IN A FAR-REACHING VICTORY FOR DISINFORMATION RESEARCHERS, COURT STRIKES DOWN MUSK'S EFFORTS TO STIFLE RESEARCH AND REPORTING ON THE SPIKE IN HATE SPEECH ON X

- In a significant and unambiguous rebuke of Elon Musk, a court has struck down his lawsuit against the civil society research NGO Center for Countering Digital Hate (CCDH).
- Court relies on California's anti-SLAPP statute, highlighting the importance of these statutes in protecting civil society and academic research and reporting.
- Musk chose to bring the action based on harm to X's reputation rather than as a defamation action, which was noteworthy, prompting the judge to call out Musk's attempt to "have it both ways – to be spared the burdens of pleading a defamation claim, while bemoaning the harm to its reputation, and seeking punishing damages based on reputational harm."
- The court's decision sends a powerful message in support of civil society and academic researchers, as well as journalists, that newsgathering (even where it involves "scraping" of online platforms) as well as the reporting based on those efforts are protected activities.

On Monday, the District Court, Northern District of California, in a blistering order, granted a motion to dismiss and strike all claims in a case brought by X Corp. against the Center for Countering Digital Hate (CCDH). The dismissal represents a significant rebuke of Elon Musk's attempts to silence CCDH – Judge Charles R. Breyer opens his order by writing "sometimes it is unclear what is driving a litigation … . Other times, a complaint is so unabashedly and vociferously about one thing that there can be no mistaking its purpose. This case represents the latter circumstance. This case is about punishing [CCDH] for their speech." That punishment was intended to silence CCDH for criticizing X, and "perhaps in order to dissuade others who might wish to engage in such criticism."

Following the takeover of Twitter by Musk in 2022, there was a pause in advertising on the platform triggered by a spike in hate speech. That spike had been tracked by civil society and academic researchers like CCDH and Media Matters (which has also been sued by Musk, for defamation, in Texas).

Robbie Kaplan, who represented CCDH in this case, praised the court for vindicating CCDH's mission and refusing "to allow Elon Musk and X Corp. to weaponize the courts to censor good-faith research and reporting." What she is referring to, as I have reported on previously (*see, e.g.,* my December 2023 briefing note), is that civil society and academic researchers who monitor, analyse and report on online hate speech and other disinformation have been under significant pressure (and not only by Musk) because of right-wing accusations (including in court filings and in House committee hearings) that their efforts to call out hate speech and disinformation are tantamount to "censorship of conservative free

speech." This pressure has, in many cases, led to self-censorship by researchers for fear that they would be sued or subpoenaed. Musk's suit was intended to burden CCDH, a non-profit, with, in the words of CCDH, "spiralling legal costs" (even if ultimately there was no case to answer for) to put them out of business and to send a message to other disinformation researchers that their efforts (typically based on "scrapping" data from the subject platforms) could result in massive legal costs, and perhaps potential legal jeopardy.

The Court Order

CCDH is a non-profit research group that monitors online hate speech (the suit names, among others, CCDH's US non-profit entity and its UK non-profit entity). CCDH describes itself as a "non-profit that disrupts the spread of digital hate and disinformation."

From X Corp.'s perspective, the case involved two separate means by which CCDH acquired X Corp. data and three publications in which CCDH made use of that data. X Corp. alleged that CCDH had undertaken a "series of unlawful acts" designed to "improperly gain access to protected X Corp. data," following which it "cherry-pick[ed]" users' posts from that data in order to 'falsely claim' in reports and articles that "it had statistical support showing" that the X Corp. platform "is overwhelmed with harmful content." This, X Corp. claimed, was intended to prompt advertisers to stop advertising on X. X Corp. alleged that CCDH used "flawed methodologies to advance incorrect, misleading narratives."

The court dismissed the lawsuit under California's anti-SLAPP legislation (SLAPPs being "strategic litigation against public participation"). The dismissal is not only a victory for CCDH but also a vindication for civil society and academic researchers engaged in monitoring and calling out online hate speech and disinformation.

Like others in its sector, CCDH tracked an increase in hate speech on X following its takeover by Musk in October 2022. According to the complaint, CCDH's tracking involved scraping data directly from X using a social media web-scraping tool SNScrape and obtaining data indirectly via Brandwatch, "a trusted partner" of X that offers SaaS products to monitor brands on social media.

In response to a pause in advertising by certain advertisers on the platform following the takeover, Musk claimed that hate speech had "fallen below prior norms." In November, CCDH published a report ("Fact check: Musk's claim about a fall in hate speech doesn't stand up to scrutiny") rebutting those claims by reporting that hateful language had increased significantly. A February 2023 report ("Toxic Twitter") reported that just ten "reinstated" extremist accounts that Musk had allowed back onto the platform (including "neo-Nazis, white supremacists, misogynists and spreaders of dangerous conspiracy theories") had generated 2.5 billion views putting them on track to reach 20 billion impressions over the course of a year, which CCDH estimated would "generate up to $19 million a year in advertising revenue" for X. An earlier report ("The Disinformation Dozen"), published in March 2021 before Musk acquired Twitter, posited that 12 anti-vaxxers were responsible for almost two-thirds of anti-vaccine content circulating on social media.

