

# THE GOOD SAMARITAN EXEMPTION AND THE CDA

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Mr. Ballon was named the Lawyer of the Year for Information Technology Law in the 2013 edition of Best Lawyers in America. In addition, he was the 2010 recipient of the State Bar of California IP Section's Vanguard Award and named new media lawyer of the year in 2012 by the Century City Bar Association. He is listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology. He also has been recognized by *The Daily Journal* as one of the Top 75 IP litigators and Top 100 lawyers in California and is consistently listed as a top Northern California and Southern California litigator. Mr. Ballon also holds the CIPP certificate for the International Association of Privacy Professionals (IAPP).

## 37.05 The Good Samaritan Exemption (Section 230 of the CDA)

### 37.05[1] In General

#### 37.05[1][A] Scope, Exclusions and Legislative Purpose

Congress, in the Telecommunications Act of 1996,<sup>1</sup> expressly overruled the *Stratton Oakmont v. Prodigy Services, Inc.*<sup>2</sup> decision discussed in section 37.04[3]. 47 U.S.C.A. § 230(c)—captioned in the legislation as “Protection for ‘Good Samaritan’ blocking and screening of offensive material” and colloquially referred to by most courts as the CDA<sup>3</sup>—contains three main provisions set forth in two subparts. Subpart 230(c)(1) overrules the *Stratton Oakmont* decision, while

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<sup>5</sup>See Ian C. Ballon, *Pinning the Blame in Cyberspace: Towards A Coherent Theory for Imposing Vicarious Copyright, Trademark and Tort Liability for Conduct Occurring Over the Internet*, 18 Hastings J. Communications & Ent. L. 729, 759 (1996).

#### [Section 37.05[1][A]]

<sup>1</sup>47 U.S.C.A. § 230(c).

<sup>2</sup>*Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995); see generally *supra* § 37.04[3] (analyzing the case).

<sup>3</sup>Section 230 was added to the Telecommunications Act of 1934 by the Telecommunications Act of 1996, in a part of the statute also referred to as the Communications Decency Act (or CDA). The bulk of the CDA, other than section 230, which was codified at 47 U.S.C.A. § 223, addressed criminal sanctions for adult material made accessible to minors and was largely struck down by the U.S. Supreme Court as unconstitutional in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); see *infra* § 41.02.

Section 230 (which was section 509 of the Telecommunications Act of 1996) is frequently referred to by courts as the Communications Decency Act, or CDA, and occasionally as section 230 of the Telecommunications Act of 1934 (although, of course, there was no Internet in 1934).

subpart 230(c)(2)(A) broadly exempts any action undertaken in good faith to restrict access to or the availability of certain offensive material and subpart 230(c)(2)(B), which was added by a later amendment and exempts any action taken to enable or make available the technical means to do so (such as filtering tools)—in other words, liability imposed for doing the very things that Prodigy did in the *Stratton Oakmont* case that had led to liability. In fact, the provisions of the Good Samaritan exemption reach more broadly than the specific objectives that prompted enactment of the law.

Subpart 230(c)(1) provides that “[n]o provider or user of an interactive computer service<sup>4</sup> shall be treated as the publisher or speaker<sup>5</sup> of any information provided by an-

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The first edition of this treatise referred to section 230 as the Good Samaritan exemption, reflecting the caption used by Congress in the Telecommunications Act of 1996, although technically, as discussed below, only section 230(c)(2) provides a “Good Samaritan” exemption for undertaking action not otherwise required, whereas section 230(c)(1)—which is the provision most commonly litigated—requires no action at all by an interactive computer service provider or user to benefit from the immunity it provides. Referring to section 230 as the “CDA” is likewise an incomplete characterization of section 230 for the same reason. Section 203(c)(2) is the only part that deals with “communications decency”—encouraging Good Samaritan measures to restrict access to certain material that, while lawful, could be viewed as objectionable—whereas section 230(c)(1) (which creates an exemption from liability for publishing or speaking content originating with a third party) is agnostic to decency. Indeed, the immunity created by section 230(c)(1) would apply equally to decent or indecent content (so long as not obscene or otherwise prohibited by federal criminal law).

In this edition, section 230 is referred to by its colloquial name—the CDA—but, to avoid confusion with the criminal provisions of the statute addressed in chapter 41, it is also referred to as the Good Samaritan exemption created by the Telecommunications Act of 1996.

<sup>4</sup>An *interactive computer service* is defined under the Act as “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 . . . .” 47 U.S.C.A. § 230(f)(2). An *access software provider* is defined as “a provider of software . . . or enabling tools that do any 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, or translate content.” 47 U.S.C.A. § 230(f)(4).

<sup>5</sup>The term *publisher or speaker* is not defined in the statute. The Fourth Circuit, in the first case to construe the CDA, interpreted the term to encompass both traditional publisher and distributor liability – reading *publisher or speaker* broadly to apply to any speech, as well as any

other information content provider.”<sup>6</sup> Section 230(c)(1) is a self-executing provision intended to overrule *Stratton-Oakmont* and any other similar case that would hinder the development of Internet commerce by imposing liability standards on intermediaries that would deter them from operating online. By its terms the exemption created by subpart 230(c)(1) applies to any claim—not merely defamation—where liability is sought to be imposed on someone as the *publisher* or *speaker* of information provided by someone else, and is self-executing.

Courts subsequently have broadly construed subpart 230(c)(1) to preempt virtually all speech-based claims (not merely defamation) brought against interactive computer services or users for content created by others. The issue litigated in subsection 230(c)(1) cases therefore frequently is whether a given defendant should be treated as an *information content provider*, in which case the exemption is not available, or merely the publisher or speaker of information provided by another information content provider. Depending on the facts of a given case, an interactive computer service provider or user may be treated as an information content provider with respect to some content or business functions, while enjoying the Good Samaritan exemption for

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traditional editorial functions. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330–33 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The Fourth Circuit concluded that section 230 “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” 129 F.3d at 330. The D.C. Circuit reached a similar conclusion 17 years later by applying the “ordinary meaning” to *publisher*:

“one that makes public,” and “the reproducer of a work intended for public consumption.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1981); *cf. also* RESTATEMENT (SECOND) OF TORTS § 577 (1977) (“Publication of defamatory matter” means both the communication of, and the failure to remove, the relevant content.). Indeed, the very essence of publishing is making the decision whether to print or retract a given piece of content . . .).

*Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence).

<sup>6</sup>An *information content provider* is defined as “any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C.A. § 230(f)(3).

others.

Subpart (c)(2) of section 230 provides that:

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).<sup>7</sup>

Subpart 230(c)(2)(B) exempts providers or users of interactive computer services from liability on account of “any action taken to enable or make available to information content providers or otherwise the technical means to restrict access to material described in paragraph: (1)” which really should mean subpart 230(c)(2)(A). This provision addresses a very specific, narrow issue (the provision of screening software or other tools) that, unlike subparts (c)(1) and (c)(2)(A), arises only infrequently.<sup>8</sup>

Subpart (c)(2)(A) inverts the common law rules on distributor and publisher liability by immunizing conduct undertaken to monitor or screen content. Traditionally, the more editorial control exerted, the more likely it was that a company would be subject to the greater potential liability of a publisher, rather than the lower exposure to defamation claims faced by distributors, such as newspaper vendors and bookstores.<sup>9</sup>

By its terms, section 230(c)(2) requires *action* to be taken for either of the exemptions set forth in section 230(c)(2) to apply. While the applicability of section 230(c)(1) will be determined by the nature of the claim (one seeking to hold a defendant liable as a publisher or speaker) and whether the content at issue comes from another information content provider, entitlement to the exemptions created by subparts (c)(2)(A) and (c)(2)(B) depend on affirmative conduct by an

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<sup>7</sup>47 U.S.C.A. § 230(c)(2).

<sup>8</sup>See *infra* § 37.05[4][D].

<sup>9</sup>See, e.g., Restatement (Second) of Torts § 581, at 231 (1977); *supra* §§ 37.03[2], 37.04.

interactive computer service or user and are not self-executing.

By this statute, “Congress sought to spare interactive computer services this grim choice [of taking no action or risking greater liability by voluntarily filtering material] by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn’t edit or delete. In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content . . . .”<sup>10</sup>

While subparts (c)(1) and (c)(2) provide independent grounds for an interactive computer service provider or user to qualify for the exemption, the two sections form part of a coherent statutory scheme and in some cases may provide overlapping protection. Section 230(c)(1) exempts cases such as *Stratton Oakmont* where liability is premised on acting as a publisher or speaker, while subpart 230(c)(2)(A) broadly exempts liability for actions such as those undertaken by Prodigy in the *Stratton Oakmont* case from which a duty to act otherwise might be inferred. In cases such as *Stratton Oakmont*, interactive computer service providers and users would be deemed exempt under both provisions. In other cases, however, parties may only be entitled to an exemption under one or the other subpart.<sup>11</sup>

By their plain terms, both subparts (c)(1) and (c)(2) reach more broadly than the facts of *Stratton Oakmont*. Subpart (c)(1) exempts causes of action premised on publisher or speaker liability—not merely defamation—and subparts (c)(2)(A) and (c)(2)(B) exempt *any action*—not merely efforts to filter certain words or screen content.

As explained by the Ninth Circuit,

Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection

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<sup>10</sup>*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (*en banc*) (emphasis in original).

<sup>11</sup>Where an interactive computer service provider or user is entitled to either exemption, the one provided by section 230(c)(1) is preferable. Subpart (c)(1) focuses on the nature of plaintiff’s allegations, which may lend itself better to a motion for summary judgment—or even a motion to dismiss or judgment on the pleadings. *See infra* § 37.05[7]. By contrast, because a defendant must show good faith to prevail under section 230(c)(2)(A), it may be more difficult to prove entitlement to that safe harbor short of trial.

