JANUARY 19, 1948

SOCIAL SECURITY #: 745-00-4325

SINCE MR. WOLF HAS BEEN INSENSITIVE IN HIS HANDLING OF YOUNG ARTISTS IN THE MUSIC INDUSTRY, WE FEEL HE IS DESERVING OF THE PUBLIC KNOWING THIS INFORMATION: WHILE MR. WOLF IS SO BUSY DESTROYING CAREERS, HIS FAMILY AFFAIRS ARE IN A STATE OF DESTRUCTION AS WELL. MR. WOLF'S WIFE, DANIELLA LEE WOLF, IS CURRENTLY ACTIVELY PURSUING A DIVORCE, ALLEGING ABANDONMENT AND SEXUAL INFIDELITY. IN ADDITION TO BEING INCOMPETENT IN HANDLING HIS PERSONAL FAMILY AFFAIRS, MR. WOLF FILED FOR BANKRUPTCY IN 1982, JUST THREE YEARS AFTER LAW SCHOOL. ITS NICE TO KNOW THE INDUSTRY IS BEING DRAINED BY A FAT CAT CROOK WHO IS INCAPABLE OF HANDLING BOTH FAMILY AND FINANCIAL AFFAIRS!

# **BRIEF FOR THE PETITIONER**

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No. 99-404

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IN THE SUPREME COURT OF THE  
STATE OF MARSHALL  
OCTOBER TERM 1999

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HARRY P. WOLF,  
Petitioner,  
v.  
HACKLIBRARY INC.,  
Respondent.

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ON WRIT OF CERTIORARI TO THE FIRST DISTRICT  
COURT OF APPEALS  
OF THE STATE OF MARSHALL

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## **BRIEF FOR PETITIONER**

Harry Apostolakopoulos  
Hunter M. Barrow  
Kristi Belt

SOUTH TEXAS COLLEGE OF LAW  
1303 San Jacinto Street  
Houston, Texas 77002-7000  
(713) 659-8040

Attorneys for Petitioner



QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT 47 U.S.C. § 230 OFFERS HACKLIBRARY NO IMMUNITY FROM LIABILITY FOR POSTING HARRY WOLF'S PRIVATE INFORMATION ON ITS INTERNET ARCHIVE.
- II. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT HACKLIBRARY WAS NOT LIABLE FOR PUBLICLY DISCLOSING HARRY WOLF'S PRIVATE FACTS UNDER MARYLAND STATE LAW.

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TO THE HONORABLE SUPREME COURT OF THE STATE OF  
MARSHALL

Petitioner, Harry Wolf, respectfully submits this brief in support of his request that this Court reverse the decision of the court of appeals.

OPINIONS BELOW

The circuit court's opinion is unreported. The opinion and order of the First District Court of Appeals (No. 99-01-CV-3PO) is likewise unreported but is contained in the Record on Appeal. (R. at 2-11.)

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is omitted in accordance with section 1020(2) of the Rules for the Eighteenth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions to the determination of this action include: U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI, cl. 2; and U.S. CONST. amends. I, XIV. (*See* Appendix A.)

The following statutory provision is relevant to the determination of this action: 47 U.S.C. § 230 (Supp. 1997) (*See* Appendix B).

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

On January 15, 1999, unknown persons who identified themselves as the "MP3 TERRORISTZ" hacked the World Wide Web page of the CHICAGO POST ("ChiPost.com"), a daily newspaper. (R. at 3.) The newspaper's web page normally contains headlines, articles from the CHICAGO POST, and advertisements. (R. at 3.) The hackers replaced the newspaper's web page with a single page containing pornographic material and disparaging remarks about intellectual property law and attorneys employed in the music industry. (R. at 3.) There is no evidence that any information about Petitioner Harry Wolf was visible on this web page.

Nevertheless, the hacked page's HTML source code contained additional material encoded as "comments." (R. at 3.) This material is not normally displayed by the majority of Internet browsers. (R. at 3.) The "comments" included offensive remarks and divulged personal information about Wolf, an attorney employed by MoneyMusic, Inc., a music publishing enterprise. (R. at 5.)

The hackers referred to Wolf as a “crook” and a “thief” because Wolf’s exercise of his professional duties had adversely impacted the interests of a group of musicians involved in a copyright dispute with Wolf’s employer. (R. at 10-11.) In apparent retribution to Wolf’s exercise of his professional duties, the hackers declared that Wolf deserved to have his personal affairs disclosed to the public. (R. at 11.)

Specifically, the hackers disclosed that Wolf’s wife was pursuing a divorce on the grounds of abandonment and sexual infidelity. (R. at 11.) However, the record does not show that an application for divorce has ever been filed in a court. The hackers also disclosed that Wolf had filed for bankruptcy in 1982, three years after his law school graduation. (R. at 11.)

The “comments” also included Wolf’s home and e-mail addresses, telephone number, date of birth, and social security number. (R. at 10.) The veracity of the factual statements contained in the “comments” is not disputed. (R. at 3.) In concluding the barrage of statements, however, the hackers also opined that Wolf was “incapable of handling both family and financial affairs.” (R. at 12.)

Three hours after the hacking took place, ChiPost.com’s system administrator discovered the intrusion and immediately took the site offline in order to restore it to its legitimate status. (R. at 3-4.) The record contains no evidence as to the number of visitors who viewed the ChiPost.com hacked page during this three-hour period because no access statistics were kept. (R. at 4.) Despite the fact that ChiPost.com is expected to receive multiple visitors per hour, the record does not contain any evidence about the time of day that the hacking took place. (R. at 4.) Furthermore, most of these visitors could not read Wolf’s personal information located in the “comments,” because such encoding is not normally displayed by the majority of web browsers (R. at 3-4.)

That same day, a web site named HackLibrary obtained a copy of ChiPost.com’s hacked page. (R. at 5.) The record does not reflect how HackLibrary obtained this copy. However, in other instances, HackLibrary’s own employees have downloaded a copy of a hacked page, or a third party has delivered such a copy to HackLibrary via e-mail. (R. at 4.)

HackLibrary is a web site published by HackLibrary Inc., the Respondent in this case. (R. at 4.) HackLibrary contains hacker news as well as an archive where visitors can view copies of roughly two hundred hacked web pages. (R. at 4.) It is undisputed that HackLibrary placed ChiPost.com’s hacked page on its archive three days after receiving it, on January 18, 1999. (R. at 5.) Although the archive bears a disclaimer stating the hacked pages it displays are available solely for “academic research” and “public information” purposes, HackLibrary’s site contains

pervasive advertising. (R. at 4.) Indeed, HackLibrary is financed by revenue from these advertisements. (R. at 4.)

Moreover, although there are viewers who find hacked pages by browsing through the archive out of curiosity, there are also users seeking to directly view specific hacked pages on the archive by means of using an Internet search engine. (R. at 4-5.)

Even though HackLibrary may lack a set policy for determining which hacked sites to post, it apparently exercises choice over its archive's content because it is likely to exclude minor sites. (R. at 4.) Additionally, even though several similar "hacked page" sites exist on the web, it was only HackLibrary that posted ChiPost.com's hacked page on its archive. (R. at 5.)

While Wolf's personal information was available for public viewing on HackLibrary's archive, Wolf himself was subjected to an onslaught of harassing e-mail and telephone messages in the privacy of his home. (R. at 5.) Indeed, many of the offensive calls were placed at all hours of the night. (R. at 5.) Much like the "comments" exclusively found on HackLibrary's archive, these aggravating messages ridiculed Wolf's handling of his family and financial affairs. (R. at 5.)

In April of 1999, Wolf discovered that ChiPost.com's hacked page had been available on HackLibrary's archive for more than two months. (R. at 5.) Wolf immediately contacted HackLibrary and requested it to remove the hacked ChiPost.com page from its archive, or to alternatively redact the references to him from the "comments." (R. at 5-6.)

HackLibrary refused to honor Wolf's request, retorting that it was merely saving copies of sites that had already been on public display on the web. (R. at 6.) Upon denial of his request, Wolf brought suit against HackLibrary for invasion of his privacy, seeking damages for the harm he suffered as a result of HackLibrary's publicly disclosing his private facts. (R. at 6.)

#### B. SUMMARY OF THE PROCEEDINGS

This action was originally brought in the Madison County Circuit Court in the State of Marshall. (R. at 2, 6.) HackLibrary moved for summary judgment arguing that: (1) It was immune from liability under 47 U.S.C. § 230(c) (Supp. 1997) of the Communications Decency Act ("CDA") because it could not be treated as the publisher of hacked web sites created by other persons; and (2) the publication of Wolf's facts was not actionable because the information had already been public at the time of disclosure, and was also the subject of legitimate public concern. (R. at 6.) The trial court found HackLibrary to be an "interactive computer service provider," and granted its motion for summary judgment, holding

that HackLibrary was immune from liability under section 230(c). (R. at 6.)

The First District Court of Appeals for the State of Marshall affirmed the trial court's summary judgment award on different grounds. (R. at 2.) Specifically, the court of appeals held that section 230(c) did not immunize HackLibrary from liability because HackLibrary was a "provider" rather than a "publisher" of the actionable content. (R. at 6-7.) However, the court of appeals found that the facts HackLibrary disclosed about Wolf had already been public at the time of disclosure. (R. at 8.) Moreover, the court of appeals held that the First Amendment protected the disclosure of Wolf's facts because ChiPost.com's hacking was a newsworthy event of legitimate concern to the public. (R. at 9.) Accordingly, the court of appeals affirmed the summary judgment in HackLibrary's favor. (R. at 9.)

On July 27, 1999, this Court granted Wolf leave to appeal the decision of the court of appeals. (R. at 12.) The issues under consideration are whether HackLibrary is protected from liability under section 230(c) of the CDA, and whether its actions constitute an invasion of Wolf's privacy. (R. at 12.)

## SUMMARY OF THE ARGUMENT

### A.

The Marshall Court of Appeals for the First District correctly held that HackLibrary is not shielded from liability as an "interactive computer service" under section 230(c). HackLibrary is responsible for creating the actionable material and is thus liable under section 230 as a "content provider." HackLibrary is also subject to liability for refusing to withdraw the material after being informed of its actionable character. Finally, absolving HackLibrary, a commercial web site operator, from liability for publicly disclosing Wolf's private facts is against public policy and contrary to congressional intent.

### B.

The court of appeals erred when it held that HackLibrary is not liable for invading Wolf's privacy. First, the CDA does not preempt Wolf's invasion of privacy claim brought under Marshall state law. Second, HackLibrary's disclosure of Wolf's private facts constituted an invasion of Wolf's privacy under the Second Restatement of Torts, which is followed in Marshall. Finally, Wolf's private facts were neither newsworthy nor had they already been made public when HackLibrary disclosed them. Therefore, Wolf is entitled to relief under Marshall law, and the judgment of the court of appeals should be accordingly reversed.

## ARGUMENT AND AUTHORITIES

## I. SECTION 230(c) OF THE CDA DOES NOT IMMUNIZE HACKLIBRARY FROM LIABILITY FOR INVADING WOLF'S PRIVACY UNDER MARSHALL LAW.

The government has a duty to protect the right of its citizens to avoid intrusions of their privacy. See *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988). While common decency defines what constitutes a privacy intrusion, the primary concerns are the feelings of the individual and the harm the individual will suffer by the exposure of his private matters to the public. See *Sipple v. Chronicle Publ'g Co.*, 200 Cal. Rptr. 665, 670 (Ct. App. 1984).

In this case, HackLibrary egregiously invaded Harry Wolf's privacy when it publicized intimate facts relating to the state of his marriage, financial history, and his own identity. This morbid prying into Wolf's private life was further exacerbated by the fact the disclosure occurred on the Internet, where a communication rapidly reaches a wide audience. See *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996). Consequently, this Court should offer Wolf the protection enunciated in *Frisby*, and hold HackLibrary liable for the harm it caused him.

## A. SECTION 230(C) DOES NOT IMMUNIZE HACKLIBRARY FROM LIABILITY BECAUSE IT IS NEITHER A "PUBLISHER" NOR A "SPEAKER" OF THE ACTIONABLE MATERIAL IT POSTED ON ITS ARCHIVE.

The Internet is an international network of interconnected computers. See 47 U.S.C. § 230(f)(1) (Supp. 1997); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) ("*Reno I*"). Internet communications are generally accomplished between "servers" and "clients." See *Shea v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996). A "server" is a computer system that accesses stored data and presents it over the Internet to a client. See *id.* "Client" refers to software that displays or presents the data received from the "server." See *id.*

The primary form of client-server communication today is the World Wide Web ("web"). See *ACLU v. Reno*, 31 F. Supp. 2d 473, 483 (E.D. Pa. 1999) ("*Reno II*"). The web consists of billions of "hypertext" documents maintained on servers. See *id.* "Many organizations have 'home pages' on the Web." *Id.* "These are documents that provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to their organization." *Id.*

Viewers can access specific web pages by using "search engines," programs making use of software capable of automatically contacting various web pages and enabling users to quickly locate information they

are specifically seeking. *See Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996). Finally, a “hacker” is an “individual involved with the unauthorized access of computer systems by various means.” *United States v. Riggs*, 739 F. Supp. 414, 423 (N.D. Ill. 1990).

1. *HackLibrary is subject to liability as an information “content provider” under section 230(c) because it created the content that gave rise to this action.*

“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.” 47 U.S.C. § 230(c)(1) (Supp. 1997). “The term ‘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, including specifically a service or system that provides access to the Internet . . .” *Id.* § 230(f)(2). Under this definition, HackLibrary is a “user” of an “interactive computer service” because there is no evidence that HackLibrary offers a connection to the Internet as a whole.

“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.” *Id.* § 230(f)(3). Accordingly, Section 230(c) does not extend immunity from liability to parties who make on-line postings of actionable material they have created themselves. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (statement of Sen. Exon).

The case of *Blumenthal v. Drudge* is particularly instructive. 992 F. Supp. 44 (D.D.C. 1998). In *Blumenthal*, a presidential advisor brought a defamation suit against gossip columnist Drudge and interactive service provider America Online (“AOL”) over a statement Drudge published on the Internet alleging plaintiff had a spousal abuse past. *See id.* at 46. However, Drudge had a licensing agreement with AOL under whose terms Drudge would “create” the report and provide AOL with copies in exchange for a royalty. *See id.* Drudge transmitted the actionable report both to his own web site and to AOL via e-mail. *See id.* at 48.

