

The Age of the Internet and the Schism between Individuals Rights to Freedom of Speech and Right to Privacy

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We live in an “information society” where information is disseminated and readily accessible via the Internet. The click of a mouse can provide indulgence into the life of a celebrity or photos and personal information about private individuals. The availability of all this information on the Internet has led to an infringement on one’s privacy rights in the name of free speech. In the United States courts have reached different results when confronted with practicing privacy rights of individuals over the free speech rights of anonymous bloggers. Today employers and employees need to keep abreast of decisions by the courts and enactments by the legislature to know what speech is protected and when one’s identity is protected.

A. Free Speech of Anonymous Bloggers

Privacy, in the traditional sense, seems to be extinct with the advent of blogging and social networking sites such as MySpace, Facebook, and Twitter², where people can post pictures of strangers and blog about private individuals or entities. The First Amendment allows for the right of people to blog anonymously while a traditional sense of privacy protects the confidential or private information of individuals that bloggers publish. Thus, the issue becomes whether the free speech right of the blogger outweighs the privacy right of the individual.

Most recently, the Supreme Court of New York addressed this issue. In *Cohen v. Google, Inc.*, the Supreme Court of New York granted petitioner’s pre-action discovery of information to

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² One’s Tweets can give rise to a defamation action. The current case of famed rock star and actress Courtney Cobain aptly summarizes the free speech rights at play in using Twitter. Attached hereto is the SCAPP titled by the author.

serve Google with a subpoena to release information about an anonymous blogger.¹ In this case, an anonymous blogger authored a website, skanksnyc.com, defaming Liskula Cohen with such words as “skank” and “ho”, among others.² Cohen asserted the necessity to subpoena Google in order to bring a cause of action for defamation against the creator of the blog.³ In New York, “courts traditionally require a strong showing that a cause of action exists” and will only grant a petition for pre-action discovery when the petitioner “demonstrates that he or she has a meritorious cause of action and that the information is material and necessary to the actionable wrong.”⁴ Here, the petitioner established all the elements for defamation and thus the court granted the petition.

The court rejected the blogger’s defense that the blog was opinion and thus protected speech.⁵ While opinion is protected speech, determining whether a statement is fact or opinion is determined based upon whether an average person hearing the statement would take it to mean.⁶ This court considered three factors in determining how the average person would interpret the blog:

(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to

¹ *Cohen v. Google, Inc.*, N.Y. Slip Op. 29369 (N.Y.S.2d 2009) (hereinafter Cohen).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986).

be opinion, not fact.⁷

The court found that the words “ho” and “skank” were readily understood to suggest that Cohen was sexually promiscuous.⁸ The court concluded that since the words “ho” and “skank” were captions to sexually provocative photographs on the blog, the statements made by the anonymous blogger convey facts that can be proven true or false.⁹ And lastly the court found that the entire context of the blog, defamatory words associated with the photographs are “reasonably susceptible of a defamatory connotation and are actionable.”¹⁰ Based upon these factors the court held that the statements of the blogger are such that would lead an average person to believe that what is being read or heard is true.¹¹

Further the court opined that while the Internet is a modern day platform for discussing ideas and conveying opinions,¹² bloggers who post defamatory statements or private information about private citizens should not be able to hide behind a shield of anonymity. A bloggers right to privacy must not outweigh the rights of those that suffer from anonymous postings or words.¹³ The court found it imperative to assure that people who abuse the Internet take responsibility for their actions.¹⁴

⁷ *Id.*. See also, *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153 (1993).

⁸ *Cohen* N.Y. Slip Op. 29369.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cohen*, N.Y. Slip Op. 29369.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

While this court found that privacy rights outweigh the First Amendment rights of anonymity, there are benefits to the public interest in protecting anonymous bloggers on the Internet. While bloggers may not be protected from posting defamatory statements, the First Amendment does protect bloggers from posting their opinions about third parties.¹⁵ Anonymous blogging assists in the free discussion of issues, ideas, and opinions, without any reprisals. The judicial system should continue balancing the rights of free speech to the rights of privacy.

B. Free Speech and Anti-Strategic Lawsuits Against Public Participation

Contrary to New York Law, *Cohen v. Google, Inc.* may have been decided against the petitioner if the case was heard in California.¹⁶ California's Anti-Strategic Lawsuits Against Public Participation Statutes (anti-SLAPP) protects in some instances the free speech of publishers over the privacy rights of individuals. California is one of a number of states that have created Anti-SLAPP Statutes have been enacted by several states in order to protect the public's right to petition and right to free speech relating to issues of public interest or concern. The purpose of these statutes is to ensure public participation and discussion in matters of significance in the interest of the public.¹⁷ In California, an anti-SLAPP petition is granted if it concerns "any written or oral statement or writing made in a place open to the public or public forum in connection with an issue of public interest",¹⁸ unless the Plaintiff can establish "both

¹⁵A good example of this is found in the case of *Drakulic vs. Silvestre*, Case No. SC049520, wherein it was alleged the defendant's attorney posted some defamatory information on a Yahoo financial chatboard. Attached is the motion to strike files in that action by the author.