(c)(2), for its part, provides an additional shield from liability, but only for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable.” § 230(c)(2)(A). Crucially, the persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider [or user] of an interactive computer service. *See* § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, *see Roommates*, 521 F.3d at 1162–63, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers [sic]<sup>12</sup> from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.<sup>13</sup>

Section 230(c) not only affords immunity for interactive computer service providers and users in U.S. litigation, but it also provides a defense to recognition or enforcement of a foreign judgment of defamation against an interactive computer service provider where liability would be inconsistent with section 230 had the judgment been entered in the United States.<sup>14</sup>

The Good Samaritan exemption does not apply to “[f]ederal criminal statute[s.]”<sup>15</sup> “any law[s] pertaining to intellectual property,”<sup>16</sup> or the federal Electronic Communications Privacy Act<sup>17</sup> “or any similar State law.”<sup>18</sup> The legislative history also makes clear that the exemption is not intended to

<sup>12</sup>The Good Samaritan exemption applies to *interactive computer service* providers and users, not Internet Service Providers, which is the term that the *Barnes* court mistakenly uses.

<sup>13</sup>*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009).

<sup>14</sup>*See* 18 U.S.C.A. § 4102(c); *infra* § 37.09[3] (analyzing the statute and its practical effects). This defense applies to interactive computer service providers only, not users, and only with respect to defamation which, while broadly defined, is still narrower than the full range of claims preempted by the CDA. *See infra* § 37.09[3].

<sup>15</sup>47 U.S.C.A. § 230(e)(1).

<sup>16</sup>47 U.S.C.A. § 230(e)(2); *see generally infra* § 37.05[5].

<sup>17</sup>47 U.S.C.A. § 230(e)(4). The Electronic Communications Privacy Act, 18 U.S.C.A. §§ 2510 *et seq.*, prohibits the interception of email communications sent over the Internet or otherwise in interstate commerce. *E.g., U.S. v. Maxwell*, 42 M.J. 568 (A.F.C.C.A. 1995), *aff'd in part*, 45 M.J. 406 (U.S. Armed Forces Ct. App. 1996); *infra* § 44.06. ECPA, however, generally does not prohibit employers from intercepting employee email. *See infra* §§ 44.06, 44.07, 58.07[5][A].



limit potential liability for cancelbots.<sup>19</sup> The scope of these exclusions, and in particular the one for intellectual property laws, are analyzed further in section 37.05[5].

Where either subparts (c)(1) or (c)(2) apply, they potentially foreclose a wide array of state civil and criminal claims and federal civil laws. The Good Samaritan exemption expressly preempts inconsistent state laws,<sup>20</sup> but not those consistent with its provisions.<sup>21</sup> It also applies to federal civil claims,<sup>22</sup> as evidenced by the fact that the statute *excludes* federal criminal laws and claims under the Electronic Communications Privacy Act. Hence, by negative inference, the exemption applies to federal civil statutes other than the ECPA. This conclusion is bolstered by the fact that one of the express policy objectives of the Good Samaritan exemption is 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 . . . .”<sup>23</sup> To date, courts have applied the exemption to federal

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<sup>18</sup>47 U.S.C.A. § 230(e)(4).

<sup>19</sup>Conference Report 104–458, 104th Cong. 2d Sess. 194 (1996). A cancelbot is an algorithm or command script that automatically deletes all messages from a specified source. Paul Evan Peters, “In Your Face in Cyberspace,” *Educom Review*, Sept/Oct. 1994.

<sup>20</sup>47 U.S.C.A. § 230(e)(3) (“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.”).

<sup>21</sup>The statute does not “prevent any State from enforcing any State law that is consistent with this section.” 47 U.S.C.A. § 230(e)(3). As expressed in terms of stated policy, the purpose of the section is to promote the development of the Internet and other interactive computer services and media, preserve the free market for the Internet and online services without state or federal government regulation, encourage the development of technologies that maximize user control over what information is received by users, remove disincentives for the development and use of blocking and filtering technologies that parents may use to restrict children’s access to objectionable or inappropriate online material and ensure the enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer. 47 U.S.C.A. § 230(b).

<sup>22</sup>As with any federal law, an exclusion or exemption created by one Congress does not bind subsequent Congresses. Absent further Acts of Congress, however, section 230(c) exempts interactive computer service providers and users for any federal claims covered by section 230(c) that are not excluded by one of the provisions of section 230(e), where the terms for eligibility of section 230 otherwise apply.

<sup>23</sup>47 U.S.C.A. § 230(b)(2).

claims in several different cases.<sup>24</sup>

The exclusion of *federal* criminal claims likewise suggests that state criminal laws inconsistent with the Good Samaritan exemption are preempted.<sup>25</sup>

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<sup>24</sup>See, e.g., *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (holding a claim under the Fair Housing Act preempted by section 230(c)(1)); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*) (holding the defendant entitled to CDA protection for some but not all of the functions of its site in a Fair Housing Act case); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding claims of a victim of a child sex trafficker under 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595, brought against the publisher of Backpage, where sexually explicit ads of the minor plaintiff were placed, were preempted by the CDA); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing as preempted by section 230(c)(2) (with leave to amend) plaintiff's claim under the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030); *Holomaxx Technologies Corp. v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating Holomaxx's virtually identical complaint against Yahoo!); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008) (granting judgment on the pleadings in favor of Comcast under the section 230(c)(2) on plaintiff's claim under the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030); *Doe v. Bates*, 35 Media L. Rep. (BNA) 1435, 2006 WL 3813758 (E.D. Tex. 2006) (holding plaintiff's claim, as mother and next friend of a child whose image was posted by a Yahoo! egroup moderator, for relief under 18 U.S.C.A. § 2252A(f) was barred by the CDA); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 539–40 (E.D. Va. 2003) (holding that the CDA preempted a Civil Rights claim alleging that the defendant had failed to protect the plaintiff from harassing and blasphemous comments directed at Muslims in an Internet chat room; “the exclusion of federal criminal claims, but not federal civil rights claims, clearly indicates, under the canon of *expressio unius est exclusio alterius*, that Congress did not intend to place federal civil rights claims outside the scope of § 230 immunity.”).

<sup>25</sup>Courts have also reached this conclusion, albeit in two unreported decisions. See *People v. Gourlay*, Docket No. 278214, 2009 WL 529216, at \*3 (Mich. Ct. App. Mar. 3, 2009) (analyzing the statutory scheme of the CDA and concluding that the CDA potentially preempts inconsistent state criminal laws because “the phrase ‘any State or local law’ includes civil and criminal laws.”); *Voicenet Communications, Inc. v. Corbett*, 39 Communications Reg. (P & F) 430, 2006 WL 2506318, at \*3–4 (E.D. Pa. Aug. 30, 2006). *Voicenet* was a suit by Usenet newsreader and Internet service providers against state and local law enforcement officials under 42 U.S.C.A. § 1983 for allegedly violating their constitutional and statutory rights in connection with the execution of a search warrant. In addition to holding that the CDA preempted state criminal provisions, the court ruled that the CDA confers a right under section 1983 not to be treated under state criminal laws as the publisher or speaker of information provided by someone else.

The Good Samaritan exemption does not insulate either interactive computer service providers or users from direct liability for information that they create themselves. Likewise, it does not cover conduct in the physical world. The Good Samaritan exemption applies only in the world of networked computers.<sup>26</sup> Where applicable, however, it leads, in many instances, to results dramatically different from what the outcome would be if the same parties, conduct and claims arose on *terra firma*, rather than in cyberspace.<sup>27</sup>

One court observed that as of early 2012, there had “been approximately 300 reported decisions addressing immunity claims advanced under 47 U.S.C. § 230 in the lower federal and state courts. All but a handful of these decisions find that the website is entitled to immunity from liability.”<sup>28</sup>

Although the CDA provides an affirmative defense, one court ruled that the violation by government officials of the right of a user or provider of an interactive computer service to immunity under the CDA as a publisher or speaker of third party content confers a right to bring a civil rights ac-

<sup>26</sup>See 47 U.S.C.A. § 230(f)(2) (defining *interactive computer service*).

<sup>27</sup>Given the broad scope of its preemptive effect, the continued large volume of litigation under the CDA two decades after its passage undoubtedly reflects that lawyers used to the rules of defamation and tort liability on *terra firma* still do not know or cannot quite fathom that no matter how egregious the conduct in most instances intermediaries in cyberspace cannot be held liable for content that originated with third-party users of their sites and services. As underscored in the *Cubby* and *Stratton Oakmont* cases analyzed in section 37.04, which pre-dated the enactment of the Good Samaritan exemption, the laws of the physical world impose liability on intermediaries who knew or should have known about defamatory material or who for one reason or another are held to the liability standard of a publisher. When those same disputes revolve around Internet sites or services, however, the rules are dramatically different. Whereas a newspaper potentially could be held liable for Fair Housing Act violations, Craigslist, the online equivalent of the classified ad section of a newspaper could not. As Chief Judge Easterbrook of the Seventh Circuit explained:

[Plaintiff may] identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination . . . . It can assemble a list of names to send to the Attorney General for prosecution. But given § 230(c)(1) it cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.

*Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008).

<sup>28</sup>*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. App. 2012).

tion under 42 U.S.C.A. § 1983.<sup>29</sup>

The statute and its legislative history are discussed further in section 37.05[1][C], following a discussion of courts that have applied section 230 (in section 37.05[1][B]) and claims that have been held preempted (in the first part of section 37.05[1][C]). The CDA's interplay with the federal SPEECH Act<sup>30</sup> is separately considered in section 37.09[3].

### **37.05[1][B] Circuit-by-Circuit and State Court Summary**

The First,<sup>1</sup> Third,<sup>2</sup> Fourth,<sup>3</sup> Fifth,<sup>4</sup> Sixth,<sup>5</sup> Seventh,<sup>6</sup> Eighth,<sup>7</sup> Ninth,<sup>8</sup> Tenth<sup>9</sup> and D.C.<sup>10</sup> Circuits have all construed

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<sup>29</sup>See *Voicenet Communications, Inc. v. Corbett*, 39 Communications Reg. (P & F) 430, 2006 WL 2506318 (E.D. Pa. Aug. 30, 2006).