The court granted AOL’s motion for summary judgment on the grounds AOL could not be held liable as a publisher or distributor of the actionable material under section 230(c). *See id.* at 51-53. However, *Blumenthal*’s narrow holding has no bearing in this case because *Blumenthal* sued under a defamation rather than “public disclosure of private facts” theory. This is a crucial difference because “[t]he terms ‘publisher’ and ‘distributor’ derive their legal significance from the con-

text of defamation law,” *Zeran*, 129 F.3d at 332, and are thus meaningful only in a defamation context.

Moreover, the publisher-distributor distinction is irrelevant to a public disclosure of private facts case because once a plaintiff’s private information becomes public, republication by third parties—in contrast to republication in a defamation case—is not actionable. See *Veilleux v. National Broad. Co.*, 8 F. Supp. 2d 23, 37 (D. Maine 1998). Consequently, the result in *Blumenthal* was predicated on defamation law principles inapplicable to public disclosure cases, and should not be considered as persuasive precedent.

The nonapplicability of its result notwithstanding, *Blumenthal* is significant because the court qualified its holding by adding that AOL would have been liable under section 230(c) had it been *even partly* responsible for creating the actionable material. See *Blumenthal*, 992 F. Supp. at 50 (emphasis added).

While the court gave deference to the legislative prerogative immunizing interactive service providers from liability over third-party defamatory content, it also proclaimed that “[i]f we were writing on a clean slate, we would agree with the plaintiff.” *Id.* This unequivocal statement underscores the grave concern courts have with a rigid rule invariably depriving an injured plaintiff like Wolf of meaningful recourse when a service provider posts a third party’s actionable material on-line.

Several federal courts have shared this concern. In *Zeran v. America Online, Inc.*, the court granted summary judgment in AOL’s favor where the plaintiff claimed he had been defamed by an unidentified third party who posted messages on one of AOL’s discussion forums. 958 F. Supp. 1124, 1137 (E.D. Va.), *aff’d*, 129 F.3d 327 (4th Cir. 1997). Similar to *Blumenthal*, the court held AOL was not a publisher of the third party’s defamatory statements, and was thus immune from liability under section 230(c)(1). See *id.* at 1133. However, the court agreed that there could be cases where information initially placed on-line by a third party would be deemed to be information created by the service provider itself, thereby rendering section 230(c)(1) inoperable. See *id.* at n.20.

This is indeed such a case. The record indicates that HackLibrary either downloaded ChiPost.com’s hacked page or received a copy by e-mail. (R. at 4.) In either case, but for HackLibrary’s conscious decision to copy and post the hacked page on the web, the actionable material would have disappeared following ChiPost.com’s restoration. This is because there is no evidence the hackers posted the page anywhere else on the Internet, and the record shows that no other “hacked site” archive posted the page either.

Section 230(c) does not define the term “create.” “When a word is not defined by a statute, [courts] normally construe it by reference to a dic-

tionary.” *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 898 (10th Cir. 1997). To “create” means to “cause to exist” or to “bring into being.” AMERICAN HERITAGE DICTIONARY 338 (2d ed. 1995). By making available the sole copy of a page that was otherwise doomed to disappear, HackLibrary effectively caused the page, and all of its contents, to exist on the Internet.

This fact underlies another crucial distinction from *Blumenthal*. In *Blumenthal*, even if AOL had deleted its own copy of the *Drudge Report*, that report would have still been available for perusal on the Internet because Drudge posted it both on AOL’s system and on his own web page. *See Blumenthal*, 992 F. Supp. at 47-48. Therefore, AOL escaped liability because Blumenthal could not show that AOL created the report’s content. *See id.* at 50. In sharp contrast, HackLibrary has created the hacked page and should be liable for its contents under section 230(c)(1) in this case. *See id.*

Moreover, the fact that HackLibrary chooses which hacked pages to display on its archive demonstrates that it is creating content in a manner similar to that of a traditional news medium, by virtue of its being “more than a passive receptacle or conduit for news, comment and advertising.” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Significantly, the fact that HackLibrary kept ChiPost.com’s hacked web page for three days before finally posting it on its archive raises the inference that HackLibrary debated the posting of the page, which in turn shows HackLibrary’s complete editorial control over its archive’s content. For these reasons, HackLibrary is a content provider under section 230(f) and, therefore, not immune from liability. *See* 47 U.S.C. § 230(c)(1) (Supp. 1997).

2. *HackLibrary is subject to liability because it refused to remove Wolf’s information from its archive after Wolf notified it of the information’s actionable character.*

In *Zeran*, the Fourth Circuit reviewed the district court’s granting of summary judgment in AOL’s favor where a pseudonymous AOL user posted defamatory messages about Zeran on AOL’s message boards. 129 F.3d at 328. As a result of these messages, Zeran was inundated with threatening and offensive telephone calls. *See id.*

On appeal, Zeran primarily argued that following notification, AOL “unreasonably delayed in removing the defamatory messages posted” by the third party. *Id.* Zeran further contended that AOL also “failed to screen for similar postings thereafter.” *Id.* The Fourth Circuit affirmed, holding that Zeran could not sustain a suit against AOL under section 230(c)(1) because AOL was neither the publisher nor the distributor of the actionable material. *See id.* at 330-31. The court added that “it



would be impossible for service providers to screen each of their millions of postings for possible problems." *Id.* at 331.

However, this case is highly distinguishable from *Zeran*. First, in marked contrast to AOL, HackLibrary did not simply delay in removing Wolf's private information from its archive. Instead, it flatly refused to remove the actionable material after Wolf put it on notice of the material's character. Because HackLibrary chose to post Wolf's private facts on its archive while fully aware of their actionable content, it should be held liable.

Second, unlike AOL, which has more than sixteen million subscribers constantly posting new material on-line, see *America Online, Inc. v. AT&T Corp.*, No. CIV.A. 98-1821-A, 1999 WL 688152, at \*1 (E.D. Va. Aug. 13, 1999), HackLibrary maintains a static archive of only about 200 web pages, the composition of which changes only at HackLibrary's will. Additionally, the fact HackLibrary kept the hacked page for three days before posting it on its archive further demonstrates that, contrary to AOL in *Zeran*, HackLibrary had ample opportunity to investigate its materials before it posted them on-line.

Finally, unlike defamation, truth is not a defense to a public disclosure claim. See RESTATEMENT (SECOND) OF TORTS § 652D (1977). Consequently, HackLibrary would not have been burdened with determining the veracity of the content that became the basis of this lawsuit. Therefore, none of the reasons the Fourth Circuit articulated in favor of AOL in *Zeran* apply to HackLibrary in this case.

In fact, some courts have been reluctant to extend interactive service providers the same amount of immunity that the Fourth Circuit did in *Zeran*. A case in point is *Cubby, Inc. v. CompuServe, Inc.*, where the plaintiff alleged he was defamed by a third-party article that appeared on one of CompuServe's discussion fora. 776 F. Supp. 135, 136 (S.D.N.Y. 1991). *Cubby* is especially significant because the court expressly defined the applicable standard of liability for a service provider to be "whether it knew or had reason to know" that the third-party material it posted on-line was actionable. *Cubby*, 776 F. Supp. at 140-41. Under this standard, an interactive service provider that is put on notice of its content's actionable character cannot escape liability simply because the content was created by a third party. Accordingly, HackLibrary is subject to liability for publicly disclosing Wolf's private facts.

This standard is deep-rooted in the common law. See generally *Byrne v. Deane*, 1 K.B. 818, 821 (Eng. C.A. 1937) (holding property owner's inaction in removing writing from his wall after receiving notice of writing's actionable nature constitutes publication of the writing). Following this longstanding approach, the British Defamation Act of 1996 does not provide a defense for service providers knowingly dissemi-

nating actionable material on the Internet. *See* Defamation Act, 1996, ch. 31, § 1 (Eng.).<sup>1</sup>

In the United States, some information service providers and users have sought to avoid liability for third-party content by claiming common carrier status, as common carriers are generally immune from liability for the content of messages they carry on their equipment. *See Lunney v. Prodigy Serv. Co.*, 683 N.Y.S.2d 557, 562 (App. Div. 1998).

Congress has not provided clarification as to whether an information service provider or user is a common carrier. However, “where a statute is silent with respect to a specific issue, the Court must defer to the [overseeing] agency’s interpretation of the statute . . .” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Pertinently, in a 1998 report to Congress, the FCC found that information service providers are not subject to regulation as common carriers. *See In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501 § 13 (1998). Thus, HackLibrary is not a common carrier merely because it posts material on the Internet. *See also America Online, Inc. v. Greatdeals.net*, 49 F. Supp. 2d 851, 856 (E.D. Va. 1999) (holding that AOL is not a common carrier merely because of its being an information service provider).

Moreover, “lack of control over content does not by itself make one a common carrier,” *World Communications v. FCC*, 735 F.2d 1465, 1471 (D.C. Cir. 1984), and merely “earning a profit does not make one a common carrier” either. *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 26-27 (2d Cir. 1978). Under these holdings, HackLibrary cannot claim that it is a common carrier simply because it refrained from altering the hacked page’s content or because it derives its revenue from advertising. Accordingly, HackLibrary cannot be entitled to immunity from liability by claiming common carrier status.

#### B. ABSOLVING HACKLIBRARY FROM LIABILITY IS AGAINST PUBLIC POLICY AND VIOLATES CONGRESS’ INTENT.

Section 230 of the CDA is not affected by the finding that the “indecent transmission” and “patently offensive” provisions of the Act are unconstitutional. *See Reno v. ACLU*, 521 U.S. 844, 885 (1997) (“*Reno I*”). This is because “the same statute may be in part constitutional and in part unconstitutional.” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Consequently, section 230’s expressed purpose to deter stalking and harassment by means of a computer remains a valid objective of the CDA. *See* 47 U.S.C. § 230(b) (Supp. 1997).

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1. (See Appendix C.)

1. *It is against public policy to immunize HackLibrary, a for-profit web site operator, from liability for publicly disclosing Wolf's private facts.*

There are four reasons why HackLibrary must be held liable for disclosing Wolf's private facts. First, the CDA was partly enacted in order to protect citizens from electronic harassment as well as to protect the sanctuary of the home from uninvited indecencies. See 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon).

In this case, Wolf clearly requested HackLibrary to refrain from displaying his personal information on its archive, especially since it appeared to cause the series of harassing telephone calls that intruded upon Wolf's privacy at his home. See *State by Humphrey v. Casino Mktg. Group*, 491 N.W.2d 882, 888 (Minn. 1992). HackLibrary disregarded Wolf's legitimate request and then violated the express congressional policy of protecting an individual's privacy interest, by disclosing Wolf's private facts. HackLibrary's actions were all the more flagrant because most of the resulting harassment took place in Wolf's own home. See *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1578 (7th Cir. 1986). HackLibrary must not be allowed to rely on section 230 of the CDA to shield itself from liability that arises from violating that same statute's underlying purpose.

Another important purpose of section 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. See 47 U.S.C. § 230(b)(3) (Supp. 1997); *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). However, *Zeran's* offering of blanket immunity to internet service providers for any third-party content they post would eliminate content monitoring costs while simultaneously minimizing the service providers' risk of liability. As a result, service providers would be bereft of any motive to engage in self-regulation.

On the other hand, the *Zeran* and *Blumenthal* decisions demonstrate the power of interactive service providers to inflict severe damage on the private lives of those who, like Wolf, have a limited ability to defend themselves. In this case, HackLibrary had exclusive power to remove the actionable material from its archive but refused to do so. Furthermore, because Wolf did not know the identity of the hackers, he could not sue them for damages. Thus, if Wolf's suit against HackLibrary is precluded as a matter of law, Wolf would be left without a remedy. This refutes the Fourth Circuit's argument that notice-based liability must be rejected on the grounds of fostering frivolous lawsuits against service providers. See *Zeran*, 129 F.3d at 333.

Moreover, HackLibrary is engaged in the business of posting hacked pages on the Internet because it derives revenue from advertisements it

carries on its archive. See 47 U.S.C. § 231(e)(2)(A) (Supp. 1999).<sup>2</sup> Because HackLibrary's business involved the posting of Wolf's private information, it is only fair for HackLibrary to bear the cost that is commensurate with the benefit it derived, and compensate Wolf for the damage it caused him. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D.D.C. 1998).

Additionally, the application of the *Zeran* rule to similar cases would lead to absurd judicial results. For example, a newspaper disclosing private facts about an individual in its print version is subject to liability. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975). However, under *Zeran*, the same newspaper would be immune from liability for printing the same facts on its on-line version, where the audience can be larger, and the resulting harm to plaintiff greater. See *Zeran*, 129 F.3d at 331.

The Fourth Circuit has also warned that notice-based liability would cause a chilling effect on Internet speech because service providers would "have an incentive to remove contents upon notification" in order to avoid potential liability. *Zeran*, 129 F.3d at 333 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)). The court further declared that this chilling effect on Internet speech would be incompatible with First Amendment mandates. See *id.* However, the Fourth Circuit's reliance on the First Amendment is misplaced.

The First Amendment provides that Congress shall make no law abridging the freedom of speech. See U.S. Const. amend. I;<sup>3</sup> *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996). However, freedom of speech is not an absolute right. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Although core First Amendment principles make the safeguarding of this freedom a steadfast rule, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broad. v. FCC*, 395 U.S. 367, 386 (1969); see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (holding that each medium of expression must be assessed for First Amendment purposes by its own standard). Under the First Amendment, both the content and context of speech are critical elements. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978).

In this context, the government may limit protected speech where a communication continues to invade a substantial privacy interest after

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2. "A person will be deemed to be 'engaged in the business' if the person . . . devotes time, attention, or labor in such activities . . . with the objective of earning a profit." 47 U.S.C. § 231(e)(2)(A) (Supp. 1999).