¹⁶ *Cohen*, N.Y. Slip Op. 29369.

¹⁷ Segal, Jonathan, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 *Cardoza Arts & Ent. L.J.* 693, 650 (2009)

¹⁸ C.C.P. § 425.16(b)(1).

legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment.”¹⁹ In 1992, the California Legislature enacted C.C.P. § 425.16 in direct response to the “disturbing increase” in meritless lawsuits designed “to chill the valid exercise of the constitutional rights of freedom of speech....”²⁰ In 1997, the Legislature amended C.C.P. § 425.16(a), expressly instructing California Courts to “broadly...construe[]” this statute.²¹ In 1999, the California Supreme Court further directed all California Courts “whenever possible...[to] interpret the First Amendment and section 425.16 in a manner ‘favorable to the exercise of freedom of speech, not to its curtailment.’”²² Thus, in California, it can be assured that the legislation has determined that free speech is super or limited to the privacy rights of individuals.

1. The Interpretation of California’s Anti-SLAPP Statute

C.C.P. § 425.16 sets forth a two-step process under which any Special Motion to Strike/Anti-SLAPP must be analyzed. First, the Court must decide whether the Defendant has made a sufficient threshold showing that the challenged cause of action is subject to a special Motion to Strike under C.C.P. § 425.16(e). If the threshold showing has been made, the Court must next determine whether the Plaintiff has demonstrated a probability of prevailing on her claims. *See e.g., Weinberg v. Feisel*, 110 Cal.App.4th 122, 1130 (2003). This broad interpretation of the anti-SLAPP statute has effectively diminished the privacy rights of individuals over the Internet.

Under C.C.P. § 425.16(e), an act in furtherance of a person’s right to free speech

¹⁹ Segal, Jonathon, 26 Cardoza Arts & Ent. L.J. at 643.

²⁰ *See*, C.C.P. § 425.16.

²¹ *See*, Stats. 1997, ch. 271, § 1; amending 425.16(a).

²² *See, Briggs v. Eden Council for Hope and Opporutnity*, 19 Cal.4th 1106,1119 (1999) (quoting *Bradbury v. Superior Court*, 49 Cal.App.4th 1170,1176 (1996)).

expressly includes “(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest [and/or] (4) or any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest.” The term “public forum” as used in Section 425.16 has been defined as “a place that is open to the public where information is freely exchanged.”²³ It is not limited to physical setting but also includes various other non-physical locations of public communications.²⁴ Thus, a publicly-accessible website is considered to be a public forum for purposes of C.C.P. § 425.16.²⁵ The website itself does not require a comment section or other public participation to be considered a public forum.²⁶

“The most commonly articulated definitions of ‘statements made in connection with a public issue’ focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest.”²⁷

C.C.P. § 425.16(e)(3)’s requirement that the defendant’s allegedly-wrongful activity be “‘in connection with an issue of public interest’...is to be ‘construed broadly’ so as to encourage

²³ See *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 475 (2000).

²⁴ *Id.* at 476.

²⁵ See *ComputerXpress Inc. V. Jackson*, 93 Cal.App.4th 993, 1007 (2001); *Barrett v. Rosenthal* 146 P.3d 510, 514 at fn. 4.

²⁶ See *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 897 (2001).

²⁷ See *Commonwealth Energy Corp. V. Investor Data Exchange, Inc.*, 110 Cal.App.4th 26, 33; *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO*, 105 Cal.App.4th 913, 924 (2003).

participation by all segments of our society in vigorous public debate related to issues of public interest.”²⁸ Courts should “err on the side of free speech” in deciding whether an issue is one of public interest.²⁹

An event of “significant interest to the public and the media” satisfies the public interest element for purposes of C.C.P. § 425.16.³⁰ In the case *Seelig v. Infinity Broadcasting Corp.*, the Court held that a radio “shock jock’s” commentary regarding plaintiff’s decision to appear on a television show was made in connection with an issue of public interest protected by the First Amendment.³¹ Specifically, the Court held:

“The offending comments arose in the context of an on-air discussion between the talk-radio cohosts and their on-air producer about a television show of significant interest to the public and the media... Before and after its network broadcast, *Who Wants to Marry a Millionaire* generated considerable debate within the media... *By having chosen to participate as a contestant in the Show, plaintiff voluntarily subjected herself to inevitable public scrutiny and potential ridicule by the public and the media*” (emphasis added).³²

Matters involving a celebrity’s personal life constitute matters of public interest if the celebrity herself is the subject of widespread public interest.³³ Statements about a “nationally known figure” necessarily concern a matter of public interest.³⁴

In *Hall v. Time Warner, Inc.*, the Court found that plaintiff, the former housekeeper for

²⁸ See *Seelig v. Infinity Broadcasting Corp.*, 97 Cal.App.4th 798, 808.

²⁹ See *Gallagher v. Connell*, 123 Cal.App.4th 1260, 1275 (2004).

³⁰ See *Seelig v. Infinity Broadcasting Corp.*, 97 Cal.App.4th 798, 807-808 (2002).

³¹ *Id.*

³² *Id.* at 807.

³³ See *Hall v. Time Warner, Inc.*, 153 Cal.App.4th 1337, 1347 (2007).

³⁴ See *Sipple v. Foundation for Nat. Progress*, 71 Cal.App.4th 226, 239. (1999).

actor Marlon Brando sued the producers of the national television show “Celebrity Justice” after it was revealed that Brando had named Hall a beneficiary of his living trust.³⁵ In reversing the trial court’s denial of defendants’ special motion to strike, the Court held as follows:

“The public’s fascination with Brando and widespread public interest in his personal life made Brando’s decisions concerning the distribution of his assets a public issue or an issue of public interest. *Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando’s will, she nevertheless became involved in an issue of public interest by virtue of being named in Brando’s will*” (emphasis added).³⁶

“Major societal ills are issues of public interest.”³⁷ Criminal conduct, particularly with regard to drug use, constitute matters of public interest.³⁸ News reports concerning current criminal activity serve important public interests.³⁹ Statements regarding matters of even lesser public significance have been held as matters of public interest sufficient to invoke the protection of C.C.P. § 425.16. For example, in *Ingels v. Westwood One Broadcasting Services, Inc*, the Court held that an interchange on a radio call-in show regarding whether a caller was too old to participate in the show involved a matter of public interest protected by the First Amendment.⁴⁰ In *Dowling v. Zimmerman*, the Court held that defendant’s statement that someone entered tenants’ locked garage and turned off the dial of their water heater involved a matter of public interest protected by the First Amendment “even though it directly affected only two tenants.”⁴¹

a. Cohen Would Not Have Prevailed Under CA’s Anti-SLAPP

³⁵ *Id.*

³⁶ *See Hall*, 153 Cal.App.4th at 1347.

³⁷ *See Lieberman v. KCOP Television, Inc.*, 110 Cal.App.4th 156, 165 (2003).

³⁸ *See M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623, 629 (2001).

³⁹ *See Briscoe v. Reader’s Digest Association, Inc.*, 4 Cal.3d 529, 536 (1971).

⁴⁰ *Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal.App.4th 1050 (2005).

⁴¹ *Dowling v. Zimmerman*, 85 Cal.App.4th 1400, 1420 (2001).

Statute

In *Cohen*, the written statements were made in the public forum of the Internet. Further, similar to *Seeling*, Cohen's decision to appear on the cover of popular magazine's such as *Elle* and *Vogue* were made in connection with an issue of public interest protected by the First Amendment.⁴² Cohen voluntarily put herself in the public eye, subjecting herself to public scrutiny. Thus, under California law, the information posed on skanksnyc.com is protected by free speech and the blogger could have maintained her anonymity.

Once a defendant has established that the basis of plaintiff's claims constitute free speech activity protected by C.C.P. § 425.16 and the First Amendment, the burden shifts to Plaintiff to demonstrate a probability of success on her claim.⁴³ Plaintiff cannot simply rely on allegations in the complaint to make this showing.⁴⁴ Instead, Plaintiff must be able to provide sufficient evidence to permit the court to determine whether there is a probability that plaintiff *will likely* prevail on her claims.⁴⁵

Under Civil Code § 45, "libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

b. Cohen Would Not Have Prevailed Because Defendant's Statements Were Mere Hyperbole and Not Actionable.

⁴² *Id.*

⁴³ *See Globetrotter Software, Inc v. Elan Computer Group*, 63 F.Supp.2d 1127, 1130 (N.D.Cal. 1999).

⁴⁴ *See Paul for Council v. Hanyecz*, 85 Cal.App.4th 1356, 1364 (2001).