<sup>30</sup>18 U.S.C.A. §§ 4101 to 4105.

#### **[Section 37.05[1][B]]**

<sup>1</sup>See *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (affirming dismissal of a claim brought by a publicly traded company against an Internet message board operator for allegedly false and defamatory postings by pseudonymous posters). In *Lycos*, the court also affirmed dismissal of the plaintiff's claims against the individual pseudonymous posters because it had failed to plead fraud with particularity.

<sup>2</sup>See *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003). In *Green*, the plaintiff sued AOL over allegedly defamatory material about him that was posted in its "Romance Over 30" chat room and over a computer virus sent to him from a third party. In ruling that sections 230(c)(1) and 230(c)(2) barred the action, the court rejected arguments that AOL had waived its immunity by the terms of its membership contract and because AOL's Community Guidelines outline standards for online speech and conduct and contain promises that AOL would protect him from other subscribers, which the court treated as a claim that AOL was negligent in promulgating harmful content and in failing to address harmful content on its network.

<sup>3</sup>See *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (dismissing plaintiff's claim for defamation based on material posted by a third party); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding a defamation claim based on a third party's posting on AOL preempted by section 230(c)(1)), *cert. denied*, 524 U.S. 937 (1998).

<sup>4</sup>See *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008). In *Doe*, plaintiffs, a minor and her mother, sued MySpace for liability over a sexual assault that occurred when the minor, after lying about her age so that she could circumvent the safety features that otherwise would have prevented her from communicating with adult strangers, created a MySpace profile where she posed as an adult, and

was thereafter contacted by a 19-year-old boy to whom she provided her telephone number and, after the two communicated offline, she agreed to meet him in person, at which time the assault allegedly occurred.

<sup>5</sup>See *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating and reversing a jury award for the plaintiff over highly offensive comments posted on a gossip website, based on the finding that defendants were entitled to immunity under the CDA).

In *dicta* in a footnote in an earlier case, a Sixth Circuit panel had stated that “even if the complaint or proposed amended complaint had alleged that TripAdvisor’s users’ statements are defamatory, TripAdvisor cannot be held liable for its users’ statements under the Communications Decency Act, 47 U.S.C. § 230(c)(1).” *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 599 n.8 (6th Cir. 2013).

The Sixth Circuit had previously declined to reach the issue of the applicability of the CDA in a case where it found that the plaintiff had failed to state a claim against an “adult” dating site based on the warranty disclaimers in the site’s Terms and Conditions (making it unnecessary to consider the applicability of the CDA). See *Doe v. SexSearch.com*, 551 F.3d 412, 416 (6th Cir. 2008); see generally *infra* § 37.05[6] (discussing the case).

<sup>6</sup>See *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (holding a claim under the Fair Housing Act preempted by section 230(c)(1)); see also *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (affirming dismissal of a claim by college athletes who were secretly video-recorded in locker rooms, bathrooms and showers, against the companies that provided Internet access and web hosting services to sites that sold copies of these videos; discussing the CDA extensively in *dicta*).

Chief Judge Easterbrook wrote the opinions in both *Craigslist* and *GTE Corp.* In *GTE Corp.*, he raised a number of questions about the potential scope of the CDA without resolving them. He ultimately affirmed the lower court’s dismissal based on the defendant’s failure to allege any duty on the part of the web hosts to monitor and prevent misconduct, thereby making it unnecessary to reach the issue of section 230’s applicability and its proper scope. In his comments in *dicta*, Judge Easterbrook suggested that subpart (c)(1) might be merely a definitional section, while subpart (c)(2) sets forth the scope of the immunity provided by the Good Samaritan exemption. This hypothesis, however, is inconsistent with the text of section (c)(1), which does not read like a definitional section, and with the structure of section 230 as a whole, which includes a separate definitions section in section 230(f).

In *Craigslist*, Judge Easterbrook appeared to have retreated from this position in affirming the entry of judgment for the defendant, finding plaintiff’s Fair Housing Act claim preempted by section 230(c)(1). However, Judge Easterbrook subsequently cited both *GTE* and *Craigslist* in *Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) for the proposition that “subsection (c)(1) does not create an ‘immunity’ of any kind.” In *Chicago v. StubHub*, the Seventh Circuit held that a suit by the City of Chicago asserting that an Internet ticket resale service was responsible for collecting a special city amusement tax on ticket sales was not preempted by the

section 230(c)(1) broadly to preempt claims against interac-

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CDA. Judge Easterbrook wrote that subsection (c)(1) “limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement. But Chicago’s amusement tax does not depend on who ‘publishes’ any information or is a ‘speaker.’” *Id.*; see also *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630 (Ill. App.) (applying Seventh Circuit law in ruling that plaintiff’s negligent supervision claim was not preempted by the CDA because section 230(c)(1) “limits who may be called the publisher or speaker of information that appears online . . . [and therefore] could foreclose any liability that depends on deeming the ICS user or provider a publisher or speaker . . . [but] was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve use of the Internet.”), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012).

Outside the Seventh Circuit and Illinois state court, *Chicago v. StubHub* and *Lansing* may be distinguished as cases where liability was not premised on republication of third party speech. See, e.g., *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 n.4 (N.C. App. 2012) (distinguishing *Chicago v. StubHub* because “the issue before the Seventh Circuit in that case was the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content.”). Judge Easterbrook’s view in *Chicago v. StubHub* that “subsection 230(c)(1) does not create an ‘immunity’ of any kind,” however, may reflect a narrower interpretation of the scope of CDA preemption than is applied in other circuits, at least to the extent that liability is premised on an interactive computer service provider’s failure to act. See *infra* § 37.05[3][B] (discussing this issue in greater detail).

Chicago’s suit against StubHub ultimately ended after the Illinois Supreme Court ruled that municipalities may not require electronic intermediaries to collect and remit amusement taxes on resold admission tickets. See *Chicago v. StubHub, Inc.*, 663 F.3d 933 (7th Cir. 2011); *Chicago v. StubHub, Inc.*, 979 N.E.2d 844 (Ill. 2012).

<sup>7</sup>See *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010). In *Johnson*, the court held that plaintiffs’ defamation claim against an ISP that provided hosting services to [www.complaintsBoard.com](http://www.complaintsBoard.com), where allegedly defamatory statements about plaintiffs’ Kozy Kittens Cattery business had been posted, was preempted by the CDA because sections 230(c)(1) and 230(e)(3) collectively “bar[red] plaintiffs from holding ISPs legally responsible for information that third parties created and developed” and the record contained no evidence that the InMotion, the ISP, “designed its website to be a portal for defamatory material or do anything to induce defamatory postings.” *Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010).

In *Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 779–80 (8th Cir. 2012), the court, in reversing the entry of a preliminary injunction barring a school district from suspending two students for operating a blog on which they and a third student posted racist and derogatory comments about other students at their school, declined to address whether the CDA was applicable to the case but noted in dicta that the CDA would not necessarily have protected the plaintiffs even if it was applicable

tive computer service providers or users based on content

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because their own posts contributed to the disruption at school that led to their suspension.

<sup>8</sup>See *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. July 25, 2011); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (holding that the CDA preempted a right of publicity claim); *Batzel v. Smith*, 333 F.3d 1018, 1022, 1031, (9th Cir. 2003) (rejecting the argument that by minor wording changes and the addition of a “moderator’s message” to a third-party posting (and by his decision to publish or not publish certain messages) a website owner was jointly responsible with the speaker as an information content provider); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120 (9th Cir. 2003) (holding an Internet dating site exempt under the CDA from liability for various claims arising out of a third party’s submission of a phony profile purporting to belong to the plaintiff); see also *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) (broadly construing section 230(c)(2)(B)).

The *en banc* panel in *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*) scaled back somewhat the broad scope previously given to the exemption in the Ninth Circuit—particularly in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003)—by expansively defining the exclusion for information content providers. In *Carafano*, a third party had created a profile by filling out a questionnaire supplied by the defendant-dating site. Because a third party, not the defendants, created the profile, the Ninth Circuit had held that the defendants in *Carafano* were exempt from liability. In *Roommate.com*, however, the Ninth Circuit held that the defendant acted as an information content provider when it created a questionnaire that site users used to create profiles for a roommate matching site, where the contents of those profiles were at issue in the case. The *en banc* panel characterized the language used in *Carafano* as “unduly broad” and expressly disavowed language in that case that suggested that an interactive computer service was “automatically immune so long as the content originated with another information content provider.” 521 F.3d at 1171 & n.31. The Ninth Circuit reaffirmed the holding for the defendant in *Carafano* but on narrower grounds—characterizing the form/questionnaire in that case as a neutral tool used by a third party to create the actionable profile where plaintiff’s claim amounted to one for negligence in failing to screen. By contrast, the plaintiff’s claim in *Roommate.com* centered on the very questions written by the site and used by users to create their profiles.

The Ninth Circuit also has recognized certain fact-specific exceptions to CDA coverage. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit held that plaintiff’s negligent undertaking claim was preempted by the CDA but ruled that her promissory estoppel claim was not, where the defendant allegedly affirmatively undertook to provide assistance in removing material that it would not otherwise have been required to remove under the CDA, but did not do so. In ruling that a quasi-contract claim for promissory estoppel was not preempted by section 230(c)(1) because it was not premised on publication or speaking, the Ninth Circuit was careful to explain that it was not opining on whether

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the claim might be preempted by section 230(c)(2)(A), which Yahoo! had not raised in its appeal. *See generally infra* §§ 37.05[4][B], 37.05[6] (discussing the case in greater detail).