3. The United States Constitution applies to the states via the Fourteenth Amendment. See U.S. CONST. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

the sender receives clear and unambiguous notice of the specific communication that the complainant does not want to receive. *See Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-37 (1970). In this case, Wolf informed HackLibrary that the hacked ChiPost.com page contained items of his private information. (R. at 5-6.) Because HackLibrary refused to remove Wolf's information, his privacy interests continued to be invaded for so long as his information remained posted on HackLibrary's archive. Accordingly, imposing liability on HackLibrary does not interfere with its First Amendment rights. *See id.*

Finally, neither the statute nor its legislative history support the proposition that Congress intended to protect free speech by enacting section 230(c)(1). Thus, while eliminating notice-based liability might be consistent with the goal of promoting unfettered free speech on-line, it is inconsistent with fostering self-regulation, which is after all the enunciated congressional objective. *See* 47 U.S.C. § 230(b)(3) (Supp. 1997). Therefore, this Court should espouse Congress' policy considerations and subject HackLibrary to liability for the posting of Wolf's private information on its archive.

2. *Congress did not intend to shield interactive service providers or users from liability for actionable material they post on the web merely because someone else was the original author.*

In construing a statute, courts must start with its language. *See Bailey v. United States*, 516 U.S. 137, 144 (1995). However, courts should also be cognizant of the statute's legislative history, especially when the scope of the statute is ambiguous. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 (1982). The CDA contains provisions that were either added after the hearings were concluded or as amendments offered during floor debate on the legislation. *See* S. REP. NO. 105-225, at 8-9 (1998). Consequently, doubts remain as to the statute's meaning and scope. These doubts should therefore be resolved by examining the statute's legislative history. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 123 (1983).

When examining a statute's legislative history for an indication of congressional intent, a congressional committee conference report is recognized as the most reliable evidence of congressional intent because it represents the final statement of the terms agreed to by both houses. *See Garcia v. United States*, 469 U.S. 70, 76 (1984). Congress enacted section 230(c) in order to overrule *Stratton Oakmont v. Prodigy Serv., Inc.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), and any similar decisions which treat on-line "providers and users as publishers and speakers of content that is not their own *because they have restricted access to objectionable material.*" H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 208 (emphasis added).

At the outset, Congress' policy behind the protection is antithetical to HackLibrary's conduct. This is because not only has HackLibrary patently failed to restrict access to objectionable material (as evidenced by the pornographic images displayed on the hacked version of Chi-Post.com's page), but it has continued to offer such access after being notified of the material's objectionable character.

Additionally, because Congress only intended to overrule *Stratton Oakmont* and other similar decisions which have treated interactive service providers as publishers of content created by others, see H.R. CONF. REP. No. 104-458, at 208 (1996), the courts should read the statute narrowly and apply it only in the context of defamation claims.

Significantly, there is no reference in the legislative history to *Cubby*. See *id.* Moreover, Congress is presumed to act intentionally when omitting a word in a statute. See *United States v. Wong Kim Bo*, 472 F.2d 720, 727 (5th Cir. 1972). Thus, had Congress intended to exempt on-line providers from notice-based liability, as well as republisher liability, it would not have limited its discussion to *Stratton Oakmont*. See Ian C. Ballon, *Zeran v. AOL: Why the Fourth Circuit Is Wrong* (visited Aug. 12, 1999) <<http://www.finnegan.com/pubs/internet/zeranvaol.html>>.

Furthermore, *Stratton Oakmont*, did not impose notice-based liability on the defendant. Consequently, Congress did not have to obviate notice-based liability in order to overrule the case. Indeed, by reversing *Stratton Oakmont*, section 230 codified a modified version of the *Cubby* standard under which a service provider or user may be held liable for third-party statements in instances where it actually knew the material posted on-line was actionable, and failed to take any action. See Ian C. Ballon, *The Emerging Law of the Internet*, 19TH ANNUAL INSTITUTE ON COMPUTER LAW 1997, at 169, 279 (PLI PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES No. 547, 1999).

Finally, the "publisher" and "notice-based" terminology have been extensively used in cases and commentary on the subject of defamation in interactive networks. Because Congress has used the common-law term "publisher" in the CDA, Congress is presumed to have intended the statutory definition of the term to encompass the same meaning as its common-law counterpart. See *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1988) (holding that in enacting the Sherman Act, Congress was presumed to be familiar with and accept the common-law definition of the term "restraint of trade" with all its evolutionary possibilities).

For these reasons, it is evident that had Congress intended to extend protection from notice-based liability to interactive service providers, it

would have expressly done so. Because no such express mandate exists, Wolf's claim against HackLibrary for public disclosure of private facts has been validly asserted.

## II. THE COURT OF APPEALS INCORRECTLY HELD THAT HACKLIBRARY DID NOT INVADE WOLF'S PRIVACY UNDER MARSHALL LAW.

The danger that new technologies pose upon the "dignity and personality of the individual" has been a paramount concern for jurists and commentators ever since Warren and Brandeis published their seminal article on privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). The right to privacy not only protects an individual's seclusion, solitude or private affairs, but also forbids the public disclosure of embarrassing private facts. See William Prosser, *Privacy*, 48 CAL. L. REV. 383, 401 (1960). Recent commentary has naturally concentrated on how Internet communications can invade an individual's right to privacy via disclosure of private facts. See Giorgio Bovenzi, *Liabilities of System Operators on the Internet*, 11 BERKELEY TECH. L.J. 93, 117 (1996). Indeed, the effect of increased computer use on individual privacy has been the matter of recent supranational legislation. See Council Directive 95/46, art. 27, 1995 O.J. (L281) 31.<sup>4</sup>

### A. HACKLIBRARY INVADED WOLF'S PRIVACY UNDER MARSHALL LAW BECAUSE IT PUBLICLY DISCLOSED WOLF'S PRIVATE FACTS.

The State of Marshall follows the Second Restatement of Torts in invasion of privacy cases. (R. at 8.) However, a potential choice of law problem arises because Wolf is an Illinois resident, who has also suffered the harm in Illinois. (R. at 10.)<sup>5</sup> This problem is overcome, however, because, like Marshall, Illinois courts follow the Restatement approach in deciding public disclosure cases. See *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 902 (Ill. App. Ct. 1990). Therefore, the same substantive law is eventually applied regardless of the answer to the choice of law problem.

As regards procedural law, summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Anderson v. Liberty Lobby, Inc.*,

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4. See Appendix C.

5. Because suit was filed in Marshall, this state's choice of law rules determine the applicable substantive law. See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In this context, some courts have held that privacy claims should be determined by the law of the jurisdiction where plaintiff is domiciled, which would be Illinois in this case. See *Bernstein v. National Broad. Co.*, 129 F. Supp. 817, 825-26 (D.D.C.), *aff'd*, 232 F.2d 369 (D.C. Cir. 1956). Other courts follow the "most significant relationship" approach, which would lead to the application of Marshall law. See *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1091 (S.D.N.Y. 1984).

477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). On review, the evidence is construed in the light most favorable to the nonmovant. See *Hunter v. Bryant*, 502 U.S. 224, 233 (1991). Finally, this Court should exercise de novo review over First Amendment issues. See *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990).

1. *The CDA does not preempt Wolf's action against HackLibrary brought under Marshall State law.*

The Supreme Court has held that federal preemption of state law is appropriate in three circumstances: (i) where Congress expresses an intent to displace state law; (ii) where Congress implies such an intent; and (iii) where state law conflicts with federal law. See *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

The federal statute applicable to this case states in pertinent part: “[N]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with that section.” 47 U.S.C. § 230(e)(3) (Supp. 1997). Thus, section 230 reflects no express congressional intent to preempt all state law causes of action arising out of privacy torts committed by service providers or users. See *Mobil Oil Corp. v. Virginia Gasoline Marketers*, 34 F.3d 220, 226 (4th Cir. 1994).

As to implied intent, the question to be asked is whether Congress, in enacting the federal statute, intended to exercise its constitutionally delegated authority to set aside the laws of a state. See *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996). However, “statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when the statutory purpose to the contrary is evident.” *United States v. Texas*, 507 U.S. 529, 533 (1993); see also *Louisiana v. Maryland*, 451 U.S. 725, 746 (1981) (presumption is that Congress does not attempt to displace state law).

Section 230 further provides: “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.” 47 U.S.C. § 230(e)(3) (Supp. 1997). The statute does not define “inconsistent” state causes of action. However, the legislative history shows that by overruling *Stratton Oakmont* Congress intended to preempt state law only in the area of defamation. See H.R. CONF. REP. No. 104-458, at 208 (1996), 1996 WL 46795. Because there is no evidence that Congress intended to preempt public disclosure of private facts claims, Wolf's suit against HackLibrary is not implicitly preempted by section 230 of the CDA. See *United States v. Texas*, 507 U.S. 529, 533 (1993).



Moreover, the fact that several states have enacted legislation aimed at regulating the conduct of interactive services users underscores the absence of a blanket federal preemption in cases of torts committed on-line. See GA. CODE ANN. § 16-9-9.1 (1996) (prohibiting Internet users from falsely identifying themselves on-line); CAL. BUS. & PROF. CODE § 17502 (West 1997) (providing for penalties in cases of on-line false advertising).

Additionally, "the Supremacy Clause<sup>6</sup> commands preemption of state laws to the extent that such laws directly conflict with federal law." *Zeran v. America Online*, 958 F. Supp. 1124, 1131 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997). The Fourth Circuit elaborated that direct conflicts requiring preemption exist: (1) where it is impossible for a private party to comply with both federal and state law; and (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. See *id.* at 1133-35.

First, the test for determining whether simultaneous compliance with both federal and state law is possible consists of deciding whether both federal and state law may concurrently operate without impairing the operation of the former. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 447-48 (1960). In this case, Wolf's assertion of a public disclosure claim under Marshall law does not impair the operation of section 230(c). This is because Wolf does not claim that HackLibrary is liable as a "publisher" (which section 230 proscribes), but rather as a content provider, which section 230 allows. See 47 U.S.C. § 230(c)(1) (Supp. 1997). Therefore, Wolf's claim cannot be preempted on the grounds it renders section 230 inoperative. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (applying state law does not offend the Supremacy Clause where party can simultaneously comply with federal law).

Second, Congress' objective in enacting section 230 was to promote self-regulation of Internet service providers by refusing to impose "publisher" liability on providers who made efforts to restrict access to objectionable material. See H.R. Conf. Rep. No. 104-458, at 208 (1996), 1996 WL 46795. In sharp contrast, HackLibrary has not made any effort to restrict objectionable material in this case, as is evidenced by its refusal to redact Wolf's private information, and by its display of pornography on its archive. Therefore, Wolf's assertion of his public disclosure claim does not impede the fulfillment of congressional objectives. Accordingly, Wolf's claim is not preempted by section 230. Cf. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (federal preemption proper in area of foreign policy where federal government has exclusive legislative authority).

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6. U.S. CONST. art. VI, cl. 2; see *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

Finally, the Fourth Circuit in *Zeran* based its finding of preemption on the Commerce Clause, which empowers Congress to act in a field of “apparent international character” such as the Internet.<sup>7</sup> See *Zeran v. America Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997). Even if service provider regulation is a part of interstate commerce, the Fourth Circuit’s reliance on the Commerce Clause is misplaced because state laws regulating commerce must be preempted only “when Congress has unmistakably ordained that its enactments alone are to regulate [that] part of commerce . . . .” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Because it has been shown that section 230 does not preempt state law expressly or otherwise, any attempt to predicate federal preemption on Commerce Clause grounds must fail.

2. *HackLibrary, Inc. publicly disclosed Harry Wolf’s private facts.*

The State of Marshall recognizes the tort of public disclosure of private facts:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy if the matter publicized is of a kind that:

(a) would be highly offensive to a reasonable person of ordinary sensibilities, and

(b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977).

### Publicity

Publicity means that the matter is publicized by communicating it to the general public, or to a sufficient number of people that it becomes public knowledge. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975). In order to sustain a public disclosure of private facts action, the plaintiff need only present evidence of an actual disclosure to the general public or one which is *likely to reach the general public*, as opposed to a “publication” required in a defamation action. See *Tureen v. Equifax*, 571 F.2d 411, 419 (8th Cir. 1978) (emphasis added). “The likelihood of widespread dissemination can be inferred from the medium employed by the defendant for the particular publication.” *Williams v. KMCO Broad. Div.-Meredith Corp.*, 472 S.W.2d 1, 3 (Mo. Ct. App. 1971). Traditionally, any publication of plaintiff’s private facts in a newspaper or magazine of even a small circulation has been sufficient to give publicity to the facts. See *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548, 555 (Wis. 1989); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

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7. U.S. CONST. art. I, § 8, cl. 3.

In this case, the record does not reflect how many viewers visited HackLibrary's archive between January and April of 1999. Yet, display of Wolf's information on a site of even moderate traffic would suffice to render it public despite the fact that the "comments" were not viewable by most web browsers. This is because the information was available to anyone on the Internet for more than two months. "Approximately 70.2 million people of all ages use the Internet in the United States alone." *ACLU v. Reno*, 31 F. Supp. 2d 473, 481-82 (E.D. Pa. 1999) ("*Reno II*"). Given the sheer number of on-line users, it is almost certain that some of HackLibrary's visitors were able to read the "comments." At a minimum, there exists an issue of fact as to whether the information's disclosure amounted to publicity. Therefore, summary judgment for HackLibrary was improper and must be reversed. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

### Private Facts

The second element of a public disclosure claim is that the disclosed facts are private. See *Roshto v. Hebert*, 439 So. 2d 428, 430 (La. 1983); RESTATEMENT (SECOND) OF TORTS § 652D (1977). Private facts typically encompass family, sexual, medical, financial, or other intensely personal topics. See *Doe v. Mills*, 536 N.W.2d 824, 829 (Mich. Ct. App. 1995); RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

Most importantly, the right to privacy extends to the individual interest in avoiding disclosure of personal matters about the marital relationship. See *Whalen v. Roe*, 429 U.S. 589, 599 (1977). The disclosure of the fact that Danielle Wolf was "pursuing" a divorce falls squarely within this rule's ambit. Pursuing a divorce manifests a strenuous marital relationship that a reasonable couple would not want revealed to the public, especially where the difficulty has been the result of a spouse's abandonment and extramarital affair. Cf. *Johnson v. Sawyer*, 47 F.3d 716, 734 (5th Cir. 1995) (holding that facts of an amorous relationship belong to the private realm).

