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A Fashion Model, a Mean-Spirited Name-Calling Detractor, a Blog, and at Least Four Teachable Moments

Remember that silly riddle when you were a kid that went something like this: Question: When is a door not a door? Answer: When it's ajar? Well, this column is about a story that is no longer a story (I hope).

It *was* a bizarre story, and it set things ajar in certain quarters for a brief time. The problem was quickly resolved (or so it seems), though fallout may still be falling out. However, whatever the case, the incident created several teaching moments for Cyberians.

Here's the basic story. In late August this year, the New York *Daily News* reported that a Canadian fashion model, Liskula Cohen (who, among other things, had graced the cover of *Vogue* magazine), had been slimed on a Blogger™ blog that was run under a cloak of anonymity. In August 2008, the faceless blogger wrote five different posts entitled "Skanks of NYC" And posted two photographs that showed Cohen and an unidentified man in sexually suggestive positions. The captions below each photo described her as the "Skankiest in NYC" and a "psychotic, lying ... skank." One post read "desperation seeps from her soul, if she even has one." As Richard Koman, both a lawyer and regular technology pundit, wrote on ZDNet's online site, "There's no denying the sex appeal of a story featuring a gorgeous model, a mean-spirited name-calling detractor, allegations of sleazy sexual behavior, blogs and Google."

Cohen sued the company that owns Blogger in a state trial court in New York, seeking to force Blogger to reveal the IP address of the blog's owner/operator. The company that owns Blogger is, as Koman implied, none other than Google™, your friendly little search engine oligopoly.

Teachable Moments 1 and 2

So, right off the bat, here are two teachable moments. What is an IP address, and how can one's IP address lead to one's "outing" or unmasking?

Each computer that is connected to the Internet has a clearly identifiable, numeric address that techies call its "IP address" (that is, the Internet Protocol address). An IP address is always made up of four sequences of patterned digits that are separated by periods—for example, 217.227.80.89.

Static IP addresses enable the same computer to be contacted under the same unique and permanent address at any time (by a web server, for instance). *Dynamic* IP addresses are allocated, on the other hand, to "dial-up Internet connection companies" for distribution to customers dialing up to the Internet from a single computer using a telephone modem connection. Dial-up customers receive a currently unoccupied (that is, "dynamic") IP address that changes each time they log on to the Internet. So, in the situation described above, the fashion model's attorney sought to force Google to reveal the blogger's IP address. Once the static IP address of the anonymous blogger was known, the registration process could easily be accessed and the name and location of the anonymous blogger would be known.

Google's attorneys argued strenuously in the New York state trial court that they should not have to reveal the IP address of the anonymous blogger's computer server, citing primarily privacy interests. Google lost the case. In siding with Cohen, Justice Joan Madden of the New York State Supreme Court rejected Google's argument that "blogs serve as a modern day forum for conveying personal opinions, including invective and ranting, and that the statements in this action when considered in that context, cannot be reasonably understood as factual assertions." Justice Madden ordered Google to reveal the IP address of the anonymous blogger's computer server, and Google did so. To the surprise of many, the blogger who had hurled thunderbolt insults from what was undoubtedly perceived to be a safe anonymous bunker turned out to be a woman—a woman whom the fashion model knew on a casual, social basis.

The blogger's name is Rosemary Port, whom a follow-up story in the *Daily News* described as a "pretty 29-year-old Fashion Institute of Technology student." As soon as Port's name was revealed, she retained a high-profile New York lawyer, Salvatore Strazzulo, to file a $15 million lawsuit against Google, alleging that Google had violated its fiduciary duty to protect her expectation of privacy. (As of this writing, the status of that lawsuit is unclear.)

"When I was being defended by attorneys for Google, I thought my right to privacy was being protected," Port was quoted by the *Daily News* as having told the reporter. "But," she went on to add, "that right fell through the cracks. Without any warning, I was put on a silver platter for the press to attack me." As if that weren't enough hyperbole for one day (I personally doubt that any duty Google might have rises to the level of the duty of a fiduciary), Strazzullo added that he was "ready to take this all the way to

the Supreme Court. Our Founding Fathers wrote *The Federalist Papers* under pseudonyms. Inherent in the First Amendment is the right to speak anonymously."

This brings us to the next teachable moments. (No, the comparison of "skank slurs" with the pseudonymous writings of "Publius"—a.k.a. Alexander Hamilton, James Madison, and John Marshall—does not directly create a teachable moment, though it is chutzpah of the highest order, and, in my view, a truly breathtaking pronouncement. Maybe that's a teachable moment in its own way.) Speaking out in an exclusive story that was published in the *Daily News* after the court order forced Google to reveal her identity, Port said that Cohen should blame herself for the uproar. "This has become a public spectacle and a circus that is not my doing," said Port. "By going to the press, she defamed herself," Port said. "Before her suit, there were probably two hits on my Web site: One from me looking at it, and one from her looking at it," Port added. "That was before it became a spectacle. I feel my right to privacy has been violated."

Google itself attempted to skate on the thin edge between natural sympathy for the allegedly defamed Cohen and sympathy for the desire to protect Port's Internet anonymity. Following the brouhaha in the New York court, a spokesperson for Google, Andrew Pederson, said: "We sympathise [British spelling] with anyone who may be the victim of cyberbullying. We also take great care to respect privacy concerns and will only provide information about a user in response to a subpoena or other court order." (See *London Times Online*, www.timesonline.co.uk/tol/news/world/us_and_americas/article6801213.ece.)