Similarly, in *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), the Ninth Circuit held that the CDA did not bar a claim by an aspiring model against the owners of Model Mayhem, a social networking site for people in the modeling industry, for negligently failing to warn her about two individuals who used the website as part of a scheme to lure her to a fake audition, where they proceeded to rape her. The court held that the plaintiff did not seek to hold Internet Brands liable as a publisher or speaker, but rather for its own failure to warn her about how third parties targeted and lured victims through Model Mayhem (which Internet Brands allegedly knew because it had sued the former owners of Model Mayhem in 2010 alleging that it faced liability for civil suits based the prior misconduct of the two men who went on to rape the plaintiff). The appellate panel explained that “[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content. Any obligation to warn could have been satisfied without changes to the content posted by the website’s users.” *Id.* at 897. The court conceded that posting or emailing a warning could be deemed an act of publishing information, but wrote that “section 230(c)(1) bars only liability that treats a website as a publisher or speaker of content provided by somebody else: in the words of the statute, ‘information provided by another information content provider.’” *Id.* at 898, quoting 47 U.S.C.A. § 230(c)(1). The panel held that “[a]n alleged tort based on a duty that would require . . . a self-produced warning therefore falls outside the scope of section 230(c)(1).” *Id.* at 898. The panel further conceded that Internet Brands acted as the “publisher or speaker” of user content by hosting the plaintiff’s Model Mayhem profile and this action could have been described as the “but for” cause of her injuries because “[w]ithout it Flanders and Callum would not have identified her and been able to lure her to their trap” but the court wrote that “[p]ublishing activity is a but-for cause of just about everything Model Mayhem is involved in” and “the CDA does not provide a general immunity against all claims derived from third-party content.” *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894, 899 (9th Cir. 2014); *see generally infra* §§ 37.05[3][B][ii], 37.05[6] (analyzing the case and its import in greater detail).

Likewise, in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), the Ninth Circuit found grounds for carving out a narrow exception when a communication was not intended for further distribution, ruling that material “provided by another information content provider” necessarily means “provided” for publication, such that the exemption would not apply if the author never intended that a communication be posted. *Id.* at 1034. This fact-specific exception is unlikely to arise very often. On remand, summary judgment was entered in favor of the defendant based on *res judicata* because an earlier suit on the same grounds had been involuntarily dismissed for lack of prosecution by a federal court in North Carolina. *See Batzel v. Smith*, 372 F. Supp. 2d 546 (C.D. Cal. 2005). In a rare instance where the exception was raised in a case, a district court



originating with others, although the Tenth Circuit<sup>11</sup> (and to a lesser extent the Ninth Circuit)<sup>12</sup> have broadly construed the term *information content provider* in a manner that potentially limits the scope of subpart (c)(1) of the exemption in particular circumstances.

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read *Batzel* narrowly based on its facts. *See Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 931 (D. Ariz. 2008) (ruling that the *Batzel* exception would not apply where the original author changed his mind, and asked that an allegedly defamatory post be removed, because the statutory term provided does not imply an ongoing process).

In *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), the Ninth Circuit broadly construed the CDA to preempt state right of publicity claims notwithstanding an express exclusion in the statute for claims “pertaining to intellectual property.” 47 U.S.C.A. § 230(2); *see generally infra* § 37.05[5].

In *Medifast, Inc. v. Minkow*, 577 F. App’x 706 (9th Cir. 2014), an unreported decision, a Ninth Circuit panel remanded for further consideration the question of whether the defendant was insulated from liability under the CDA for republishing statements that were liber *per se*, where the defendant raised the issue of CDA immunity for the first time on appeal.

<sup>9</sup>*See Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (affirming summary judgment in favor of the defendant on plaintiff’s claims for defamation and negligence based on the CDA). In *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), the Tenth Circuit purported to reaffirm the broad scope of *Ben Ezra, Weinstein & Co.* but held that an interactive service provider was liable as an information content provider where it solicited, paid for and sold the offending content at issue in the suit and suggested that such liability could be found whenever “it in some way specifically encourages development of what is offensive about the content.” *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

<sup>10</sup>*See Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (affirming dismissal of negligence and intentional assault claims against Facebook and its founder because they did not create or provide the Facebook page that allegedly promoted religious hate and violence). In *Klayman*, the District of Columbia Circuit brushed aside as irrelevant the assertion that Facebook collected data on its users and their activities, which it employed to make its advertising more profitable, because it had no bearing on Klayman’s theories of liability. *See id.* at 1358.

<sup>11</sup>*See FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009). *Accusearch* is discussed in greater detail in the preceding footnote and below in sections 37.05[3][C] and 37.05[3][D].

<sup>12</sup>*See Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*) (discussed in a footnote *citing* Ninth Circuit case law, earlier in this section, and in greater detail below in section 37.05[3][C]).

The Ninth Circuit<sup>13</sup> also has broadly construed section 230(c)(2)(B), which addresses making available the technical means to restrict access, as discussed below in section 37.05[4][D].

The Eleventh Circuit discussed the CDA in *dicta* in a reported decision in 2006<sup>14</sup> and subsequently applied it to find a defamation claim preempted in an unreported opinion in 2014.<sup>15</sup>

The California<sup>16</sup> and Florida<sup>17</sup> Supreme Courts and the

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<sup>13</sup>See *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

<sup>14</sup>See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321–23 (11th Cir. 2006) (analyzing but finding it unnecessary to decide whether the CDA preempted a Florida right of publicity claim); *infra* § 37.05[5] (discussing the case).

<sup>15</sup>See *Dowbenko v. Google*, — F. App'x —, 2014 WL 4378742 (11th Cir. 2014) (holding plaintiff's defamation claim against Google, premised on the allegation that Google purportedly used algorithms to manipulate its search results so that an allegedly defamatory article about Mr. Dowbenko appeared immediately below his own website in Google search results, was preempted by the CDA).

<sup>16</sup>See *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006) (holding that the CDA preempted libel and conspiracy claims against users based on both publisher and distributor liability). In *Barrett*, the California Supreme Court reversed an intermediate appellate court's opinion that had held that distributor liability could be imposed where a defendant was provided with notice. See *generally supra* § 37.04 (discussing distributor and publisher liability). The court followed *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) in holding a user exempt from liability for an article that she reposted on a newsgroup without any alterations. In so holding, the court rejected the suggestion that the Good Samaritan exemption was only available for passive users. The court conceded, however, that “[a]t some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source.” 40 Cal. 4th at 60 n.19.

Justice Moreno concurred in the opinion to express his view that publishers that conspire with original content providers to defame would not be entitled to immunity under section 230(c)(1).

*Barrett v. Rosenthal* has been applied by other courts in California. See, e.g., *Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding plaintiff's defamation claim barred by the CDA). In *Pham*, the plaintiff had alleged that the defendant was liable for adding additional information to an allegedly defamatory email that the defendant re-circulated. The court, however, held that the defendant did not make a material contribution where nothing he added was itself defamatory.

New York Court of Appeals,<sup>18</sup> intermediate appellate courts in Connecticut,<sup>19</sup> Georgia,<sup>20</sup> Illinois,<sup>21</sup> Indiana,<sup>22</sup> New Mexico,<sup>23</sup>

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The CDA likewise has been applied in other cases by intermediate appellate courts in California. *See, e.g., Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (affirming an order granting defendant's demurrer without leave to amend); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833–35, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (dismissing claims on demurrer against eBay for, among others, negligence, based on the CDA); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 698, 104 Cal. Rptr. 2d 772 (1st Dist. 2001) (holding that the CDA preempted claims of premises liability and nuisance based on Internet use at a public library).

<sup>17</sup>*See Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (holding that the CDA preempted a negligence claim even where the defendant had actual notice).

<sup>18</sup>*See Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *see also Beyer v. Parents for Megan's Law*, 44 Misc. 3d 1206, 2014 WL 305742 (Suffolk County Sup. 2014) (unreported trial court opinion holding the defendant organization was insulated from liability for republishing on its website an edited version of an article that previously appeared in *NewsDay*, and for refusing to take it down); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (Sup. 2010) (trial court opinion dismissing a defamation claim brought against Yelp! Inc. by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, and holding not preempted, but dismissing on the merits, a deceptive acts or practices claim based on the allegation that for \$300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback).

<sup>19</sup>*See Vazquez v. Buhl*, 150 Conn. App. 117, 90 A.3d 331 (2014) (holding a website operator insulated from liability by the CDA for providing a link to a third party's article); *see also Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003–04 (Super. Ct. 2000) (trial court decision holding negligence and breach of contract claims against AOL based on user emails preempted by the CDA; granting AOL's motion to strike for failing to state a claim upon which relief can be granted).

<sup>20</sup>*See Internet Brands, Inc. v. Jape*, 760 S.E.2d 1 (Ga. Ct. App. 2014) (holding that the CDA barred a defamation claim by a user against the operator of an Internet forum for boating enthusiasts, based on comments posted by another user of the forum).

<sup>21</sup>*See Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 279 Ill. Dec. 113, 799 N.E.2d 916, 920 (2d Dist. 2003) (affirming dismissal of a complaint asserting defamation against a website aimed at warning the public of health fraud, which posted an article authored by a third party that contained

North Carolina,<sup>24</sup> Texas<sup>25</sup> and Washington,<sup>26</sup> and trial courts in New Jersey,<sup>27</sup> like the majority of federal circuit courts that have considered the issue, have also construed subpart 230(c)(1) of the CDA very broadly.

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disparaging comments accusing the plaintiff, an alleged medical consultant, of being a liar and a charlatan); *see also Gains v. Romkey*, No. 11-0594, 2012 WL 7007002 (Ill. App. 3 Dist. 2012) (following *Fonorow* in affirming that the defendant was insulated from liability for defamation by the CDA, in an unreported opinion).

<sup>22</sup>*See Miller v. Federal Express Corp.*, 6 N.E.3d 1006 (Ind. Ct. App. 2014) (affirming summary judgment for the defendants in a suit for defamation and intentional infliction of emotional distress based on posts made to a newspaper website by employees of the two corporate defendants, whose posts were made using company computers, based on the finding that the appellants' claims were preempted by the CDA).