Moreover, the bankruptcy history of an individual is not a matter of public concern to third parties not legitimately interested in that individual's financial situation. See *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898-99 (Tex. 1970). Third parties are not entitled to this information absent their having a legitimate business reason, such as commencing a transaction with the individual. See *id.* Similarly, Wolf's bankruptcy information is of no interest to HackLibrary's readers because none of them had a legitimate business interest in Wolf's financial history or creditworthiness.

Finally, an individual's identity is treated as a private fact where its disclosure is irrelevant to the issue incident to disclosure. See *Doe v.*

*Univision Television Group*, 717 So. 2d 63, 64 (Fla. Dist. Ct. App. 1998) (TV interviewee's identity was irrelevant to the medical problems his neighbors faced, and was not thus a topic of public concern). Similarly, Wolf's address, date of birth and social security number constitute private facts because their disclosure was the byproduct of an irrelevant hacking of a major newspaper's web page. In any event, granting HackLibrary's motion for summary judgment was improper because all these questions should have been decided by a jury. See *Winstead v. Sweeney*, 517 N.W.2d 664, 673 (Mich. 1994).

### **Offensive Material**

When intimate details of one's life are displayed in public in a manner offensive to the ordinary reasonable person, there is an actionable invasion of privacy. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). "An individual . . . is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

In this regard, the case of *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998), is particularly illuminating. Michaels, a popular musician, moved for a preliminary injunction to prevent dissemination of a videotape on the grounds of invasion of privacy and copyright infringement. See *id.* at 828. The tape depicted the plaintiff and a famous actress, the intervenor, having sex. See *id.*

The court found that "distribution of the tape on the Internet would constitute public disclosure of the plaintiff's private facts despite the fact that another videotape depicting the intervenor having sex with her husband had already been widely distributed." *Id.* at 840. The court explained that "even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives," and concluded that the videotape's contents were highly offensive to the plaintiff. *Id.*

In this case, the information about Wolf's marital difficulties and infidelity is also offensive because intimate relations and family quarrels are entirely private matters to which no reasonable member of the community has an interest. See *Reid v. Pierce County*, 961 P.2d 333, 341 (Wash. 1998). Hence, the "comments" HackLibrary posted on its archive constitute private matters, the disclosure of which was highly offensive to Wolf.

B. HACKLIBRARY IS NOT ENTITLED TO ANY AFFIRMATIVE DEFENSES  
ABSOLVING IT FROM LIABILITY.

There is no liability when a defendant merely gives further publicity to information about the plaintiff that is already public. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). Additionally, there is no liability when the facts disclosed are newsworthy because they are of legitimate interest to the public. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

1. *Wolf's private information had not been publicly displayed before HackLibrary posted it on its archive.*

“An individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may already be available to the public in some form.” *United States Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 500 (1994); *Abraham & Rose, PLC v. United States*, 138 F.3d 1075, 1083 (6th Cir. 1998).

The *Michaels* court also applies this holding. 5 F. Supp. 2d at 823. The court found that ten days prior to the public disclosure that gave rise to the suit, a 148-second clip from the actionable videotape became available for viewing on the Internet. See *id.* at 841. The court rejected defendant’s argument that this amounted to a previous disclosure, holding instead that the exposure of a portion of the tape for ten days could not render the contents of the clip “matters of public knowledge.” *Id.* Therefore, the plaintiff’s privacy interest in the unreleased portion of the tape was found to be undiminished. See *id.*

This case is strikingly similar to *Michaels* in this respect. However, the court of appeals found that because the actionable information remained on ChiPost.com’s hacked page for three hours before being removed, Wolf’s information had become public before HackLibrary posted the page on its archive. This holding is baseless because the record is devoid of any access statistics for ChiPost.com’s site during the three hours the hacked page was on display. Whether the number of viewers was sufficient to constitute a “public disclosure” can therefore only be speculated. Consequently, the granting of HackLibrary’s summary judgment motion was improper because all doubt must be construed in the nonmovant’s favor. See *Hunter v. Bryant*, 502 U.S. 224, 233 (1991).

Furthermore, if a video clip can remain on the Internet for ten days without rendering the contents of the entire videotape public, it follows that neither can the display of a web page for three hours constitute a public disclosure. See *Michaels*, 5 F. Supp. 2d at 841.

Additionally, the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemi-

nation of the information. *See United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 770 (1989). It is certain that the number of people who viewed Wolf's private information within this three-hour period is substantially smaller than the total number who visited the page during that time because Wolf's information was encoded as "comments" and was, therefore, not viewable by the majority of Internet browsers. (R. at 3.) However, even if a small number of people viewed Wolf's information before HackLibrary posted it on its archive, Wolf's privacy interest is not diminished in the least, and he can validly assert his public disclosure claim against HackLibrary. *See id.*

2. *HackLibrary could not be absolved from liability on the grounds Wolf's private facts were newsworthy.*

"When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977). The scope of legitimate public concern encompasses newsworthy matters. *See Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 478-79 (Cal. 1998); RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977). Additionally, the legitimate interest of the public may also extend to the private matters of a public figure. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. f (1977).

### **Newsworthiness**

Newsworthiness is determined by (a) the social value of the facts disclosed, (b) the depth of the intrusion into the private affairs of the plaintiff, and (c) the extent to which the plaintiff voluntarily acceded to a position of public notoriety. *See Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 45 (Cal. 1971); *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

A disclosure lacks social value when it fails to add to the knowledge the citizens use when they make vital choices in the community. *See Central Nat'l Bank v. United States Dep't of Treasury*, 912 F.2d 897, 900 (5th Cir. 1980). Knowledge of Wolf's marital difficulties, social security number and bankruptcy history in no way enables a citizen to make a significant choice relevant to community affairs. Moreover, the fact that Wolf's private information remained encoded in "comments" even after HackLibrary obtained a copy of the hacked page reflects that HackLibrary itself did not consider Wolf's information as possessing sufficient social value to divulge to a wider audience. Also, the fact that the other "hacked page" archives spurned ChiPost.com's hacked page indicates that Wolf's private facts were not newsworthy.

Furthermore, a lapse of time is an important factor in determining whether the publicity goes to unreasonable lengths in revealing facts

about one who has resumed a private life. See *Melvin v. Reid*, 297 P. 91, 94 (Cal. Ct. App. 1931) (holding defendant liable for disclosing the fact that plaintiff had been a prostitute and an acquitted defendant in a murder trial several years earlier); RESTATEMENT (SECOND) OF TORTS § 652D cmt. k (1977).

Similarly, the public disclosure of Wolf's bankruptcy is deeply intrusive, especially where there is no evidence that Wolf has been financially irresponsible during the past seventeen years. Moreover, *Melvin* demonstrates that even if Wolf's bankruptcy is part of the public record, it is not necessarily newsworthy. This is because the plaintiff in *Melvin* prevailed despite the fact that her prosecution and trial for murder was part of the public record. See *id.* at 93.

Finally, the court of appeals held that the information was newsworthy because it concerned the hacking of a major newspaper's web page. (R. at 9.) However, even when an event is a matter of public interest, the identity of the person suffering the harm is not. See *Vassiliades v. Garfinckel's Brooks Bros.*, 492 A.2d 580, 587 (D.C. 1985). Further, the subject matter of the publicity here consists of Wolf's spousal relationship, bankruptcy history, and identification information, not ChiPost.com's hacking. See RESTATEMENT (SECOND) OF TORTS § 652D (1977). Therefore, the question of whether ChiPost.com's hacking constitutes newsworthy information is irrelevant to this dispute. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975).

### First Amendment Protection

The court of appeals further held that because HackLibrary's publication concerned a newsworthy matter, it was protected by the First Amendment, especially since the matter asserted was true. However, the Restatement provides for tort liability even when publicity is given to true statements of fact. See *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) (citing *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940)); RESTATEMENT (SECOND) OF TORTS § 652D (1977). Critics of the Restatement approach have argued that imposing tort liability for publicly disclosing true facts about a plaintiff could violate the press' right to free speech. To that end, these critics have relied on *Florida Star v. B.J.F.*, where the court narrowly held that there can be no recovery for disclosure of and publicity to facts that are *a matter of public record* under the First Amendment. 491 U.S. 524, 533 (1989) (emphasis added).

However, the fact that Danielle Wolf was "pursuing a divorce" is not a matter of public record because the record does not reflect that there has been a filing for a divorce in court. See *Aquino v. Bulletin Co.*, 154 A.2d 422, 427 (Pa. Sup. Ct. 1959). Similarly, because the record contains no evidence that Wolf's bankruptcy proceedings were made public, there

exists the possibility that the record was sealed or otherwise kept out of the public record.

Moreover, the Supreme Court has also acknowledged that each individual is surrounded by a “zone of privacy within which the state may protect him from intrusion by the press.” *Cox Broad. Co. v. Cohn*, 420 U.S. 469, 487 (1975). Furthermore, in *Rosenbloom v. Metromedia, Inc.*, the Court recognized the strength of legitimate state interests in protecting the well-being of its citizens, even in the face of a broad First Amendment challenge. 403 U.S. 29, 64-65 (1971). Consequently, the court of appeals’ First Amendment analysis does not apply to this case.

Instead, protection from disclosure should apply to Wolf’s other disclosed facts, namely his home and e-mail addresses, and social security number. Specifically, a “strong privacy interest” exists with respect to disclosure of one’s social security number. *Sheet Metal Workers Int’l Ass’n Local 19 v. United States Dep’t of Veteran Affairs*, 135 F.3d 891, 898 (3d Cir. 1998). This is because a social security number is a universal identifier containing highly sensitive information about its bearer. See George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U. L. REV. 521, 524 (1990).

On the other hand, the scope of a matter of public concern may extend to the use of names and likenesses in giving information to the public for purposes of education, amusement or enlightenment. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (1977). However, such an extension of scope is valid only when the public is reasonably expected to have a legitimate interest in what is disclosed. See *id.*

HackLibrary has indeed stated that many Internet users viewing the hacked pages on its site do so “out of curiosity or academic interest.” (R. at 5.) Nevertheless, HackLibrary’s contention is unavailing because it has been shown that the public has no legitimate interest in knowing Wolf’s alleged spousal infidelities, bankruptcy history, and his other indicia of identification.

Ultimately, the court of appeals further erred by deciding the newsworthiness issue as a matter of law. This is because where is room for differing views on whether a publication could be newsworthy, the question is one to be determined by the jury and not by the court. See *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 562 (Ct. App. 1988).

### **Public Figure**

“A voluntary public figure is an individual voluntarily placing himself in the public eye.” Restatement (Second) of Torts ? 652D cmt. e (1977). Such public figures may be subject to disclosure of their private facts. See *Wilson v. Grant*, 687 A.2d 1009, 1015 (N.J. Super. Ct. App.



Div. 1996). However, the record does not reflect that Wolf did anything to accede to a position of public notoriety.

Moreover, even if Wolf is deemed an involuntary public figure by virtue of his assuming a prominent role in a cultural institution such as a music publisher, it does not follow that it is in the public interest to know private facts about him. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975). Most persons are connected with some vocational activity as to which the public can be said to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest would effectively expose everyone's private life to public view. See *Gilbert v. Medical Econs. Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

Additionally, a matter is not deemed to be of public concern if it only relates to the individual concerns of the discloser and its audience. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985). In this case, the hackers admitted to disclosing Wolf's information in retaliation for his professional dealings with a group of musicians. (R. at 11.) Hence, the disclosure relates only to the interests of the hackers and their audience, which overlaps with HackLibrary's clientele. Therefore, the publication of this information is not one of public concern.

Finally, the standard for determining the scope of the public's legitimate interest in a disclosure about a public figure becomes a matter of community mores. See *Capra v. Thoroughbred Racing Ass'n of N. Am.*, 787 F.2d 463, 464 (9th Cir. 1986). Because a question involving determination of community mores is one of fact, see *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 305 (Iowa 1979), the scope of the public's legitimate interest in Wolf's facts must be determined by the jury.

For these reasons, Wolf's personal information is not newsworthy, and HackLibrary is not entitled to a newsworthiness defense absolving it from liability. Accordingly, the court of appeals erred in affirming summary judgment in HackLibrary's favor.

#### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Harry Apostolakopoulos  
Hunter M. Barrow  
Kristi Belt

South Texas College of Law  
1303 San Jacinto Street  
Houston, Texas 77002-7000  
(713) 659-8040  
Attorneys for Petitioner

APPENDIX A

CONSTITUTIONAL PROVISIONS

**U.S. CONST. art. I, § 8, cl. 3**

The Congress shall have Power . . .

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

**U.S. CONST. art. VI, cl. 2**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**U.S. CONST. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. CONST. amend. XIV**

**Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the

number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## APPENDIX B

47 U.S.C. § 230 (Supp. 1997)

### **§ 230. Protection for private blocking and screening of offensive material**

#### **(a) Findings**

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

**(b) Policy**

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

**(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).

**(d) Obligations of interactive computer service**

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to

minors. Such notice shall identify, or provide the customer with access to information identifying, current providers

of such protections.

**(e) Effect on other laws**

**(1) No effect on criminal law**

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

**(2) No effect on intellectual property law**

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

**(3) State law**

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.

**(4) 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 of the amendments made by such Act, or any similar State law.

**(f) Definitions**

As used in this section:

**(1) Internet**

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

**(2) Interactive computer service**

The term "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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

**(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.

**(4) Access software provider**

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

#### APPENDIX C

##### THE BRITISH DEFAMATION ACT

The British Defamation Act provides in pertinent part:

##### **1 Responsibility for publication**

(1) In defamation proceedings a person has a defence if he shows that— . . .

(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

Defamation Act, 1996, ch. 31, § 1 (Eng.)

#### APPENDIX D

##### THE EUROPEAN UNION DIRECTIVE ON PRIVACY PROTECTION

The European Union Directive on Privacy Protection provides in pertinent part:

##### **Article 1**

s.1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

Council Directive 95/46, art. 27, 1995 O.J. (L281) 31.