⁴⁵ *See DuPont Merck Pharmaceutical Co. v. Superior Court*, 78 Cal.App.4th 562, 568 (2000).

Cohen claims defamation per se against the anonymous blogger for calling her, among other things, “skank,” “skanky,” “ho” and “whoring.”⁴⁶ Similar to the New York Court in *Cohen*, “California courts use a ‘totality of circumstances’ test to determine if a statement is one of fact or of opinion.”⁴⁷ “In determining whether statements are of a defamatory nature, and therefore actionable, ‘a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction.’”⁴⁸ In making this determination, “‘the context in which the statement was made must be considered.... ‘The publication in question must be considered in its entirety; ‘[it] may not be divided into segments and each portion treated as a separate unit.’”⁴⁹

“‘Rhetorical hyperbole,’ ‘vigorous epithet[s],’ ‘lusty and imaginative expression[s] of... contempt,’ and language used ‘in a loose, figurative sense’ have all been accorded constitutional protection” and as such are *not* actionable.⁵⁰ The following cases are particularly instructive. In *Ferlauto* the California Supreme Court held that defendant’s calling plaintiff attorney a “loser wannabe lawyer,” was *not* actionable for libel because “the average reader would deem [defendant’s] comments about plaintiff as subjective expressions of opinion devoid of factual

⁴⁶ *Cohen*, N.Y. Slip Op. 29369.

⁴⁷ See *Baker v. Los Angeles Herald Examiner*, 42 Cal.3d 254, 260 (1986).

⁴⁸ See *Balzaga v. Fox News Network, LLC*, 173 Cal.App.4th 1325, 1338 (2009) (quoting *Morningstar v. Superior Court*, 23 Cal.App.4th 676, 688 (1994)).

⁴⁹ See *Balzaga*, *supra*, 173 Cal.App.4th at 1338 (quoting *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*, 69 Cal.App.4th 1057, 1064-1065 (1999)).

⁵⁰ See *Ferlauto v. Hamsher*, 74 Cal.App.4th 1394, 1401 (1999); *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988); *James v. San Jose Mercury News, Inc.* 17 Cal.App.4th 1, 15 (1993); *Mikovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

matter.”⁵¹ In *James v. San Jose Mercury News, Inc.*, the Court found defendant newspaper’s descriptions of plaintiff defense attorney’s conduct as “a common and sleazy tactic to ruin kids as witnesses,” “a sad lesson in justice,” and “a fishing expedition to attack the character of the kid.” to be protected “imaginative expression” and “rhetorical hyperbole.”⁵²

In *Cohen*, every single one of the allegedly defamatory statements made by the anonymous blogger for which Plaintiff has brought suit constitutes “rhetorical hyperbole,” “vigorous epithet[s],” “lusty and imaginative expression[s] of... contempt,” and language used “in a loose, figurative sense” that has been accorded free speech protection as a statement of opinion rather than an actionable statement of fact.⁵³ Contrary to the decision of the New York court, most of the statements do not set forth any “actual fact” that can be provably true or false.⁵⁴ There are no dates, citation records, criminal arrest or conviction references, references to news articles, references to witnesses, or any other supporting facts in these statements that could lead a reasonable person to believe any actual facts about anyone.⁵⁵ None of these statements are made by a reporter or journalist.⁵⁶ When taken in context and particularly when read together, none of these purportedly wrongful statements can be reasonably construed as stating an “actual fact” that is provably false, nor would any reasonable person reading these statements perceive them as anything more than precisely the kind of rhetorical hyperbole afforded full free speech

⁵¹ See *Ferlauto*, supra n.46, at 1398-1406.

⁵² *James v. San Jose Mercury News, Inc.*, 17 Cal.App.4th 1, 27 (1993).

⁵³ See *Ferlauto*, supra n.46 at 1401 (citing *Greenbelt, supra*, 398 U.S. at 14; *Letter Carriers v. Austin* 418 U.S. 264, 286 (1974)).

⁵⁴ *Id.*

⁵⁵ *Cohen*, N.Y. Slip Op. 29369.

⁵⁶ *Id.*

protection by the First Amendment.⁵⁷ For this reason alone, the Court should not have granted Cohen's pre-action request for discovery of the bloggers identity.

C. Conclusion

The Internet provides a popular platform that allows for any person or entity to publish private information about third parties making it available to millions of users on the Internet. In analyzing the case of *Cohen v. Google*, one can surmise that privacy rights of individuals are better protected in some states than others. The analysis of whether rights to freedom of speech should be higher on a value hierarchy than an individuals right to privacy is really a fact intension one.

⁵⁷ *Id.*