<sup>23</sup>*See Woodhull v. Meinel*, 145 N.M. 533, 202 P.3d 126 (Ct. App. 2008) (broadly construing the scope of section 230(c)(1) but finding defendant's entitlement to the exemption to present a factual question precluding summary judgment based on defendant's requesting that users post potentially defamatory material to make fun of plaintiff).

<sup>24</sup>*See Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing an order for summary judgment for the plaintiff on its unfair or deceptive trade practices claim based on a North Carolina law making it unlawful to sell a ticket for more than \$3 over its face value, finding an online marketplace that enabled third parties to buy and sell tickets to sporting events, concerts and similar events was entitled to CDA immunity and was entitled to summary judgment).

<sup>25</sup>*See GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged victims of the nonconsensual posting of pornographic images of themselves to two "revenge porn" websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App. Beaumont 2010) (affirming the entry of a no-evidence motion for summary judgment in favor of the defendant on plaintiff's claim for defamation based on the CDA, in a case where the plaintiff alleged that the defendant website vouched for the accuracy of anonymously posted user information and failed to verify its accuracy).

<sup>26</sup>*See Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001) (granting summary judgment for the defendant on claims for negligent misrepresentation, tortious interference and breach of contract, based on the CDA).

<sup>27</sup>*See Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005).

### 37.05[1][C] Analysis and List of Claims Potentially Preempted

The Good Samaritan exemption has been held to preempt claims for defamation,<sup>1</sup> negligence,<sup>2</sup> negligent misrepresenta-

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#### [Section 37.05[1][C]]

<sup>1</sup>See, e.g., *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–19 (1st Cir. 2007) (affirming dismissal of a claim for defamation under section 230(c)(1) and rejecting the argument that “the construct and operation” of defendant’s website, including a feature that allowed a single person to post under multiple screen names, made Lycos an information content provider); *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003) (holding that section 230 barred a tort action against AOL for its allegedly negligent failure to remove allegedly defamatory material from a chat room on its network); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (dismissing plaintiff’s claim for defamation against a commercial gripe site based on material posted by a third party); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating a jury award and reversing the lower court’s denial of the defendant’s motion for judgment); *Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010) (affirming the lower court’s sua sponte dismissal with prejudice of plaintiffs’ defamation claim against an ISP because sections 230(c)(1) and 230(e)(3) collectively “bar[red] plaintiffs from holding ISPs legally responsible for information that third parties created and developed” and the record contained no evidence that the website host “designed its website to be a portal for defamatory material or do anything to induce defamatory postings.”); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (holding that section 230 proscribed a defamation claim against AOL based on material created by a third party); *Dowbenko v. Google*, — F. App’x —, 2014 WL 4378742 (11th Cir. 2014) (holding plaintiff’s defamation claim against Google, premised on the allegation that Google purportedly used algorithms to manipulate its search results so that an allegedly defamatory article about Mr. Dowbenko appeared immediately below his own website in Google search results, was preempted by the CDA); *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing with prejudice claims against Yahoo, Google, Neustar, eNom, Intelius, Switchboard LLC & Whitepages, Inc. and Xcentric Ventures for displaying, distributing or linking to allegedly defamatory third party blog posts about the plaintiff and for allegedly selectively editing the posts, failing to remove them, and manipulating search results to give them greater prominence); *Russell v. Implode-Explode Heavy Industries, Inc.*, No. 08-cv-2468, 2013 WL 5276557, at \*4–9 (D. Md. Sept. 18, 2013) (granting judgment on the pleadings, holding that a website was immune from liability under state law claims brought by a Native American tribe over a blog article authored and posted by third-party that contained allegedly defamatory and libelous content about the tribe’s home loan program); *Gavra v. Google Inc.*, 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013) (dismissing

plaintiff's claims without leave to amend, holding that the CDA immunized Google from liability for an attorney's claims for invasion of privacy, defamation, and "blackmail/extortion" arising from Google's alleged failure to remove unflattering videos posted by a former client); *Regions Bank v. Kaplan*, 8:12-CV-1837-T-17MAP, 2013 WL 1193831, at \*18 (M.D. Fla. Mar. 22, 2013) (dismissing claims of defamation *per se* and invasion of privacy arising from a "Fraud-Net" alert bulletin published by a third party on the Florida Bankers Association's website that allegedly contained false and defamatory statements); *Mmubango v. Google, Inc.*, CIV. A. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013) (dismissing with prejudice plaintiff's claims for defamation and negligence arising out of Google's alleged refusal to remove from its search engine links to negative statements about the plaintiff that were posted on wikiscams.com, an unrelated website); *Merritt v. Lexis Nexis*, 12-CV-12903, 2012 WL 6725882 (E.D. Mich. Oct. 23, 2012) (recommending sua sponte dismissal of plaintiff's defamation claim upon concluding that LexisNexis was immune under the CDA for plaintiff's claim that Lexis Nexis "published, and continued to publish false information until pressured by authorities to remove the information . . ." because it could not be held liable for traditional functions of a publisher), *report and recommendation adopted*, No. 12-12903, 2012 WL 6725881 (E.D. Mich. Dec. 27, 2012); *Hadley v. GateHouse Media Freeport Holdings, Inc.*, Case No. 12 C 1548, 2012 WL 2866463 (N.D. Ill. July 10, 2012) (dismissing defamation claim based on publication of statements that implied that plaintiff had committed a crime); *Directory Assistants, Inc. v. Supermedia, LLC*, 884 F. Supp. 2d 446 (E.D. Va. 2012) (dismissing with prejudice claims against an individual user who forwarded by email articles posted online); *Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (dismissing and granting summary judgment on a claim for defamation against online booksellers over promotional statements for a book posted on the defendants-booksellers' websites); *Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (granting summary judgment for the defendant, the operator of a gripe site, on claims for defamation, false light and intentional and negligent interference with economic relations based on the CDA); *Black v. Google Inc.*, No. 10-02381 CW, 2010 WL 3222147 (N.D. Cal. Aug. 13, 2010) (dismissing a defamation claim where the plaintiffs alleged that Google "sponsored or endorsed" a third party site and failed to provide an adequate dispute resolution system for complaints about user comments), *aff'd mem.*, 457 F. App'x 622 (9th Cir. 2011); *Novins v. Cannon*, Civ. No. 09-5354, 2010 WL 1688695 (D.N.J. Apr. 27, 2010) (dismissing a defamation claim brought against users for allegedly republishing a defamatory web post or email); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 877-80 (N.D. Ind. 2010) (granting judgment on the pleadings on libel and false light claims that sought to hold the defendant liable for user comments posted to its interactive website, commenting on a posted newspaper article); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (holding a claim by the Independent party candidate for governor to compel Ask.com to block from its search engine an allegedly defamatory page that included him in a list of individuals that, when viewed as a snippet, appeared to identify

him with the Communist Party, barred by the CDA); *Eckert v. Microsoft Corp.*, No. 06-11888, 2007 WL 496692 (E.D. Mich. Feb. 13, 2007); *Dimeo v. Max*, 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006) (holding that section 230(c)(1) overrides the traditional treatment of publishers under statutory and common defamation law), *aff'd*, 248 F. App'x 280 (3d Cir. 2007); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006) (holding preempted plaintiff's claims for defamation, invasion of privacy and negligence over Google's archiving messages posted by USENET users, provision of search tools that allow access to allegedly defamatory material and caching content), *aff'd*, 242 F. App'x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 156 (2008); *Whitney Information Network, Inc. v. Verio, Inc.*, 79 U.S.P.Q.2d 1606, 2006 WL 66724 (M.D. Fla. Jan. 11, 2006); *Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238, 1248–49 (D. Minn. 2005); *Smith v. Intercosmos Media Group, Inc.*, No. Civ. A. 02-1964, 2002 WL 31844907 (E.D. La. Dec. 17, 2002) (“any claim made by the plaintiffs for damages or injunctive relief with regard to either defamation and libel, or negligence and fault . . . are precluded by the immunity afforded by section 230(c)(1) [of the CDA] and subject to dismissal); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006) (holding that the CDA preempted libel and conspiracy claims against users based on both publisher and distributor liability); *Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding barred by the CDA a claim for defamation based on the defendant forwarding an allegedly defamatory email and supplementing it with a brief comment); *Brendan N. Fleming, LLC v. Duncan*, Case No. 2010CV0966 (Columbia Cty., Ga. Sup. Ct. Judgment on the Pleadings Granted Dec. 15, 2010) (dismissing a defamation claim brought against Yahoo! Over a user post as preempted by the CDA); *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 799 N.E.2d 916, 920 (Ill. 2d Dist. 2003) (affirming dismissal of plaintiff's claim for defamation against a website aimed at warning the public of health fraud, which posted an article authored by a third party that contained disparaging comments about the plaintiff, an alleged medical consultant, as being a liar and a charlatan); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (Ill. App. Div. 2005); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. 2010); *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (N.Y. Sup. 2009); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App. Beaumont 2010) (affirming the entry of a no-evidence motion for summary judgment in favor of the defendant on a claim for defamation based on the CDA, in a case where the plaintiff alleged that the defendant website vouched for the accuracy of anonymously posted user information and failed to verify its accuracy).