# BRIEF FOR THE RESPONDENT

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No. 99-404

---

IN THE SUPREME COURT OF THE  
STATE OF MARSHALL

---

HARRY P. WOLF,

*Petitioner,*

v.

HACKLIBRARY, INC.,

*Respondent.*

---

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS  
OF THE STATE OF MARSHALL

---

BRIEF FOR RESPONDENT

---

Alice Sum

Christine Lent

Kimberly Gilyard

LEVIN COLLEGE OF LAW  
UNIVERSITY OF FLORIDA

P.O. 117620

Gainesville, FL 32611-0421

(352) 392-0421



QUESTIONS PRESENTED

- I. WHETHER SUMMARY JUDGMENT ON HACKLIBRARY'S STATUTORY IMMUNITY DEFENSE BY THE TRIAL COURT WAS APPROPRIATE WHEN CONGRESS EXPRESSLY IMMUNIZED INTERACTIVE COMPUTER SERVICES FROM PUBLISHER LIABILITY FOR THE WORKS OF THIRD PARTIES.
  
- II. WHETHER SUMMARY JUDGMENT ON PETITIONER'S INVASION OF PRIVACY CLAIM IN FAVOR OF HACKLIBRARY WAS APPROPRIATE WHEN HACKLIBRARY ARCHIVED INFORMATION AVAILABLE FROM THE PUBLIC DOMAIN THAT WAS OF LEGITIMATE PUBLIC INTEREST.

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OPINIONS AND JUDGMENTS BELOW

The order of the Madison County Circuit Court granting Respondent's Motion for Summary Judgment is unreported. The opinion of the First District Court of Appeals of the State of Marshall affirming the Circuit Court's decision is contained in the Record on Appeal. (R. 1-12).

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted pursuant to § 1020(2) of the Rules for the Eighteenth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

STATUTORY PROVISION

The excerpts from relevant statutory provisions are attached in Appendix A.

## STATEMENT OF THE CASE

## A. SUMMARY OF THE FACTS

HackLibrary, Inc. is a Marshall corporation. (R. 4). HackLibrary, Inc. is the creator of the web site known as "HackLibrary." (R. 4). HackLibrary is a library, similar to an electronic database, containing news about successful computer hacker exploits, provided for public information and academic purposes. (R. 4). HackLibrary is one of at least five web sites available to the public on the internet that contain this information. (R. 5). HackLibrary contains exact duplicates of hacked web pages and presently archives in excess of two hundred copies of web pages that have been the subject of previous hacker exploits. (R. 4). The archive displays a disclaimer providing that copies of the hacked web pages are made available for the sole purposes of academic research and public information. (R. 4).

HackLibrary acquires a copy of a hacked web page when an employee downloads a copy of the page, or the hacker or other internet user downloads a copy of the page onto HackLibrary's web site, usually anonymously. (R. 4). HackLibrary exercises no editorial control over which hacked web pages are selected for inclusion on its site. (R. 4). Once posted, the hacked web pages included in HackLibrary are instantly and simultaneously available to all internet users. (R. 4). The public may view the hacked site either by browsing the HackLibrary archive or reach individual pages directly by searching the Internet using a web search engine. (R. 5). HackLibrary is financed primarily by advertising revenue and does not collect a fee from individual subscribers. (R. 4).

On January 15, 1999, ChiPost.com, the web site of the daily newspaper The Chicago Post, was hacked by persons calling themselves "MP3 TERRORISTZ" ("TERRORISTZ"). (R. 3). The TERRORISTZ replaced the ChiPost.com website with its own web page. (R. 3). The hacked web page displayed sexually explicit materials, a denunciation of copyright law and intellectual property law, and critical statements about music industry attorneys and executives. In the HTML source code, behind the graphical image appearing to the general public on the web page, the TERRORISTZ hid additional information. (R. 3). These hidden comments included personal information about two music industry executives. (R. 10-11). The personal information included Harry Wolf's ("Petitioner"), home address, phone number, email, birth date, social security number, fact of prior personal bankruptcy, and pending divorce proceedings. (R. 10-11). The parties have stipulated that the statements in the HTML source code are accurate. (R. 3).

The hacked version of ChiPost.com remained on its web site for approximately three hours. (R. 3-4). Although no records were kept of the number of visitors during this three hour period, the average number of



visitors on the ChiPost.com site per hour is somewhere in the thousands. (R. 4). The copy of the ChiPost.com hacked web page was downloaded on January 15, 1999 and made available in HackLibrary archive on January 18, 1999. (R. 5).

During the months following the hack of the ChiPost.com website, Petitioner received various phone calls and email messages to his home reflecting the contents of the hacked ChiPost.com website. (R. 5). Petitioner asked HackLibrary to remove the site or redact references to him, but HackLibrary continued to display copies of sites that had already been publicly displayed on the web. (R. 6).B.

### B. SUMMARY OF THE PROCEEDINGS

Petitioner sued HackLibrary in a Marshall State court for invasion of privacy for alleged disclosure of private facts in the public forum. (R. 6). As an affirmative defense, HackLibrary asserted its statutory immunity under Section 230 of the Communications Decency Act of 1996 ("CDA"). (R. 6). The Madison County Circuit Court granted summary judgment in favor of HackLibrary, ruling that it was immune from liability as an interactive computer service provider. (R. 6).

The First District Court of Appeals for the State of Marshall affirmed the trial court's decision, but on different grounds. (R. 6-7). HackLibrary maintained that it is merely an interactive computer service that distributes previously available information provided by other content providers. (R. 7). The Court of Appeals held that HackLibrary was not immune under the CDA because it is both an interactive computer service provider and an information content provider, and cannot be without liability just because another party authored the information. (R. 7-8).

However, the Court of Appeals ruled in favor of HackLibrary on the invasion of privacy claim. (R. 8-9). The State of Marshall recognizes the tort of invasion of privacy by public disclosure of private facts, as set forth in the Restatement (Second) of Torts § 652D (1977). (R. 8). HackLibrary did not give publicity to Petitioner's private facts because the information was not private at the time that HackLibrary added the "MP3 TERRORISTZ" site to its archive. (R. 8). Also, the hacking of a major newspaper's website is of legitimate concern to the public, and as such, HackLibrary's publication of information is protected by the First Amendment. (R. 9).

On July 27, 1999, this Court granted Petitioner's leave to appeal the decision of the First District Court of Appeals affirming the Madison County Circuit Court's grant of summary judgment in favor of HackLibrary on the issues of statutory immunity under the CDA and invasion of privacy. (R. 12).

## SUMMARY OF THE ARGUMENT

## I.

On de novo review, this Court should reinstate the summary judgment granted by the Madison County Circuit Court because HackLibrary, an interactive computer service, is statutorily immune from speaker and publisher liability for information contained in the hacked version of the ChiPost.com web page HackLibrary archived in its online database. The evidence in the record demonstrates that there are no genuine issues of material fact for trial, and summary judgment is appropriate as a matter of law. Moreover, due to the nature of the conduct at issue, "computer hacking," the Petitioner is unlikely to produce any more information to create such an issue of fact for trial.

## II.

HackLibrary's act of displaying and archiving a copy of the TERRORISTZ website does not invade Petitioner's privacy by publicizing private facts. As such, this Court should affirm the summary judgment granted in favor of HackLibrary on the privacy issue.

Petitioner cannot state a cause of action because he cannot prove that the archived information was private, publicized, offensive to a reasonable person, and not of legitimate public concern. The information was not private because it was previously available from public records, easily accessible public reference sources, and the original hacked ChiPost.com site. Further, if the original hacked site was not enough to give publicity to Petitioner's personal information, then HackLibrary's archive cannot be the impetus for the transformation from "private" to "public" because the information was hidden in the source code. HackLibrary has a smaller, more specialized audience, and a visitor would have to search through over two hundred HackLibrary archives to find the site, as opposed to the instant access the original ChiPost.com site provided.

Additionally, this Court can affirm the summary judgment because offensiveness to a reasonable person and news worthiness can be decided as a matter of law. If Petitioner had truly found the archived information to be offensive, then he should have petitioned the appropriate courts to seal the records. Also, the hacking of a major newspaper's website is clearly a newsworthy item and of legitimate public concern. Because of the importance of preserving the matter of news worthiness, HackLibrary should not be forced to deliberate as to the effect of publicizing each individual fact that had previously been available in the public domain.

Therefore, this Court should reinstate the Madison County Circuit Court's grant of summary judgment in favor of HackLibrary on the statutory immunity issue and affirm the First District Court of Appeals' grant of summary judgment on the invasion of privacy issue.

### ARGUMENT

The Supreme Court of the State of Marshall should reinstate the holding of the Madison County Circuit Court as to the statutory immunity of HackLibrary, Inc. ("HackLibrary") and affirm the holding of the First District Court of Appeals, finding that HackLibrary is not liable for the tort of invasion of privacy. The circuit court properly granted summary judgment in favor of HackLibrary because HackLibrary is statutorily immune, under the Communications Decency Act of 1996 ("CDA") from liability as the publisher or speaker of information provided by a third party. *See* 47 U.S.C.A. § 230 (West Supp. 1999) ("Section 230").

Under Marshall Rule of Civil Procedure 56(c), summary judgment is appropriate, as a matter of law, if the evidence demonstrates there is no genuine issue of material fact for trial. *See* Marshall R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Because HackLibrary has statutory immunity under the CDA which preempts all state causes of action that are inconsistent with Section 230, including invasion of privacy, there are no issues of material fact for trial. *See* 47 U.S.C.A. § 230(b)(3).

Moreover, even if HackLibrary were not statutorily immune in this case, Harry Wolf ("Petitioner") cannot prove the four elements of the public disclosure of private facts tort: that the information archived by HackLibrary was private, publicized, highly offensive to a reasonable person, and not of legitimate public concern. Accordingly, the First District Court of Appeals' decision should be affirmed in part and reversed in part.

#### I. THE TRIAL COURT CORRECTLY GRANTED HACKLIBRARY'S MOTION FOR SUMMARY JUDGMENT BECAUSE CONGRESS EXPRESSLY IMMUNIZED INTERACTIVE COMPUTER SERVICES LIKE HACKLIBRARY FROM PUBLISHER LIABILITY FOR THE WORKS OF THIRD PARTIES, IN THE COMMUNICATIONS DECENCY ACT.

HackLibrary, an interactive computer service, has statutory immunity from Petitioner's cause of action for invasion of privacy. Whether a service provider like HackLibrary meets the statutory criteria for "interactive computer service" is an issue of first impression. However, the breadth of the statutory immunity is not. To date, at least two courts have interpreted Section 230 as creating a nearly absolute "federal im-

munity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” See *Zeran v. America Online Inc.*, 129 F. 3d 327, 330 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.C. 1998).

Furthermore, HackLibrary can not be liable for the tort of invasion of privacy because the MP3 TERRORISTZ (“TERRORISTZ”) were responsible for the comments encoded in the HTML source code on the hacked version of ChiPost.com. The TERRORISTZ created, and had complete editorial control over the message, and thus were the exclusive information content provider in the instant case. As such, HackLibrary falls squarely within the four corners of Section 230, making it immune from liability for the content of messages posted by a third party.

A. HACKLIBRARY IS AN INTERACTIVE COMPUTER SERVICE STATUTORILY IMMUNE FROM PUBLISHER OR SPEAKER LIABILITY UNDER THE CDA.

This Court should affirm the circuit court’s grant of summary judgment in favor of HackLibrary because the plain language of Section 230 creates both publisher and speaker immunity for HackLibrary as an interactive computer service. As a general rule, plain language controls the construction of a statute. See *Bread Political Action Comm. v. Federal Election Comm.*, 455 U.S. 577, 580 (1982). Section 230(f)(2) reads

[T]he term ‘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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. 230(f)(2).

1. *HackLibrary is an “information service” under the CDA.*

HackLibrary is an information service. Although the term “information service” is not defined in Section 230, Section 3(b) of the CDA provides that, unless defined, terms used in the CDA have the same meaning as the terms in 47 U.S.C. § 153. See 47 U.S.C.A. § 153 (West Supp. 1999)(historical notes). 47 U.S.C. § 153 (20) defines the term “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications and includes electronic publishing.” Because HackLibrary acquires, stores and has the capability to retrieve copies of hacked web pages from its archives, HackLibrary fits the statutory definition of information service. In addition, HackLibrary develops and electronically publishes original works in the form of “hacker news and information” on its website (R. 4). Thus, HackLibrary is an information service under the CDA.

2. *HackLibrary is an "information system" under the CDA.*

In addition, HackLibrary is an information system. The term "information system" is not defined in Section 230 or 47 U.S.C. § 153. Thus, unless otherwise defined, words used by Congress in enacting a statute should be interpreted as having their "ordinary, contemporary, common meaning." *See Perrin v. United States*, 444 U.S. 37, 42 (1979). Information system is defined elsewhere in 44 U.S.C. § 3502 (8) as "a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information." Thus, this Court should interpret the definition in 44 U.S.C.A. § 3502(8) as the contemporary definition of "information system." By using its website as a resource to organize, maintain and disseminate both news about hacker exploits, and the products of those exploits, namely the web pages in its archive, HackLibrary is also an information system under the CDA.

3. *HackLibrary enables computer access by multiple users to a computer server, and is therefore immune from liability under the CDA.*

As a website, HackLibrary enables computer access by multiple users, including its own employees. (R. 4). HackLibrary also enables access by the general public in the form of Internet visitors, to the server on which it uploads, stores, and archives its more than two-hundred hacked web pages. (R. 4). HackLibrary's web site is stored on a server connected to the Internet, and the web pages on that website may be viewed by anyone using a web browser. *See* Laura Lemay, *Teach Yourself More Web Publishing With HTML in a Week*, 273 (Sams.net) (1995). Hence, by enabling users to view archived pages, original news and information, those users are accessing HackLibrary's server with their computer each time they visit the HackLibrary website.

Thus, HackLibrary meets both the Section 230 definition for information service and information system, only one of which is necessary under the CDA. Furthermore, HackLibrary enables computer access by multiple users, including its employees and the public at large using the Internet with a browser, to a computer server on which its files are stored. Thus, applying the plain language of Section 230(f)(2), HackLibrary is an interactive computer service immunized from publisher or speaker liability under the CDA.