This brings us to teachable moments 3 and 4.

Teachable Moments 3 and 4

Should Google (or any other blog site provider) be subject to surrendering a customer's identity so that the provider can be sued? The U.S. Supreme Court has weighed in at least obliquely on the underlying issue faced by Justice Madden in the Cohen/Google hearing. The right to remain anonymous, it seems, has First Amendment implications. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995), the high court (with Justice Stevens writing for the majority) held that "An author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."

Balancing such First Amendment protections against a plaintiff's right to a remedy for a defamatory statement, what should tip the scales in an Internet context? And what procedural safeguards should be observed? Even though a few courts have addressed this question, it remains relatively uncharted territory. (For a brief synthesis of the extant court decisions, see Koman's analysis at the ZDNet Web site at government.zdnet.com/?p=5268.) If Port had appealed the Cohen decision, we might have more guidance on when a blogger can be stripped of his or her anonymity. If Port persists in her suit against Google, we may learn more.

In the meantime, in an interview posted on "Good Morning America's" Web site, Cohen's attorney, Steven Wagner, said that he hoped his client's triumph in court would send a message that anonymity on the Internet isn't what it used to be. "I don't know if it will change the Internet," he said. "It will change the way some people will act on the Internet." Indeed!

Some are quite concerned about that possibility. Pam Dixon, executive director of the World Privacy Forum in San Diego, put it bluntly: "You can get a really beautiful model and a sympathetic judge, it's a lightning strike situation that can set precedent. We're watching this really closely and we're concerned about this. This is the really tough intersection between free speech and defamation." And, Matt Zimmerman, senior staff attorney at the Electronic Frontier Foundation in San Francisco, said of the Cohen case:

> The notion that you can use the court as your personal private investigator to out anonymous critics is a dangerous precedent to set. This [Cohen case] doesn't change the rules ... but I think the practical impact is that litigious people will see this as a green light to try to out critics. It's one of those bad facts make bad law cases. The court looked at the type of statements being made and the person

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sion of this country in *Making Poor Nations Rich* signals that the book targets not only political institutions—such as property rights, privatization, and stable environments—but also big government as a cause of poverty. The inclusion of Sweden diffuses the message of the book, because it suggests an agenda that goes beyond explaining and addressing the issues of developing countries.

In addition, the reader struggles for some time to determine what exactly the book means by "entrepreneurship" (a term technically meaning one who organizes, manages, and takes on the risk of a business enterprise), especially in some developing countries where being a shopkeeper or farmer is common. In some relatively poor countries, many citizens are self-employed, although not always by choice (and one chapter in the book distinguishes between "necessity entrepreneurs" and "opportunity entrepreneurs"). When the problem of vagueness in the meaning of the term is compounded with a heavy reliance on anecdotal evidence, the book's message becomes a little less persuasive. For a reader not versed in development economics and seeking an understanding of the causes of and cures for economic development, further reading is advisable before accepting wholeheartedly the message in this book. **TFL**

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> wasn't engaging in very defensive behavior and unfortunately that affected the court's outcome. ... What the court was reacting to was what was more sympathetic, which was the plaintiff.

(Both of the above quotes appeared on SF Gate, the Web site of my hometown newspaper, the *San Francisco Chronicle*, in its "Tech Chronicles" column. (See www.sfgate.com/cgi-bin/blogs/techchron/detail?&entry_id=45920.) The Electronic Frontier Foundation has published a timely online legal guide for bloggers. (See www.eff.org/issues/bloggers/legal.)

Conclusion

The final teachable moment provided by this case is that if you (or your client) don't have something nice to say about someone else, be aware that a court may out you for saying something offensive about that someone else on the Internet. Anonymity is not guaranteed. Proceed at your peril in Cyberia. When is a door not a door? When it's ajar. **TFL**

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implicate the ADA. Employers may also require employees to wear personal protective equipment, such as gloves or masks. However, if an employee has a disability and needs an accommodation under the ADA when using the equipment—nonlatex gloves, for example—the employer must provide the accommodation unless it would cause undue hardship. Finally, EEOC guidelines provide that employers may require employees to work remotely as an infection-control strategy as long as employers do not single out employees because of a disability or any other reason that is protected under the law.

It is important for attorneys to advise employers on actions they need to take to prepare for a response to the upcoming flu season. Employers should formulate a flu response plan that ensures not only their employees' safety and but also the continuity of business operations.[4] **TFL**

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Endnotes

[1]Centers for Disease Control and Prevention, *Guidance for Businesses and Employers to Plan and Respond to the 2009–2010 Influenza Season*, available at www.cdc.gov/h1n1flu/business/guidance/, (last visited Sept. 4, 2009).

[2]Note that pandemic issues bring many federal laws into play, such as the Occupational Safety and Health Act, Family Medical Leave Act, HIPAA, and Fair Labor Standards Act, along with Title VII and state laws including antidiscrimination provisions.

[3]U.S. Equal Employment Opportunity Commission, *ADA-Compliant Employer Preparedness for the H1N1 Flu Virus*, available at www.eeoc.gov/facts/h1n1_flu.html (last visited Sept. 4, 2009).

[4]For more information on this topic, *see* www.flu.gov, www.cdc.gov, and www.eeoc.gov.