<sup>2</sup>See, e.g., *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003); *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (dismissing with prejudice as preempted by the CDA claims for negligence and gross negligence over MySpace's alleged deletion of celebrity imposter user profiles); *Getachew v. Google, Inc.*, Appeal No. 12-1237, 2012 WL 3217611 (10th Cir. Aug. 9, 2012) (affirming dismissal of a negligence suit based on the results displayed by a search engine); *Klayman v. Zuckerberg*, 753

tion,<sup>3</sup> negligent undertaking,<sup>4</sup> intentional infliction of

F.3d 1354 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence); *Beckman v. Match.com*, 2:13-CV-97 JCM NJK, 2013 WL 2355512 (D. Nev. May 29, 2013) (dismissing with prejudice plaintiff's claims for negligence (failure to warn) and negligent misrepresentation arising out of a brutal attack on the plaintiff by a man she met on Match.com because Match.com was immune under the CDA for claims based on information originating with a user of its website); *Mmubango v. Google, Inc.*, CIV. A. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013) (dismissing with prejudice plaintiff's claims for defamation and negligence arising out of Google's alleged refusal to remove from its search engine links to negative statements about the plaintiff that were posted on wikiscams.com, an unrelated website); *AF Holdings, LLC v. Doe*, 5:12-CV-02048-EJD, 2012 WL 4747170 (N.D. Cal. Oct. 3, 2012) (holding that plaintiff was immune from liability under the CDA for negligence arising from his "allowing the 'Doe' defendant to use his IP address and Internet connection to unlawfully distribute and reproduce a video" in an online peer-to-peer file sharing site); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (dismissing claims for negligence and negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 *et seq.* and various related regulations, among other claims, based on an eBay user's alleged sale of vacuum tubes); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (negligence and gross negligence); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735(RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (suit by a crime victim alleging breach of duty by Craigslist in failing to prevent the sale of a handgun used by its purchaser to shoot the plaintiff); *Goddard v. Google, Inc.*, No. C 08-2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006), *aff'd*, 242 F. App'x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 156 (2008); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833-35, 121 Cal. Rptr. 2d 703 (4th Dist. 2002); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003-04 (Super. Ct. 2000); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001); *Okeke v. Cars.com*, 40 Misc. 3d 582, 586-88, 966 N.Y.S.2d 843, 846-48 (N.Y. Civ. Ct. 2013) (holding Cars.com immune under the CDA from liability for negligence arising from an attempted purchase of a vehicle in response to an allegedly fraudulent advertisement posted by third party on the cars.com website; dismissing plaintiff's claim); *GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged victims of the nonconsensual posting of pornographic images of themselves to two "revenge porn" websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA).

<sup>3</sup>See, e.g., *Beckman v. Match.com*, 2:13-CV-97 JCM NJK, 2013 WL 2355512 (D. Nev. May 29, 2013) (dismissing with prejudice plaintiff's claims for negligence (failure to warn) and negligent misrepresentation



emotional distress,<sup>5</sup> assault,<sup>6</sup> harassment,<sup>7</sup> false light,<sup>8</sup> tortious (negligent or intentional) interference with contractual relations or prospective economic advantage/business expectancy,<sup>9</sup> breach of contract,<sup>10</sup> privacy<sup>11</sup> and publicity<sup>12</sup> (or ap-

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arising out of a brutal attack on the plaintiff by a man she met on Match.com because Match.com was immune under the CDA for claims based on information originating with a user of its website); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001).

<sup>4</sup>See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

<sup>5</sup>See, e.g., *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing claims against Yahoo, Google, Neustar, eNom, Intelius, Switchboard LLC & Whitepages, Inc. and Xcentric Ventures for displaying, distributing or linking to allegedly defamatory third party blog posts about the plaintiff and for allegedly selectively editing the posts, failing to remove them, and manipulating search results to give them greater prominence and cause the plaintiff emotional distress); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Ramey v. Darkside Productions, Inc.*, No. 02-730(GK), 2004 WL 5550485 (D.D.C. May 17, 2004) (granting summary judgment for the defendant where the plaintiff alleged that defendant published an advertisement in its adult directory, paid for by a third party, which included an unauthorized intimate photo of the plaintiff); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005); *GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged victims of the nonconsensual posting of pornographic images of themselves to two “revenge porn” websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA).

<sup>6</sup>See *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence).

<sup>7</sup>See, e.g., *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005).

<sup>8</sup>See *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing claims against Yahoo, Google, Neustar, eNom, Intelius, Switchboard LLC & Whitepages, Inc. and Xcentric Ventures for displaying, distributing or linking to allegedly defamatory third party blog posts about the plaintiff and for allegedly selectively editing the posts, failing to remove them, and manipulating search results to give them greater prominence, all of which he alleged portrayed him in a false light); *Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011).

<sup>9</sup>See, e.g., *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (tortious interference with business expectancy); *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (holding that a sports betting website operator was immune from

state law claims for misappropriation of trade secrets, misappropriation of licensable commercial property, civil theft, and tortious interference with contractual relations, because it was not a “developer” of user-generated content under the CDA, even though it awarded loyalty points for user posts; dismissing plaintiff’s claims with leave to amend); *Directory Assistants, Inc. v. Supermedia, LLC*, 884 F. Supp. 2d 446 (E.D. Va. 2012) (dismissing with prejudice claims against an individual user who forwarded by email articles posted online); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (interference with contractual and prospective contractual relations); *Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJMx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (granting summary judgment for the defendant, the operator of a gripe site, on claims for defamation, false light and intentional and negligent interference with economic relations based on the CDA); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing as preempted by section 230(c)(2) (with leave to amend) claims for intentional interference with contract and intentional interference with prospective business advantage); *Holomaxx Technologies Corp. v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating Holomaxx’s virtually identical complaint against Yahoo!); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010) (dismissing as preempted by the CDA claims for negligent and intentional interference with contractual relations and prospective economic advantage and fraud arising out of Google’s use of its keyword suggestion tool in connection with its AdWords program); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008); *Whitney Info. Whitney Information Network, Inc. v. Verio, Inc.*, 79 U.S.P. Q.2d 1606, 2006 WL 66724 (M.D. Fla. Jan. 11, 2006); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (no liability where images on Amazon.com had been provided by a vendor on its zShops platform); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 452–53 (E.D.N.Y. 2004) (dismissing the *pro se* plaintiff’s tortious interference claim based on alleged search result manipulation); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001) (business expectancy); see also *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931 (C.D. Ill. Aug. 3, 2012) (dismissing plaintiff’s complaint on other grounds but writing in dicta that plaintiff’s state law claims for unjust enrichment, civil conspiracy, intentional interference with current and prospective economic advantage and Illinois Human Rights Act violations were barred by the CDA because they were “really variations of defamation and invasion of privacy claims . . . ,” while plaintiff’s Lanham Act and right of publicity claims likely would not be barred and it was unclear whether plaintiff’s RICO claim would be either;), *aff’d*, 512 F. App’x 635 (7th Cir. 2013).

<sup>10</sup>See, e.g., *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing with prejudice claims for publication of private facts, invasion of privacy, intrusion upon seclusion and false light); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1199–1201 (N.D. Cal. 2009) (dismissing plaintiff’s complaint with prejudice); *Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec.

17, 2008) (dismissing plaintiff's claim with leave to amend); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 401, 405, 163 Cal. Rptr. 3d 919, 920, 924 (4th Dist. 2013) (affirming grant of anti-SLAPP motion in favor of the owner of the Orange County Register based on a claim that the newspaper breached its user agreement with the plaintiff by failing to remove user comments about the plaintiff from its website); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003–04 (Super. Ct. 2000); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001). In *Schneider*, the court explained that “assuming Schneider could prove the existence of an enforceable promise to remove the comments, Schneider’s claim is based entirely on the purported breach—failure to remove the posting—which is an exercise of editorial discretion. This is the activity the statute seeks to protect.” 108 Wash. App. at 465, 31 P.3d at 41–42.

By contrast, in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit held that plaintiff's quasi-contractual promissory estoppel claim was not preempted by section 230(c)(1) where it was premised on neither publication nor speaking, but an affirmative undertaking communicated by Yahoo's Director of Communications to help remove a phony profile, which the plaintiff alleged that she relied upon to her detriment. The court, however, did not address whether plaintiff's claim might be preempted by section 230(c)(2)(A). *See infra* §§ 37.05[4] (analyzing the potential applicability of section 230(c)(2)(A) to *Barnes* and noting conflicting authority); 37.05[6] (analyzing the case).

<sup>11</sup>*See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Gavra v. Google Inc.*, 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013) (dismissing with prejudice an attorney's claims for invasion of privacy, defamation, and “blackmail/extortion” arising from Google's alleged failure to remove unflattering videos posted by a former client); *Regions Bank v. Kaplan*, 8:12-CV-1837-T-17MAP, 2013 WL 1193831, at \*18 (M.D. Fla. Mar. 22, 2013) (dismissing claims of defamation *per se* and invasion of privacy arising from a “Fraud-Net” alert bulletin published by a third party on the Florida Bankers Association's website that allegedly contained false and defamatory statements); *Shah v. MyLife.Com, Inc.*, 3:12-CV-1592 -ST, 2012 WL 4863696, at \*3 (D. Or. Sept. 21, 2012) (recommending that defendants' motion to dismiss be granted; holding that MyLife.com and Google, Inc. “cannot be sued for simply republishing information provided by third parties, including any claim under state law for invasion of privacy by an internet posting of personal information obtained from another party.”); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 877–80 (N.D. Ind. 2010) (false light); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006), *aff'd mem.*, 242 F. App'x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 156 (2008); *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 279 Ill. Dec. 113, 799 N.E.2d 916 (2d Dist. 2003) (false light invasion of privacy and defamation).

<sup>12</sup>*See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–1119 n.5 (9th Cir. 2007); *Perfect 10, Inc. v. Giganews, Inc.*, CV11-07098 AHM SHX, 2013 WL 2109963, at \*15–16 (C.D. Cal. Mar. 8, 2013) (dismissing with

appropriation<sup>13</sup>) claims, common law misappropriation,<sup>14</sup> common law or state statutory trademark infringement or dilution,<sup>15</sup> trade secret misappropriation,<sup>16</sup> civil theft,<sup>17</sup> unjust

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leave to amend plaintiff's California right of publicity and unfair competition claims as barred by the CDA because the pornographic images found on defendant's website that were at issue in the case originated with third parties). *But see Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 298, 304 (D.N.H. 2008) (criticizing the Ninth Circuit's analysis); *see generally infra* § 37.05[5] (analyzing the issue and citing other cases).