B. IN ADDITION TO THE PLAIN LANGUAGE OF THE CDA, THE LEGISLATIVE HISTORY LEAVES NO DOUBT HACKLIBRARY IS A MEMBER OF THE CLASS CONGRESS INTENDED TO IMMUNIZE AS AN INTERACTIVE COMPUTER SERVICE UNDER THE CDA.

In addition to the plain language of Section 230, immunizing HackLibrary as an interactive computer service, Congress' legislative intent in enacting the CDA was to expressly immunize defendants like HackLibrary from liability for information disseminated on its website by a third party like the TERRORISTZ. It is significant that Congress chose the term "interactive computer service" in Section 230, rather than "internet service provider," "commercial online service," or "computer information service." See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 447 (E.D. Va. 1998); *America Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 854 (E.D. Va. 1999); *Compuserve Inc. v. Patterson*, 89 F.3d 1257, 1259 (6th Cir. 1996). The legislative history of the CDA reveals that Senators used terms like "online service provider" or simply "online provider" when they debated this legislation on the floor of the Senate. See 141 Cong. Rec. H8460-01 (daily ed. Aug. 4, 1995) (statement of Sen. Cox); 141 Cong. Rec. S8310-03 (daily ed. June 14, 1995) (statement of Sen. Coats). As such, Congress made a policy choice when it enacted the CDA using the term interactive computer service. That policy choice was to immunize a broader range of service providers than large online subscriber services with millions of customers like Compuserve, America Online ("AOL"), Prodigy and Microsoft, all of which provide access to the internet and allow their users to access proprietary software, services, bulletin boards, databases, and online chat forums. See *Zeran*, 129 F.3d at 328-29; Matthew C. Siderits, *Defamation in Cyberspace: Reconciling Cubby, Inc. v. Compuserve, Inc. and Stratton Oakmont v. Prodigy Services Co.*, 79 MARQ. L. REV. 1065, 1073 (1996).

Furthermore, the legislative history of the CDA expressly contemplates immunity for non-subscriber entities such as HackLibrary. The legislative history of the CDA reveals that the protections of Section 230 were intended to apply to "all interactive computer services . . . including non-subscriber systems such as those operated by many businesses for employee use." See H.R. Conf. Rep. No. 104-458, at 176 (1996)(emphasis added). HackLibrary is a non-subscriber entity because it does not maintain individual accounts for users in exchange for a monthly or per usage fee. Instead, the HackLibrary website provides news and information about successful hacker exploits and is financed by advertising revenues. (R. 4). HackLibrary's primary purpose is to display hacked websites for academic research and public information. (R. 4). Users are able to interact with HackLibrary by way of accessing and searching its archives

and uploading information about hacked websites for inclusion in its database. In this respect, HackLibrary has attributes of both the large online service provider, and the non-subscriber system such as those operated for employee use.

To hold HackLibrary liable as the publisher or speaker of a hacked web page created by a third party, while immunizing other interactive computer services like America Online, providing users with a front-end to the internet in exchange for subscriber fees, would undercut the CDA's basic objective. Congress' basic objective in enacting the CDA was to "target content providers, not access providers or users." See Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 58 (1996). As such, this Court should find that HackLibrary is an interactive computer service Congress intended to immunize from publisher or speaker liability when it enacted the CDA.

C. THE "TERRORISTZ" WERE THE THIRD PARTY INFORMATION CONTENT PROVIDERS OF THE HACKED CHIPOST.COM WEB PAGE.

The circuit court's holding that HackLibrary was not an "information content provider" in this instance should be reinstated. HackLibrary displayed an exact duplicate of the hacked version of the ChiPost.com web page created by the TERRORISTZ, without altering its content or appearance. Thus, the TERRORISTZ, the original creator, is culpable for any cause of action arising from the content of this web page. See *Zeran*, 129 F.3d at 330. When it enacted the CDA, Congress expressly contemplated this result. See *id.* at 331. Congress reasoned that it would be impossible for services like HackLibrary to screen every message and posting on its service, and as a consequence, providers might choose to "severely restrict" messages these providers allow their audience to post. See *id.* This would impede Congress' policy of "promot[ing] the continued development of the Internet," and "encouraging technology development to maximize user control over what information is received by individuals . . . who use the Internet." See 47 U.S.C. 230 (b)(2)-(3). Therefore, summary judgment in favor of HackLibrary is mandated under the CDA.

Section 230(f)(3) defines "information content provider" as "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." See 47 U.S.C. § 230(f)(3). Although the identity of the TERRORISTZ is unknown in the instant case, and may never be known, it would still be logical to conclude that it is a person or entity. Because the TERRORISTZ "hacked" the web site of ChiPost.com,

and made their information available through the Internet, the TERRORISTZ are also the information content provider in the instant case.

1. *Modern technological advances make it impossible to hold HackLibrary legally responsible under traditional publisher and distributor liability.*

Before the CDA was enacted, at least one court recognized that it was difficult to enforce traditional common law notions of publisher and distributor liability on the Internet. See *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 138 (S.D.N.Y. 1991). In *Cubby*, the court granted Compuserve's Motion for Summary Judgment. See *id.* at 141. The court found that it was unreasonable to require Compuserve to check all third party publications it carried for defamatory contents, when a traditional distributor like a bookstore was not required to authenticate all of the works it carried on its shelves. See *id.* at 140-41; see also *Religious Technology Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1367-69 (N.D. Cal. 1995) (holding that a bulletin board service ("BBS") was not liable for direct copyright infringement for third party posting because of the "automatic and indiscriminate" conduct in simply providing a system capable of sending messages to subscribers).

In 1996, Congress passed the CDA to specifically eliminate common law publisher and speaker liability for interactive service providers. In enacting the CDA, Congress legislatively overruled the 1995 case of *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, (N.Y. Sup. Ct. 1995). See H.R. Conf. Rep. No. 104-458, at 194 (1996). In *Stratton*, the court held that because Prodigy marketed itself as a family online service provider that controlled content, it was liable, like a newspaper, for publishing libelous statements posted by a third party. See *Stratton*, 1995 N.Y. Misc. at \*10-11. The court found that because Prodigy claimed to censor materials available on its service, it was appropriate to hold Prodigy to a higher standard than other similarly situated online service providers that did not censor. See *id.* at 10, 13. Congress specifically overruled the *Stratton* decision because it treated providers and users as publishers or speakers of content created by a third party. See H.R. Conf. Rep. No. 104-458, at 194 (1996).

2. *Modern courts have expanded, rather than retreated from decisions holding interactive service providers like HackLibrary absolutely immune from liability for works created by third parties.*

HackLibrary is not liable for the content of the web page created by the TERRORISTZ. Since the CDA was enacted in 1996, courts deciding this issue consistently hold that no cause of action can be maintained against an interactive computer service for content created by a third



party over which the service had no editorial control. *See Zeran*, 129 F.3d at 330; *Doe v. America Online, Inc.*, 718 So. 2d 385, 389 (Fla. Dist. Ct. App. 1998), *rehearing granted*, 729 So. 2d 390 (Fla. 1999)(granting summary judgment in favor of AOL because Section 230 rendered AOL immune from prosecution for a third-party's marketing and distribution of "kiddie porn" in photos and videos via one of AOL's online chat rooms, violating a local statute).

*Zeran* is the seminal case in the new frontier of interactive computer service liability after the passage of the CDA. *See Zeran*, 129 F.3d at 327. *Zeran* is factually analogous to the instant case. In *Zeran*, an anonymous user posted repeated messages on an AOL bulletin board advertising t-shirts with slogans like "Visit Oklahoma . . . It's a BLAST" and "McVeigh for President 1996," with instructions to call the *Zeran* home to order. *See Zeran*, 958 F. Supp. 1124, 1127 n. 3 (E.D. Va. 1997). *Zeran* was instantly deluged with phone calls and death threats. *See Zeran*, 129 F.3d. at 329. At one point, *Zeran* received a harassing call every two minutes. *See id.* *Zeran* contacted AOL and requested it remove the BBS postings and print a retraction. *See id.* AOL complied, but refused to print the retraction. *See id.*

*Zeran* filed suit against AOL for defamation, contending that AOL had a duty to remove the posting, notify subscribers of the hoax, and screen future messages, once he notified AOL of the problem. *See id.* at 330. AOL asserted Section 230 as its affirmative defense. *See id.* The court held that actions like *Zeran's* were barred by Section 230 because these actions thrust a service provider like AOL into the traditional role of a publisher. *See id.* The court further explained that its holding would not preclude another case against the third party who posted the messages if that party were identified. *See id.*

Although *Zeran* contended that AOL should be liable under distributor liability, the court dismissed this argument as a "subspecies" of publisher liability. *See id.* at 332. The court further stated that because "publication" of a statement is a "necessary element in a defamation action, only one who publishes can be subject to tort liability for defamation." *See id.* The court explained that AOL fell within the definition of publisher under the CDA because "everyone who takes part in the publication . . . is charged with publication." *See id.* at 332 (quoting *Tackett v. General Motors Corp.*, 836 F.2d 1042, 1046-47 (7th Cir. 1987)). As such, the court found that imposing liability upon AOL would violate the policy behind the CDA, namely discouraging self-regulation. *See id.* at 333.

Furthermore, the *Zeran* court held it would not assume Congress intended to impose liability on an interactive service provider simply because it had notice of potential defamation. *See id.*; *see also Blumenthal*, 992 F. Supp. at 52. The *Zeran* court reasoned that if this were the case, anyone could simply contact AOL and claim a posting was defamatory,

triggering the obligation for AOL to remove the posting. *See Zeran*, 129 F.3d at 333; *see also* Elizabeth deGrazia Blumenfield, *Publisher Liability in Cyberspace*, 509 PLI PAT. 763, 770 (1998) (suggesting that Internet providers would be inclined to remove messages that created the potential for liability when they received a complaint, "just to be safe").

Other courts have found that even if the identity of the person who commits defamation is known to the service provider, that does not change the result under the CDA. *See Blumenthal v. Drudge*, 992 F. Supp at 51-52. In *Blumenthal*, the plaintiff sued AOL for defamatory statements posted by one of its licensors on a publication known as the "Drudge Report." *See id.* at 47. The *Blumenthal* court held, consistent with the Fourth Circuit in *Zeran*, that Congress' policy choice to statutorily immunize interactive service providers like AOL was dispositive of the issue in *Blumenthal*, granting summary judgment in favor of AOL. *See id.* at 52-53. What the *Blumenthal* court did make clear, however, was that it believed the CDA left liability intact for "joint content providers" although that was not the case in *Blumenthal*. *See id.* at 51.

Another court has expanded the scope of the rule in *Zeran* and *Blumenthal* even one step further, prohibiting a plaintiff from engaging in discovery against an interactive service provider. *See Ben Ezra, Weinstein and Co. v. America Online Inc.*, No. CIV. 97-485 LH/LFG, 1998 WL 896459 (D.N.M. July 16, 1998) (slip op.), *summary judgment granted in* 27 Media L. Rep. (BNA) 1794 (D.N.M. Mar. 1, 1999). The *Ben Ezra* court found that Congress intended to immunize interactive computer services from "the burdens of litigation" as well as liability. *See id.* at \*2.

Thus, the current state of the law with respect to third party content providers is that it makes no difference whether the third party is anonymous or contractually related to the interactive service provider, both are treated as "information content providers." *See Zeran*, 129 F.3d at 330; *Blumenthal*, 992 F. Supp at 47. In addition, courts have concluded that distributor liability is a subspecies of the publisher liability that Congress intended to eliminate through the CDA. *See Zeran*, 129 F.3d at 332. Thus, regardless of the knowledge of the interactive computer service, there is no affirmative duty to take action, censor or post retractions for defamatory content provided by third parties. *See id.* at 333.

It appears clear from the foregoing decisions under the CDA that Section 230 does not protect an interactive service provider that creates the content it seeks immunity for. *See Blumenfield*, 509 PLI PAT. at 771. In addition, the *Blumenthal* court refused to rule out the possibility that the CDA may leave intact a cause of action for joint liability where the service participates in "joint development of content." *See id.* at 51. In the instant case, HackLibrary has no formal policy to select the hacked web pages it includes in its collection and does not take part in the crea-

tion of the pages it displays and archives. (R. 4). Furthermore, an Internet user may submit pages to HackLibrary anonymously. (R. 4).

In the instant case, Petitioner requested that HackLibrary either remove the hacked ChiPost.com web page from its archive, or in the alternative, redact the references implicating him. (R. 5-6). In the first instance, under Section 230, an interactive service provider may, but is under no statutory or common law obligation to make a judgment regarding the lawfulness of an information content provider's message. It would be an onerous burden to require every interactive service provider to investigate the truthfulness of every utterance of a third party on the Internet. This is a result Congress did not intend when it enacted the CDA.

Secondly, it is at least arguable that redacting the personal information from the HTML source code would give rise to a cause of action under the rationale in *Blumenthal* as a "joint content provider" for contributing to the content of the hacked ChiPost.com web page. In essence, Petitioner was asking HackLibrary to make modifications to a file located on a computer server, to re-save that file and to republish it in its altered form. Furthermore, Section 230 does not specifically insulate an interactive service provider from liability for altering or redacting materials provided by an information content provider. Section 230 only confers statutory immunity upon interactive service providers who "restrict access or availability of material." See 47 U.S.C. § 230(c)(2)(A). There is no mention of statutory immunity for redacting content. Arguably, compliance with Petitioner's requests may have caused HackLibrary to surrender its statutory immunity and assume the role of a content provider.

The First District Court of Appeals erroneously concluded that HackLibrary was not statutorily immune from liability because it was the one who "dredge[d] up defamatory, infringing, or otherwise actionable information." Once an interactive service provider, like HackLibrary, satisfies Section 230, it is absolutely immune, so long as it maintains a passive role with respect to the content of the information. In other words, when the interactive service provider has no responsibility for the content of a message, and exercises no editorial control over the content of a message like the message in the HTML source code of the ChiPost.com web page, Congress has made a policy choice to insulate that provider. This Court should not follow in footsteps of the First District Court of Appeal, and should decline to legislate from the bench. Accordingly, this Court should reinstate the circuit court's grant of summary judgment in favor of HackLibrary.