X Corp. brought its claim based on harm to its reputation caused by these reports rather than for defamation, which would have required it to prove that CCDH's reports were untrue and would likely have opened itself to discovery. Judge Breyer noted that X Corp. sought to "have it both ways – to be spared the burdens of pleading a defamation claim, while bemoaning the harm to its reputation, and seeking punishing damages based on reputational harm."

Under California's anti-SLAPP statute, a defendant is entitled to a motion to dismiss if the claim arises from acts in furtherance of the right to petition or of free speech in connection with a public issue, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the merits. A Ninth Circuit case holds that when an anti-SLAPP motion to dismiss challenges only legal sufficiency of a claim, a district court should apply the standard under Rule 12(b)(6) of the Federal Rules of Civil Procedure (which allows a court to dismiss a complaint for failure to state a claim upon which relief may be granted – if either there is a lack of a cognizable legal theory or sufficient facts alleged under a cognizable legal theory).

The court found that CCDH met the first prong of the anti-SLAPP statute, in that:

- the claims arose from an act "in furtherance" of CCDH's right of free speech (its gathering of data constituted a protected activity, as to which it is irrelevant, for purposes of satisfying the first prong of the anti-SLAPP statute, if that newsgathering was improper);
- the claims "arose" from CCDH's protected conduct (its newsgathering and writing of reports/articles – in furtherance of CCDH's free speech rights); and
- CCDH's actions in furtherance of its free speech rights were in connection with a public issue.

The court then found that X Corp. had not established that there is a probability that it would prevail on the merits, as to either its breach of contract claim or its constitutional law claim.

As to the breach of contract claim (that the scraping of X violated X's terms of service), X Corp. would have had to show the existence of a contract, its performance or excuse for non-performance, CCDH's breach and X's resulting damages. The court found that X Corp. had failed to adequately allege recoverable damages, and thus it did not need to reach any of CCDH's other arguments.

Under its analysis of state contract law, the court first found that the claimed loss of revenue did "not flow directly and necessarily from CCDH's breach" of the scraping provisions of X's terms of service, and therefore there was no claim in respect of direct damages. As for special damages, the court found that, at the time CCDH contracted with Twitter in 2019 (under the terms of service it accepted), it was not foreseeable that Twitter would lose "tens of millions of dollars" as advertisers paused their advertising, and it was not contemplated

that Twitter could suffer reputational harm. Moreover. X had failed to specially state its special damage.

As to the constitutional law claim, the court found precedent for disallowing X Corp.'s claim that it was entitled to damages, not stemming directly from CCDH's scraping of the X platform, but rather based on the reactions of third-party advertisers to CCDH's protected speech. The court held that, as a matter of law, the damages alleged were "impermissible defamation-like publication damages caused by the actions [and reactions] of third parties to CCDH's report" (which is protected speech). The court also found that X Corp. had not sufficiently alleged a loss for purposes of the (federal) Computer Fraud and Abuse Act, and similarly dismissed the tort claims based on CCDH's arguments around causation (that CCDH caused a breach by Brandwatch) and damages.

Concluding Thoughts

At first blush, this case is about the violation of terms of service by a civil society researcher using common automated data collection tools – known as scrapping – to support research criticizing a social media platform for allowing hate speech to remain on its platform. Incidentally, the rights of free speech that civil society and academic researchers, as well as the media, exercise when calling out disinformation on social media platforms often is only possible using these tools. Said another way, what we know about online disinformation and the role of social media platforms in amplifying extremist and hate speech typically flows from scrapping.

However, the court, in the words of Cindy Cohn, executive director of the Electronic Frontier Foundation, "saw through the attempt" to punish and shut down independent disinformation research, which is why this case needs to be seen as vindicating a more fundamental principle, namely that newsgathering (in this case through scrapping) and the related publication of reports based on that newsgathering equally are protected activities under the First Amendment. The court, in effect, found that a lawsuit by a platform alleging breach of an anti-scraping contract to bypass defamation and seeking to punish a civil society researcher for speech criticizing the platform could not survive a motion to dismiss.

On this point, the court was clear. "It is also just not true that the complaint is only about data collection… . It is impossible to read the complaint and not conclude that X Corp. is far more concerned about CCDH's speech than it is its data collection methods." It then noted that X Corp. accuses CCDH of trying "to censor viewpoints that CCDH disagrees with" and then seeks to put CCDH out of business "because of the views expressed in [CCDH's] publications." But, the court concludes, "if CCDH's publications were defamatory, that would be one thing, but X Corp. has carefully avoided saying that they are."

The effort by a platform to punish one critic for exercising its free speech rights in the hope of deterring it and others from monitoring, analyzing and reporting on content on the platform failed. As Alex Abdo, litigation director of the Knight First Amendment Institute at Columbia University, aptly noted, "Society needs reliable and ethical research into social

media platforms, and often that research relies on being able to study publicly available posts. Musk's lawsuit imperiled that kind of research by threatening it with ruinous liability, but thankfully, the court shut down his case."

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