<sup>13</sup>*See, e.g., Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238, 1248–49 (D. Minn. 2005) (holding a claim for appropriation under Minnesota law preempted by the CDA). A claim for appropriation may be stated “when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one.” Restatement (Second) of Torts § 652C, comment b.

<sup>14</sup>*See, e.g., Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1127 (D. Nev. 2013) (dismissing plaintiffs' complaint for common law misappropriation under Florida law with leave to amend). *But see Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090–91 (D. Nev. 2013) (denying the defendant's motion to dismiss plaintiff's amended complaint where plaintiff alleged that the website provider “acted as a ‘developer’ within the meaning of the CDA by promoting the publication of protected ‘service plays’ and thereby contributing to the misappropriation of Plaintiffs’ trade secrets and commercial property.”); *see generally supra* § 5.04 (analyzing common law misappropriation).

<sup>15</sup>*Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice California state law claims for trademark infringement and dilution and unfair competition premised on Yahoo's alleged use of *parts.com* as a keyword for sponsored link advertisements).

<sup>16</sup>*See, e.g., Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1127 (D. Nev. 2013) (dismissing plaintiff's complaint with leave to amend; holding that a sports betting website operator was immune from Florida law claims for misappropriation of trade secrets and common law misappropriation of licensable commercial property because it was not a “developer” of user-generated content under the CDA, even though it awarded loyalty points for user posts). The court subsequently ruled that that plaintiff's amended complaint stated claims for trade secret misappropriation and common law misappropriation that were not preempted by the CDA. *See Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090–91 (D. Nev. 2013) (holding plaintiff's trade secret and common law misappropriation claims survived dismissal because they alleged that the website provider “acted as a ‘developer’ within the meaning of the CDA by promoting the publication of protected ‘service plays’ and thereby contributing to the misappropriation of Plaintiffs’ trade secrets and commercial property.”).

<sup>17</sup>*See, e.g., Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (holding that a sports betting website operator

enrichment,<sup>18</sup> aiding and abetting,<sup>19</sup> click fraud,<sup>20</sup> manipulation of search engine results,<sup>21</sup> state law violations arising out of a search engine's sale of advertisements triggered by sponsored links,<sup>22</sup> false advertising,<sup>23</sup> ticket scalping,<sup>24</sup> waste

was immune from plaintiff's civil theft claim under Florida law, Fla. Stat. § 772.11).

<sup>18</sup>See, e.g., *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011); *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628 (E.D. Va. 2010), *aff'd in relevant part on other grounds*, 676 F.3d 144, 165–66 (4th Cir. 2012); *Ramey v. Darkside Productions, Inc.*, No. 02–730(GK), 2004 WL 5550485 (D.D.C. May 17, 2004) (granting summary judgment for the defendant where the plaintiff alleged that defendant published an advertisement in its adult directory, paid for by a third party, which included an unauthorized intimate photo of the plaintiff); see also *Nieman v. Versuslaw, Inc.*, No. 12–3104, 2012 WL 3201931 (C.D. Ill. Aug. 3, 2012) (dismissing plaintiff's complaint on other grounds but writing in dicta that plaintiff's state law claims for unjust enrichment, civil conspiracy, intentional interference with current and prospective economic advantage and Illinois Human Rights Act violations were barred by the CDA because they were “really variations of defamation and invasion of privacy claims . . .,” while plaintiff's Lanham Act and right of publicity claims likely would not be barred and it was unclear whether plaintiff's RICO claim would be either;), *aff'd*, 512 F. App'x 635 (7th Cir. 2013).

<sup>19</sup>See, e.g., *Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008).

<sup>20</sup>*Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009) (dismissing with prejudice plaintiff's complaint based on alleged harm from click fraud); see generally *supra* § 28.11 (analyzing click fraud).

<sup>21</sup>See, e.g., *Dowbenko v. Google*, — F. App'x —, 2014 WL 4378742 (11th Cir. 2014) (holding plaintiff's defamation claim against Google, premised on the allegation that Google purportedly used algorithms to manipulate its search results so that an allegedly defamatory article about Mr. Dowbenko appeared immediately below his own website in Google search results, was preempted by the CDA); *Obado v. Magedson*, Civil No. 13–2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing with prejudice as preempted by the CDA claims that Yahoo and Google allegedly manipulated search results to give greater prominence to allegedly derogatory blog posts about the plaintiff).

<sup>22</sup>See, e.g., *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice state law claims for trademark infringement and dilution and unfair competition premised on Yahoo's alleged use of *parts.com* as a keyword for sponsored link advertisements); *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628 (E.D. Va. 2010) (dismissing under the CDA plaintiff's unjust enrichment claim seeking recovery of revenue earned from sponsored link advertisements for third parties triggered by “Rosetta Stone”), *aff'd in relevant part on other grounds*, 676 F.3d 144, 165–66 (4th Cir. 2012); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010) (dismissing claims for negligent and intentional interference with contractual relations and prospective economic

advantage and fraud arising out of Google's use of the keyword suggestion tool as preempted by the CDA).

In *Rosetta Stone*, District Court Judge Gerald Bruce Lee distinguished *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295–96 (D.N.J. 2006), where the court held that CDA immunity did not bar a claim against a “pay-for-priority” search engine. First, in that case, Judge Lee wrote, the defendant, unlike Google, did not qualify as an interactive service provider. Second, Judge Lee wrote that the court did not deal with a situation, as in Google, where third party advertisers are responsible for selecting the keyword triggers.

In *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010), plaintiff, the owner of a company which marketed and sold its trademarked “Styrotrim” building materials, sued Google because its AdWords program picked up the trademark name “Styrotrim” as a commonly searched term and thereafter suggested it as a keyword to bidders in its AdWords program. In holding plaintiffs’ claims barred by the CDA, the court emphasized that Google did not provide the content for the sponsored link advertisements triggered by the keyword, that Google’s keyword suggestion tool was a neutral tool that did nothing more than provide options to advertisers, and suggesting keywords to competing advertisers was tantamount to the editorial process protected by the CDA. *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010). *But see Jurin v. Google Inc.*, 768 F. Supp. 2d 1064 (E.D. Cal. 2011) (denying defendant’s motion to dismiss amended false advertising and false association claims arising out of the sale of a keyword as a sponsored link, but dismissing without leave to amend breach of contract and breach of the duty of good faith and fair dealing claims premised on an alleged failure by Google to adhere to its Adwords policy).

In *Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086-87 (C.D. Cal. 2012), Central District of California Senior Judge Lew narrowly applied the CDA without much analysis in denying in part the defendant’s motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not claims arising out of the alleged sale of plaintiff’s “Cybersitter” mark as a key word to trigger sponsored link advertisements.

Most sponsored link cases involve federal Lanham Act claims, which are not preempted by the CDA. *See generally infra* § 37.05[5] (exclusion of claims pertaining to intellectual property); *supra* § 9.11[3] (analyzing sponsored links).

<sup>23</sup>*See Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010) (granting summary judgment to the defendant under the CDA on a false advertising claim brought by the New Jersey Attorney General based on New Jersey consumer fraud advertising regulations).

<sup>24</sup>*See Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing an order for summary judgment for the plaintiff on its unfair or deceptive trade practices claim based on N.C. Gen. Stat. § 14-344, a North Carolina law that made it unlawful to sell a ticket for more than \$3 over its

of public funds, premises liability and nuisance (based on Internet use at a public library),<sup>25</sup> nuisance (based on postings allegedly soliciting prostitution),<sup>26</sup> strict product liability,<sup>27</sup> breach of warranty,<sup>28</sup> state consumer fraud and protection statutes,<sup>29</sup> wiretapping/eavesdropping,<sup>30</sup> extortion<sup>31</sup> and unfair competition<sup>32</sup> laws, California's Autographed

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face value, because StubHub, on online marketplace, was entitled to CDA immunity for a third party transaction that occurred through its website); see also *Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010) (granting summary judgment to an interactive computer service provider under the CDA in a case brought by the New Jersey Attorney General alleging violations of the New Jersey Consumer Fraud Act and advertising regulations promulgated under the Act over ticket sales to a Bruce Springsteen concert).

<sup>25</sup>See *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772 (1st Dist. 2001).

<sup>26</sup>See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

<sup>27</sup>See, e.g., *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (dismissing a claim against eBay for strict product liability based on the alleged sale of vacuum tubes by an eBay user); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (dismissing a claim for strict product liability under Texas law for allegedly failing to implement reasonable safety measures to protect minors); *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (N.Y. Sup. 2009) (dismissing defamation and products liability claims brought against Xcentric Ventures, LLC, the operator of RipOffReport.com, based on user posts, in an unreported opinion).

<sup>28</sup>See *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (dismissing claims for breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose and breach of express warranty against eBay based on the alleged sale by an eBay user of vacuum tubes where "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA.>").

<sup>29</sup>See, e.g., *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008) (New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A); *Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010) (New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-2); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1117-18 (W.D. Wash. 2004) (Washington state statute).

<sup>30</sup>See *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing as preempted by section 230(c)(2) (with leave to amend) a claim under Cal. Penal Code §§ 630 *et seq.*); *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in dismissing Holomaxx's virtually identical complaint against Yahoo!).