II. THE COURT OF APPEALS CORRECTLY HELD THAT HACKLIBRARY DID NOT INVADE PETITIONER'S PRIVACY BY DISPLAYING AND ARCHIVING THE "TERRORISTZ" VERSION OF CHIPOST.COM.

HackLibrary did not invade Petitioner's privacy by displaying and archiving the "TERRORISTZ" version of ChiPost.com. The State of Marshall recognizes the tort of invasion of privacy by giving publicity to private life ("public disclosure tort"), as set forth in the Restatement (Second) of Torts ("Restatement"). (R. 8). To hold HackLibrary liable for the public disclosure tort, Petitioner must prove that the matter was private, publicized, highly offensive to a reasonable person, and not of legitimate concern to the public. *See* Restatement (Second) of Torts § 652D (1977). Because Petitioner cannot prove all four elements of the public disclosure tort, and it is unlikely that Petitioner will be able to produce additional facts that create a genuine issue of material fact for trial, this Court should affirm the decision of the Court of Appeals by holding that HackLibrary did not invade Petitioner's privacy.

A. HACKLIBRARY ARCHIVED INFORMATION THAT WAS AVAILABLE FROM THE PUBLIC DOMAIN.

Petitioner cannot prove that HackLibrary archived private information, because all of the facts that were hidden in the HTML source code were available from the public domain. To have a cause of action for public disclosure tort, the Petitioner must ultimately prove that such facts were private. *See* Restatement section 652D.

1. *The information was available from public records.*

HackLibrary did not invade Petitioner's privacy because it archived information that was available from public records. For example, when Petitioner filed for personal bankruptcy, he was required by law to fill out a Voluntary Petition, which requested his name, alias, social security/tax identification number, address, telephone number, county of residence or principal place of business, and extensive financial information. *See* 11 U.S.C.A., Official Bankruptcy Form 1. The Voluntary Petition is a public record under 11 U.S.C. § 107(a), and as such, is "open to examination by an entity at reasonable times without charge." 11 U.S.C. §107(a) (1999). Section 107(a) also empowers a court to protect a person "with respect to scandalous or defamatory matter contained in a paper filed" in a bankruptcy case. *Id.*

Additionally, states have enacted legislation that similarly authorizes access to public records. The California Legislature, "mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental

and necessary right of every person in this state." See CAL. GOV'T CODE § 6250 (West 1999). Public records usually include all documents and other materials, "regardless of the physical form, characteristics or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." See FLA. STAT. Ch. 119.011 (1999). Divorce actions, including Petitioner's, are accessible under public records acts because parties are required to file a petition, pursuant to statutory guidelines, with the court. See 750 ILL. COMP. STAT. § 105 (West 1999); FLA. STAT. CH. § 61.043 (West 1999).

Furthermore, comment b to section 652D states that there is no liability for giving publicity to facts about a person's life that are matters of public record, including date of birth, and fact of marriage. Some states have constitutional provisions that mandate courts be "open" and "accessible." See *Petition of Keene Sentinel*, 612 A.2d 911, 915-16 (N.H. 1992). The New Hampshire Supreme Court clarified that its courts were "public forums." See *id.* Thus, a citizen seeking a divorce must unavoidably do so in a public forum, and as a result, many family and marital matters become public. See *id.* Unfortunately, parties "seeking a dissolution of their marriage are not entitled to a private court proceeding just because they are required to utilize the judicial system." See *id.* at 916 (citing *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 119 (Fla. 1988)). Under the New Jersey Constitution, the public has a right of access to court proceedings and to court records that cannot be unreasonably restricted. See *id.*

Accordingly, the United States Supreme Court has held that "interests in privacy fade when the information involved already appears on the public record." See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). In *Cox*, the father of a rape victim sued the parent company of a television station for reporting the name of the victim. See *id.* at 474. The reporter learned the name of the rape victim from an examination of the indictments that were available for inspection in the courtroom. See *id.* at 473. The father based his suit on a Georgia statute that made it a misdemeanor to publish or broadcast the name of a rape victim. See *id.* at 474. While recognizing that there is a zone of privacy around an individual within which a state may protect from press intrusion, the Court was reluctant to make public records available to the media, while simultaneously prohibiting publication if potentially offensive to the reasonable person. See *id.* at 496.

The Court warned that doing so would "invite timidity and self-censorship" and result in the suppression of information that should be made available to the public. See *id.* Moreover, public records are by their very nature of interest to the public, and the public benefits from the reporting of the accurate contents. See *id.* at 495. This is the very

right that is critically important in preserving a type of government in which the “citizenry is the final judge of the proper conduct of public business.” *See id.* Ultimately, the press cannot be sanctioned for publishing true information disclosed in public court documents open for public inspection. *See id.* at 496.

One court has interpreted the Supreme Court’s holding in *Cox* to amount to an absolute privilege to republicize matters in the public record, no matter how offensive or private. *See Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1290 (D.D.C. 1981). Ultimately, courts have held that as long as the plaintiff obtains information from a public record, the publication of a matter does not constitute an invasion of privacy. *See Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (holding that information lawfully obtained from public records by a newspaper regarding child abuse did not result in tort of public disclosure of private facts).

Given the overwhelming case law in support of the ability to publicize information in the public records, Petitioner cannot support his claim of invasion of privacy because the general matters and specific information contained in TERRORISTZ were all available from public records. That is, the fact that he filed bankruptcy and the details of that bankruptcy, including date of the filing, social security number, home address, home phone number were all available from the Voluntary Petition the Petitioner filled out. Also, the fact that Petitioner’s wife had filed for divorce, alleging abandonment and infidelity, was available from court records. Even though the information archived by HackLibrary may have been personal to Petitioner, and Petitioner may not have wanted the information to be archived, the information certainly was not “private” because it was accessible through public records.

2. *The information was available from easily accessible sources.*

As to the other three pieces of archived information, Petitioner’s law school graduation date, date of birth and personal email address, they were readily accessible from other public sources. Petitioner’s law school graduation and date of birth, because he is general counsel for MoneyMusic, Inc., is available from the Martindale-Hubbell directory. *See Martindale-Hubbell Legal Directory*, <<http://www.martindahubbell.com>>. Petitioner’s personal email address is available from search engines on the Internet, such as Yahoo.com, which also provides home address and phone number, or Lycos.com. *See Yahoo People Search*, <<http://www.people.yahoo.com>>; *Lycos E-Mail Addresses*, <<http://www.whowhere.lycos.com/Email>>. These directories are widely accessible by any individual who has access to the Internet, and with the advent of

technology, such searches are simpler than thumbing through the yellow or white pages.

3. *Compilation of information available from public domain does not transform it into "private" information.*

Petitioner may argue that the information, although contained in the public domain, was "private" because HackLibrary archived a compilation of the information. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court held that disclosure of the contents of an FBI rap sheet could result in an invasion of privacy by public disclosure of private information and would fit within law enforcement exemption of the federal Freedom of Information Act. The Court stated that there is a "vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a clearinghouse of information." *See id.* at 764.

In interpreting the *Reporters Committee* case, the District Court for New Jersey noted that it addressed privacy interests under the Freedom of Information Act, not the constitution, and thus its analysis was unhelpful in analyzing Megan's Law cases, which implicate the Eighth Amendment. *See Paul P. v. Verniero*, 982 F. Supp. 961, 967 n.10 (D.N.J. 1997). Moreover, the court held that plaintiff's interest in compiled information, which would otherwise remain "scattered" or "wholly forgotten" are within the "zones of privacy" protected by the Constitution. *See id.* at 966. Ultimately, the court reasoned that it is of "little consequence whether this public information is disclosed piecemeal or whether it is disclosed in compilation." *See id.* at 967.

Similarly, in the instant case, it does not matter whether Petitioner's information is disclosed piecemeal or through HackLibrary's archived TERRORISTZ page. With the advent of Internet technology, numerous public records are available through searches on the Internet or from legal directories, such as WestLaw. *See Westlaw, Public Information, Records, and Filings* <<http://www.westlaw.com>>. One can access the files of a bankruptcy court through the Internet and conduct a search using any number of terms, including name, social security number, or creditor. *See RACER Bankruptcy Case Search*, <[http://www.id.uscourts.gov/wconnect/wc.dll?usbc\\_racer/main](http://www.id.uscourts.gov/wconnect/wc.dll?usbc_racer/main)>. The diligent search of the archives of every courthouse basement in *Reporters Committee* is no longer necessary, as the task of obtaining such information can be easily accomplished through a one-hour session online. Furthermore, the compilation in *Reporters Committee* was assembled by a branch of the government, the FBI, and the issue was whether the FBI

could release the compiled rap sheet under the Freedom of Information Act, as distinguishable from the unknown party that compiled the information from separate public records in the instant case. Ultimately, the instant case involves a private party and the absence of state action.

4. *The information had been previously publicized on the original ChiPost.com website.*

HackLibrary did not invade Petitioner's privacy because it archived information that had been previously publicized on the original ChiPost.com website. Matters already publicly released in a "periodical or newspaper of local or regional circulation" cannot be deemed "private." See *Wolf v. Regardie*, 553 A.2d 1213, 1219 (D.C. 1989). In *Wolf*, the plaintiff sued a monthly informational magazine for invasion of privacy by giving publicity to his private life. See *id.* at 1216. A magazine had contacted the plaintiff requesting an interview, but plaintiff ultimately refused to give details regarding his business practices and only briefly commented about his legal work. See *id.* at 1215. The magazine subsequently published a short biographical entry on plaintiff in September 1985. See *id.* The account included information about his shares in a bank, location of his business and the fact that he owned the building, and the address for another building he jointly owned. See *id.* One year later, the September 1986 issue republished the same, but abbreviated, information as the earlier publication. See *id.* at 1216. The court of appeals affirmed the summary judgment of the trial court in favor of the magazine because the facts in the two articles were a matter of public record or readily available to "anyone who would wish to ascertain it." See *id.* at 1218-19. As such, the facts obtained from public records or already publicly released media cannot be considered private. See *id.*

Similarly, the Sixth Circuit Court of Appeals has held that subsequent publication of a previously publicized matter does not support a cause of action for invasion of privacy. See *Dotson v. Wal-Mart Stores, Inc.*, 165 F.3d 27 (6th Cir. 1998). In *Dotson*, the plaintiff allegedly had shoplifted and was arrested, and a local newspaper reported the incident. See *id.* at \*1. Defendant's agents distributed the investigative report of the incident by mailing copies to plaintiff's supervisors and by placing a copy on plaintiff's car windshield. See *id.* The court, in referring to the Restatement, held that because the newspaper had reported an incident before the defendant's disclosure, the latter disclosure was only a "further publication of matters previously published to the public at large." See *id.* at \*2.

Likewise, in *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1047 (Cal. App. 1st Dist. 1984), the court held that a newspaper had an additional ground for exemption from liability, because the maga-



zine merely republished the original article. The court reasoned that is “axiomatic that no right of privacy attaches to a matter of general interest that has already been publicly released in a periodical or in a newspaper of local or regional circulation.” *See id.* at 1048.

In the instant case, HackLibrary merely displayed and archived a duplicate of the original TERRORISTZ page. HackLibrary neither added nor deleted information. Upon the hackers displaying the TERRORISTZ page, the information was available for the entire Internet public to view. Between the very moment the site was hacked and replaced until the moment that ChiPost.com’s site administrator took the page down, thousands of people probably visited the site. Therefore, Petitioner cannot reasonably assert that the information that was subsequently archived was “private.”

B. HACKLIBRARY DID NOT GIVE PUBLICITY TO PETITIONER’S PERSONAL INFORMATION BECAUSE THE INFORMATION WAS HIDDEN IN THE HTML SOURCE CODE OF THE ARCHIVE AND THE ARCHIVE WAS ACCESSIBLE BY A SMALLER AUDIENCE THAN THAT OF CHIPOST.COM.

If this Court finds that the personal information remained “private” after being published on the original TERRORISTZ page, then HackLibrary cannot be liable for publicizing private facts by merely archiving the page and limiting availability to a significantly smaller audience. A claim under section 652D requires Petitioner to prove HackLibrary gave publicity to a private fact of Petitioner’s. Comment a to section 652D further differentiates between “publicity” and “publication.” Publication is a word of art, which includes any communication. However, publicity requires that the matter must be communicated to “the public at large or to so many persons that the matter must be regarded as on of general knowledge.” *See Pinkston-Adams v. Nike, Inc.*, 1999 WL 54302 at \*3 (N.D. Ill. 1999)(citing *Chisholm v. Foothill Capital Corp.*, 3 F. Supp. 2d 925, 940 (N.D. Ill. 1998)(citing Restatement of Torts (Second), § 652D, comment a)).

In the instant case, the HTML source code for the TERRORISTZ page contained personal information about Petitioner, encoded as comments, which is not normally displayed by most web browsers. (R. 3). Therefore, if the information was not specifically accessed enough by the thousands of visitors to the ChiPost.com website to render the information public, then the information was even more unlikely to be publicized through the archive. HackLibrary maintains a website containing “hacker news and information.” (R. 4). As such, the number of visitors to HackLibrary, a specialized site, is logically smaller than that of ChiPost.com, a generally known, widely accessed site. Furthermore, the archive includes copies of over two hundred different hacked web sites.

(R. 4). Given the voluminous number of archives, HackLibrary visitors would likely have to winnow through over two hundred other archives to find TERRORISTZ, and then proceed to uncover the hidden comments. This starkly contrasts with a visit to the ChiPost.com site, which receives thousands of visitors each hour. (R. 5). Otherwise, a user may reach the individually archived HackLibrary pages directly, often by using a web search engine. Under this method, a user may stumble upon the TERRORISTZ archive, or would have to engage in a detailed, on point search. Given this, it is unlikely that HackLibrary provided the impetus to transform the personal information into public information, if thousands of visitors per hour accessing the original TERRORISTZ page on ChiPost.com does not constitute giving publicity to private facts.

