

## N.C. Bill Aimed at Curbing Defamatory Internet

### Digital Media and Data Privacy Law Blog

on 02.08.2009

Posted in Internet

A bill introduced this session in the North Carolina General Assembly would take the regulation of speech on the Internet in a troubling new direction. Indeed, the negative response to Senate Bill 46, introduced by Senator Steve Goss, has spanned the political spectrum, ranging from North Carolina's Civitas Institute, which termed it the "bad bill of the week," to the BlueNC blog. The bill has several components.

*First*, the bill would criminalize defamatory statement made over the Internet. In particular, the bill declares it to be "unlawful for any person to communicate by transmission through an electronic medium any false, defamatory statement that is libelous or slanderous." The offense would be punishable as a Class 2 misdemeanor and, notably, the State of North Carolina would have jurisdiction "if the transmission that constitutes the offense either originates in the State or is received or viewed in the State." The bill defines "electronic medium" to include "the Internet and any computerized or electronic information service," including "a bulletin board, a network, an online service, electronic mail, a forum, a blog, or a news group."

Thus, as drafted, the bill would create a new class of criminal libel in North Carolina. In response to criticism of this move -- particularly given that states have generally moved away from criminal libel statutes and those with criminal libel statutes on the books (such as North Carolina) generally have let them lie fallow -- Senator Goss apparently told local press outlets in North Carolina that the inclusion of criminal penalties in the bill was "an oversight." There is a serious question whether the enforcement of criminal libel statutes would violate the First Amendment to the U.S. Constitution in the wake of the *New York Times v. Sullivan* and *Garrison v. Louisiana* cases.

*Second*, a particularly troubling aspect of the bill appears in subsection (e) of section 2. It provides:

The person who administers or provides the facilities for the electronic medium involved in the alleged libel or slander shall not be held liable for the alleged libel or slander unless the person is guilty of negligence either in allowing the material to be placed in the electronic medium or in allowing the material to remain in the electronic medium after the person became aware that the material was false and defamatory.

This provision would make websites and web hosts liable for third-party content if they were found "negligent" in allowing a defamatory statement to be posted or to remain posted after a complaint or some other form of notice was received. This effort to hold website operators responsible for third-party content runs headlong into Section 230 of the Communications Decency Act, a federal statute that expressly provides that websites and web hosts are not responsible for defamatory or most other actionable content (the prime exception being posts amounting to copyright violations) created by third-party users. So long as the website operator -- or "interactive service provider" -- is not deemed an "information content provider" with respect to the statement at issue, the website operator cannot be treated as the publisher of the statement for liability purposes.

Congress passed Section 230 in an effort to encourage website operators to police content on their sites without running the risk of being held responsible for objectionable content they miss. Senate Bill 46 would turn that approach on its head by creating an incentive for website operators not to learn about objectionable posts made to their blogs or message boards. Because of this direct conflict with Section 230, this provision of Senate Bill 46 would be preempted and unenforceable under the Supremacy Clause, Article VI, Section 2, of the U.S. Constitution.

*Third*, Senate Bill 46 would make significant changes to North Carolina's retraction statute. The second section of the bill would require a plaintiff seeking to bring a lawsuit in response to defamatory material conveyed through an electronic medium first to give notice to the person accused of making the statement and then to allow that person 5 days to correct the statement at issue and post an apology. The request could be made through traditional means or "by placing the request at one of the locations in the electronic medium known . . . where the libelous or slanderous material was placed." Once the person receives the notice, he or she must post the apology and correction within 10 days, to the extent possible, in the same location and for the same time period that the challenged statement was posted.

If a trier of fact concludes that the statement at issue was made in good faith, was due to an "honest mistake," was posted without the prior knowledge or approval of the person "who administers the facilities for the electronic medium," or, even if the post was made with approval of the administrator, there were "reasonable grounds for believing that the communications were true" and a timely correction and apology is posted in compliance with the statute, then the plaintiff would be limited in the lawsuit to recovery of his or her actual damages.

A final note worthy of mention is that the changes to the retraction statute and the proposed liability for negligent website operators "shall not apply to anonymous communications." This provision creates a questionable incentive -- website operators would be protected from the section's liability so long they require users to post content anonymously, a move unlikely to

N.C. Bill Aimed at Curbing Defamatory Internet Content

inspire restraint among would-be Internet defamers.

In short, Senate Bill 46 as drafted is problematic in a number of ways. It appears to run afoul of both Constitutional and federal law, and the incentives it would create would likely do little to accomplish the stated objectives of the bill's sponsors, namely to reduce defamatory content in emails, message board posts, and blogs. Nevertheless, the introduction of Senate Bill 46 in North Carolina is a signal that state legislatures may become more active in attempting to curb what they view as the excesses of Internet speech. Because many news organizations operate websites that allow users to post content, the news media across the country should be on the lookout for analogues to this bill in their own states.