C. THE INFORMATION CONTAINED IN THE ARCHIVED TERRORISTZ SITE IS NOT OFFENSIVE OR OBJECTIONABLE TO A REASONABLE PERSON.

Petitioner must also prove that the archived information was offensive or objectionable to reasonable person. Offensiveness is relative to the customs of "time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens." See Restatement section 652D. An individual only has a cause of action if the publicity given is such that a reasonable person would feel justified in feeling "seriously aggrieved" by it. See *id.*

The archived information is not offensive or objectionable to a reasonable person as a matter of law. Whether the publication of an allegedly private fact rises to the level of 'highly offensive' is a question of law for the court to decide. See *Chisholm*, 3 F. Supp. 2d at 941. A court should consider the conduct, context, and circumstances surrounding the publication, as well as the publication itself. See *id.* (citing *Green v. Chicago Tribune Co.*, 675 N.E.2d 249, 254 (Ill. App. Ct. 1996)).

In the instant case, the context, conduct and circumstances demonstrate that archiving a hacked website should not be offensive or objectionable to a reasonable person. The implicit message in the comments was to criticize Petitioner's involvement in the entertainment industry. As such, HackLibrary could not have archived the information, after censoring it, and still have maintained the integrity of the original message.

Furthermore, if Petitioner truly believed that the information HackLibrary archived was offensive or objectionable, he should have petitioned the respective courts that had jurisdiction over the records to seal the information. Similarly, he should have unlisted his home address, phone number, and email address from the various publicly available reference sources. Finally, as an attorney doing business in the State of Marshall, he should have redacted his birth date and law school graduation date from the Martindale-Hubbell Legal Directory. Since the record

does not reflect that Petitioner chose these precautions to prevent publicity to information available in the public domain, he has no basis to feel "seriously aggrieved" by HackLibrary's act of archiving TERRORISTZ.

D. THE ARCHIVED TERRORISTZ AND THE INFORMATION CONTAINED THEREIN IS OF LEGITIMATE PUBLIC INTEREST AND NEWSWORTHY.

Petitioner must prove that the archived information was not of legitimate public concern. *See Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 478 (Cal. 1998)(citing Restatement (Second) of Torts § 652D (1977)). This requirement is also characterized as "newsworthiness" and is a complete bar to the public disclosure of private facts tort. The analysis of news worthiness inevitably involves balancing conflicting interests in personal privacy and the First Amendment right to freedom of the press. *See id.* When HackLibrary displayed and archived TERRORISTZ, it "published" on the Web because it made information available on the Web. *See ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996).

1. *Summary judgment is especially appropriate in the instant case because the First Amendment right to free press is implicated.*

In *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 307 (10th Cir. 1981), the court affirmed the trial court's granting of summary judgment in favor of the publisher, holding that "objective and reasonable minds cannot differ" in finding the article to constitute public disclosure of private facts. The court further explained that a judge should make a threshold determination of whether a jury question exists, especially when civil cases may have a chilling effect on First Amendment rights. *See id.* at 309 n.1. This determination acts as a "buffer" against possible First Amendment interferences. *See id.* Specifically, in *Gilbert*, requiring the publisher to undergo a trial would "unnecessarily chill the exercise of their first amendment right to publish newsworthy information." *See id.*

Similarly in the instant case, this Court should affirm the lower court's grant of summary judgment in favor of HackLibrary, because allowing this case to proceed to trial would impair HackLibrary's right to publish newsworthy information about website hacking. Furthermore, holding otherwise would hamper the ability of individuals and groups to publish newsworthy information in a rapidly developing medium of communication. The Internet enables people to "communicate with one another with unprecedented speed and efficiency and is rapidly revolutionizing how people share and receive information." *See Blumenthal*, 992 F. Supp. at 48.

2. *The hacking of websites is of legitimate public concern, and HackLibrary maintains its archives, including TERRORISTZ, for educational and research purposes.*

HackLibrary displayed and archived information that was newsworthy and of legitimate public concern. Generally speaking, hackers and hacked websites have been a nuisance to varying entities, whether public or private. For example, the FBI has noted an increase in attacks on federal websites recently. *See* David McGuire, *Hackers Strike Another Federal Website*, Newsbytes News Network (August 11, 1999). An FBI spokesperson has even commented that the FBI takes “all attacks on websites seriously.” *See id.* Such attacks are so anticipated and alarming that all 56 FBI field offices have a computer squad equipped to investigate computer crime. *See id.* Specifically, these computer squads investigate interference with government computer systems, including a noted attack by a member of the “Global Hell” group that hacked into a protected Army computer at the Pentagon and altered its contents. *See* Robert MacMillan, *FBI Tries to Crack Global Hell Ringleader*, NEWSBYTES NEWS NETWORK, August 31, 1999. “Interference with government computer systems are not just electronic vandalism; they run the risk of compromising critical information infrastructure systems.” *See id.*

Given the severe repercussions of hacking websites, it is indisputable that HackLibrary archived information that was of legitimate public concern. Potentially thousands of unsuspecting visitors to the original ChiPost.com site were surprised with vivid pornographic images and strong opinions regarding the law and certain people involved in the music industry. These visitors were probably average citizens visiting the site to read about the day’s news, as this was the website for a Chicago newspaper. Therefore, HackLibrary did not violate Petitioner’s privacy because it archived information of legitimate public concern.

Also, newsworthiness is not limited to news in the “narrow sense of reports of current events.” *See Shulman v. Group W Prod. Inc-86* (Cal. 1998). It extends to use of names or facts in giving information to the public for the “purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.” *See id.* (citing RESTATEMENT (SECOND) OF TORTS, § 652D, com. j). Therefore, because HackLibrary’s archive bears a disclaimer stating that the “copies of the hacked sites are made available solely for purposes of academic research and public information,” HackLibrary is not liable for invasion of privacy. (R. 4).

3. *Even if this Court finds that Petitioner's personal information is "private," there is a logical nexus between Petitioner's personal life and the archiving of TERRORISTZ.*

As long as there is a logical nexus or some substantial relevance between the complaining individual and the matter of legitimate public interest, there is no invasion of privacy. *See Shulman*, 955 P. 2d at 484 (citing *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980)). Moreover, if a matter is within the sphere of legitimate public interest or concern, facts related to the subject that would "otherwise be deemed private may be considered newsworthy." *See Ferraro v. City of Long Branch*, 714 A.2d 945, 956 (N.J. Super. Ct. App. Div. 1998)(citing *Romaine v. Kallinger*, 537 A.2d 284, 284 (N.J. 1988)).

In *Shulman*, the plaintiff was involved in a serious accident and injured. The defendant videotaped the rescue scene, and the subsequent broadcast included extensive footage of the entire rescue, with graphic clips of the difficult extrication from the car and the medical attention she received at the scene. *See Shulman*, 955 P. 2d at 475. The court held that the subject matter of the broadcast was of legitimate public concern because car accidents are by their very nature of interest to a large portion of the public. *See id.* at 488. Additionally, the court found that the specific detailed footage of the rescue was newsworthy as well, because the degree of truthful detail was essential to the narrative. *See id.*

Likewise, in the instant case, the general subject matter of hacked websites is of legitimate concern to the public. The detailed comments concerning Petitioner was essential to the archive because it related to the general theme of the hacked website. That is, the web page that displayed pornographic materials also contained information related to music industry executives and copyright and intellectual property law. Petitioner is general counsel for MoneyMusic, Inc. and has contact with music artists. The comments hidden in the HTML source code refer to opinions. Although personal in nature, it was logically relevant to the general subject matter of the web page.

Arguably, because of Petitioner's extensive involvement in the music industry and contact with music artists, he may have become an involuntary public figure. Petitioner is an individual who may not have sought publicity or consented to it, but through his own conduct, he has become a legitimate subject of public interest. *See* Restatement section 652D. He is employed in the music industry and represents high profile music artists. It was his involvement in the music industry that caused him to be the target of the TERRORISTZ. Therefore, the matter of Petitioner himself was of public interest, beyond website hacking. As such, the hidden comments, although personal, became public by virtue of his status.

It is also important to note that requiring the media to “sort through an inventory of facts to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task. . . .” *See Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 475 (Tex. 1995). The same is true in the instant case: HackLibrary should not have to deliberate through each individual fact hidden in the HTML source code and determine the weight. Requiring HackLibrary to do so would effectively cripple its ability to provide newsworthy information to the public for academic and research purposes.

HackLibrary is clearly not liable for invasion of Petitioner’s right to privacy. HackLibrary merely displayed and archived information that was available in the public domain, whether in public records or other reference sources. Furthermore, if the existence of the TERRORISTZ website on the original ChiPost.com website, which averages thousands of visitors each hour, was not enough to render the information public, then maintenance and archiving of TERRORISTZ in HackLibrary to a limited, specialized audience is insufficient to constitute publicity.

Further, the information archived was not offensive to the reasonable person because if Petitioner were truly offended, then he would have petitioned the appropriate courts to seal the records and redact personal information from other public sources. Finally, the hacking of websites, especially of a major newspaper, is newsworthy and of legitimate public concern. As such, Petitioner’s personal information was necessary to maintain the integrity of the report on hacking.

Summary judgment is most appropriate in the instant case to avoid a chilling effect on HackLibrary’s right to display and archive newsworthy information. Therefore, this Court should affirm the First District Court of Appeals’ grant of summary judgment in favor of HackLibrary on the invasion of privacy claim.

### CONCLUSION

For the foregoing reasons, Respondent, HackLibrary Inc., respectfully requests that this Court reinstate the Madison County Circuit Court’s grant of summary judgment in favor of HackLibrary on the statutory immunity issue and affirm the First District Court of Appeals grant of summary judgment on the invasion of privacy issue.

Respectfully submitted,

Counsel for Respondent

Alice Sum  
Christine Lent  
Kimberly Gilyard

LEVIN COLLEGE OF LAW  
UNIVERSITY OF FLORIDA  
P.O. 117620  
Gainesville, FL 32611-0421  
(352) 392-0421

## APPENDICES

## STATUTORY PROVISIONS

**United States Code Annotated, Title 11 Bankruptcy****§ 107. Public Access to Papers**

(a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may-

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or,

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

**Communications Decency Act, 47 United States Code Annotated****§ 230 Protection for private blocking and screening of offensive material.**

\* \* \* \* \*

**(b) Policy**

It is the policy of the United States—

\* \* \* \* \*

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

\* \* \* \* \*

**(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).

\* \* \* \* \*

(f) Definitions

\* \* \* \* \*

(2) Interactive computer service. The term “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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(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.

**Florida Statutes Chapter 119**

§ 119.011 Definitions - for the purpose of this chapter:

(1) “Public records” means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

**West’s Annotated California Government Code**

§ 6250 Legislative findings and declarations

In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental necessary right of every person in this state.

**West’s Smith-Hurd Illinois Compiled Statutes Annotated**

Chapter 750. Families

§ 105. Application of Civil Practice Law

(a) The provisions of the Civil Practice Law shall apply to all proceedings under this Act, except as otherwise provided in this Act.

(b) A proceeding for dissolution of marriage, legal separation or declaration of invalidity of marriage shall be entitled "In re the Marriage of \_\_\_\_\_ and \_\_\_\_\_." A custody or support proceeding shall be entitled "In re the (Custody) (Support) of \_\_\_\_\_."

(c) The initial pleading in all proceedings under this Act shall be denominated a petition. A responsive pleading shall be denominated a response. All other pleadings under this Act shall be denominated as provided in the Civil Practice Law.

**Florida Statutes, Chapter 61 Dissolution of Marriage; Support; Custody**

§61.043 Commencement of proceeding for dissolution of marriage or for alimony and child support.

A proceeding for dissolution of marriage or proceeding under §61.09 shall be commenced by filing in the circuit court a petition entitled "In re the marriage of \_\_\_\_\_, husband, and \_\_\_\_\_, wife." A copy of the petition together with a copy of a summons shall be served upon the other party to the marriage in the same manner as service of papers in civil actions generally.

**Restatement (Second) Torts §652D  
PUBLICITY GIVEN TO PRIVATE LIFE**

(a) Publicity. The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. "Publicity," as it is used in this Section, differs from "publication," as that term is used in s 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any

broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

(b) Private life. The rule stated in this Section applies only to publicity given to matters concerning the private, as distinguished from the public, life of the individual. There is no liability when the defendant merely gives further publicity to facts about the plaintiff's life that is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth, the fact of his marriage, his military record, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he has filed in a lawsuit. On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so.

Similarly, there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant's newspaper. Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public. On the other hand, when a photograph is taken without the plaintiff's consent in a private place, or one already made is stolen from his home, the plaintiff's appearance that is made public when the picture appears in a newspaper is still a private matter, and his privacy is invaded.

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

(c) Highly offensive publicity. The rule stated in this Section gives protection only against unreasonable publicity, of a kind highly offensive to the ordinary reasonable man. The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and his neighbors and fellow citizens. Complete privacy does not exist in this world except in a desert,

and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. Thus he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action under the rule stated in this Section. It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.

(d) Matter of legitimate public concern. When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.

This has now become a rule not just of the common law of torts, but of the Federal Constitution as well. In the case of *Cox Broadcasting Co. v. Cohn* (1975) 420 U.S. 469, the Supreme Court indicated that an action for invasion of privacy cannot be maintained when the subject-matter of the publicity is a matter of "legitimate concern to the public." The Court held specifically that the "States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." Other language indicates that this position applies to public records in general.

It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech. To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control. In the absence of additional holdings of the Supreme Court, the succeeding Comments are based on decisions at common law.

(f) Involuntary public figures. There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become "news." Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest,

concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private. (See Comment g).

(g) News. Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal.

(h) Private facts. Permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life. Thus the life history of one accused of murder, together with such heretofore private facts as may throw some light upon what kind of person he is, his possible guilt or innocence, or his reasons for committing the crime, are a matter of legitimate public interest. (See Illustration 13 above). On the same basis the home life and daily habits of a motion picture actress may be of legitimate and reasonable interest to the public that sees her on the screen.

The extent of the authority to make public private facts is not, however, unlimited. There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself. In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last

analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure. Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given. Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.

(j) Education and information. The scope of a matter of legitimate concern to the public is not limited to "news," in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.

#### **47 U.S.C.A. §153**

##### **§ 153. Definitions**

For the purposes of this chapter, unless the context otherwise requires—

\* \* \* \* \*

##### **(20) Information service**

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