<sup>31</sup>See *Gavra v. Google Inc.*, 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013) (dismissing with prejudice an attorney's claims

for invasion of privacy, defamation, and “blackmail/extortion” arising from Google’s alleged failure to remove unflattering videos posted by a former client); *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs’ extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>32</sup>*See, e.g., Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice California state law claims for trademark infringement and dilution and unfair competition premised on Yahoo’s alleged use of *parts.com* as a keyword for sponsored link advertisements); *Perfect 10, Inc. v. Giganeews, Inc.*, CV11-07098 AHM SHX, 2013 WL 2109963, at \*15-16 (C.D. Cal. Mar. 8, 2013) (dismissing with leave to amend plaintiff’s California unfair competition claim as barred by the CDA because the pornographic images found on defendant’s website that were at issue in the case originated with third parties); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (Pennsylvania’s unfair trade practices and consumer law); *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (California Business & Professions Code § 17200), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (California law); *Stoner v. eBay, Inc.*, 56 U.S.P.Q.2d 1852, 2000 WL 1705637 (Cal. Super. Ct. Trial Div. 2000); (California law); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008) (Illinois Consumer Fraud Act); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of New York defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff’s picture superimposed on an image of Jesus with the statement “King of the Token Jews” next to negative user posts about the plaintiff); *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing an order for summary judgment for the plaintiff on its unfair or deceptive trade practices claim based on a North Carolina law making it unlawful to sell a ticket for more than \$3 over its face value (N.C. Gen. Stat. § 14-344) because StubHub, on online marketplace, was entitled to CDA immunity for a third party transaction that occurred through its website). *But see Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (Sup. 2010) (trial court opinion dismissing a defamation claim brought against Yelp! by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, but holding not preempted (although dismissing on the merits) a deceptive acts or practices claim based on the allegation that for \$300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback). *Reit v. Yelp!*, in addition to being a lower court decision, was decided prior to the time the New York Court of Appeals decided *Shiamili*.



Sports Memorabilia statute,<sup>33</sup> the Illinois Human Rights Act,<sup>34</sup> Maryland's anti-spamming statute,<sup>35</sup> the Texas Penal Code (for obscene or illegal material depicting plaintiffs on "revenge porn" websites),<sup>36</sup> and state statutes in New Jersey, Tennessee and Washington that criminalized advertisements for commercial sexual services or abuse of a minor,<sup>37</sup> among

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<sup>33</sup>See, e.g., *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002). In *Gentry*, an appellate court affirmed entry of a judgment of dismissal in a suit by buyers of allegedly fraudulent autographs who had sued eBay for a violation of the statute, Cal. Civ. Code § 1739.7, negligence and unfair competition.

*Gentry* is an important decision to the extent the court looked beyond the plain terms of the statute at issue—which requires that sellers of autographed sports memorabilia furnish a certificate of authenticity—to determine whether its effect was inconsistent with section 230(c). In finding that it was, the court wrote that “appellants’ allegations reveal [that] they ultimately seek to hold eBay responsible for conduct within the reach of section 230, namely, eBay’s dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties.”

<sup>34</sup>See, e.g., *Nieman v. Versuslaw, Inc.*, 12-3104, 2012 WL 3201931, at \*8 (C.D. Ill. Aug. 3, 2012) (agreeing with the Magistrate Judge that plaintiff’s claim under 775 Ill. Comp. Stat. Ann. 5/6–101(A) and/or 775 Ill. Comp. Stat. Ann. 5/6-101(B) was barred by the CDA because this and plaintiff’s other state law claims were “really variations of defamation and invasion of privacy claims . . . ,” although ultimately resting on other grounds in granting the defendant’s motion to dismiss), *aff’d*, 512 F. App’x 635 (7th Cir. 2013).

<sup>35</sup>See *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536–37 (D. Md. 2006) (holding a Maryland Commercial Electronic Mail Act claim preempted by the CDA). In *Beyond Systems, Inc.*, Judge Messitte of the District of Maryland held that an interactive computer service’s claim against another interactive computer service under the Maryland Commercial Electronic Mail Act (MCEMA) was preempted by the CDA. The plaintiff alleged that the defendant was on notice that its service was being used to disseminate unsolicited email. The court, however, found no evidence that any of the offensive emails were created or altered by the defendant and therefore the claim was based on information originating with another information content provider and preempted.

<sup>36</sup>See *GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged victims of the nonconsensual posting of pornographic images of themselves to two “revenge porn” websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA).

<sup>37</sup>See *Backpage.com, LLC v. Hoffman*, 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing “publishing, disseminating or displaying an offending online post ‘directly or indirectly’ as a ‘crime of the

other claims. In addition, the exemption has been applied to foreclose federal claims under the Computer Fraud and Abuse Act,<sup>38</sup> Fair Housing Act,<sup>39</sup> and Civil Rights Act,<sup>40</sup> and for civil remedies for material constituting or containing child pornography (pursuant to 18 U.S.C.A. § 2252A)<sup>41</sup> and to compensate victims of child sex trafficking.<sup>42</sup>

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first degree'” based on the court’s finding that the statute likely was preempted by the CDA); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230).

<sup>38</sup>See *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing as preempted by section 230(c)(2) (with leave to amend) plaintiff’s claim under the Computer Fraud and Abuse Act); *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in dismissing Holomaxx’s virtually identical complaint against Yahoo!); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008) (granting judgment on the pleadings in favor of Comcast under the section 230(c)(2) on claims for violations of the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030, infringement of free speech, tortious interference with prospective economic advantage and deceptive or unfair practices barred by the Illinois Consumer Fraud Act, arising out of Comcast’s blocking email from e360, a bulk emailer, to Comcast subscribers).

<sup>39</sup>See *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (holding the statute preempted by section 230(c)(1)). *But see Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*) (remanding for further consideration plaintiff’s Fair Housing Act claim and holding the defendant to be entitled to partial immunity under the CDA but also potentially liable as an information content provider for other aspects of its service); see generally *infra* § 37.05[3][C] (discussing both cases).

<sup>40</sup>See *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003).

<sup>41</sup>See *Doe v. Bates*, 35 Media L. Rep. (BNA) 1435, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (holding plaintiff’s claim, as mother and next friend of a child whose image was posted by a Yahoo! egroup moderator, for relief under 18 U.S.C.A. § 2252A(f) was barred by the CDA).

<sup>42</sup>See *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding claims of a victim of a child sex trafficker under 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595, brought against the publisher of Backpage, where sexually explicit ads of the minor plaintiff were placed, were preempted by the CDA).

CDA immunity also has been broadly applied to conduct, including even violent acts in the physical world, where liability against an interactive computer service provider or user for its own alleged conduct or failure to take action, however characterized or framed, ultimately is premised on publication of third party content (such as social network profiles or communications in chat rooms). Thus, for example, courts have held that the CDA preempts claims by parents against Internet sites and services where children have met adults who then allegedly abused them,<sup>43</sup> by a victim against the online dating site where she met her assailant,<sup>44</sup> and by the victim of a sex trafficker against the publisher of online classified ads as a result of which the plaintiff allegedly was victimized.<sup>45</sup> It has also been held to preempt claims by a tort victim against the Internet service where the plaintiff's assailant had allegedly purchased the gun used against him,<sup>46</sup> against a social network for failing to promptly remove a profile that allegedly led to violence,<sup>47</sup> for failing to act to prevent statements made in a chatroom or transmission of a

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<sup>43</sup>See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), cert. denied, 555 U.S. 1031 (2008); *Doe IX v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (Cal. App. 2009); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001).

In *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007), *aff'd on other grounds*, 551 F.3d 412 (6th Cir. 2008), the district court had held that the CDA preempted the common law tort and contract claims brought by an anonymous user of an "adult" dating service based on the service's failure to prevent minors from joining, but the Sixth Circuit ultimately affirmed the court's dismissal based on SexSearch's Terms and Conditions, without reaching the issue of the CDA's applicability. See *infra* § 37.05[6] (discussing the case in connection with social network liability).

<sup>44</sup>See *Beckman v. Match.com*, 2:13-CV-97 JCM NJK, 2013 WL 2355512 (D. Nev. May 29, 2013) (dismissing with prejudice plaintiff's claims for negligence (failure to warn) and negligent misrepresentation arising out of a brutal attack on the plaintiff by a man she met on Match.com because Match.com was immune under the CDA for claims based on information originating with a user of its website).

<sup>45</sup>See *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

<sup>46</sup>See *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (granting a motion to dismiss).

<sup>47</sup>See *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or

computer virus<sup>48</sup> or other security breaches,<sup>49</sup> and for strict product liability and related claims based on the Internet sales of an eBay user.<sup>50</sup> Courts in the Seventh Circuit, however, may be less likely than others to hold that the CDA preempts claims based on a defendant's alleged failure to act, even where the claim is premised on third party content, at least where the connection between liability and publication is indirect.<sup>51</sup> In addition, the Ninth Circuit, in

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provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence).

<sup>48</sup>See *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003) (chatroom statements and the alleged transmission of a virus).

<sup>49</sup>See *AF Holdings, LLC v. Doe*, 5:12-CV-02048-EJD, 2012 WL 4747170 (N.D. Cal. Oct. 3, 2012) (holding that plaintiff was immune from liability under the CDA for negligence based on the theory that Botson had a duty to secure his Internet connection to protect against unlawful acts of third parties).

<sup>50</sup>See *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (granting eBay's motion to dismiss claims for strict product liability, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose, negligence, negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 *et seq.* and various related regulations, and breach of express warranty based on an eBay seller's alleged sale of vacuum tubes that allegedly injured the plaintiff by causing mercury poisoning because "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA.").

<sup>51</sup>Judge Easterbrook narrowly construed section 230(c)(1) in *Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010), in which he held that a suit by the City of Chicago asserting that a platform used by buyers and sellers to resell event tickets was responsible for collecting a special city amusement tax on ticket sales was not preempted by the CDA. Judge Easterbrook wrote that subsection (c)(1) "limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.'" *Id.*; see also *Lansing v. Southwest Airlines Co.*, 980 N.E. 2d 630, 638–39 (Ill. App. 2012) (applying Seventh Circuit law in ruling that plaintiff's negligent supervision claim was not preempted by the CDA because section 230(c)(1) "limits who may be called the publisher or speaker of information that appears online . . . [and therefore] could foreclose any liability that depends on deeming the ICS user or provider a publisher or speaker . . . [but] was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve use of the Internet."), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012); *infra* § 37.05[3][B] (analyzing *Lansing*).

*Doe No. 14 v. Internet Brands, Inc.*,<sup>52</sup> held that a claim premised on an interactive computer service's failure to warn about a danger associated with the site (as opposed to a tort arising from an alleged failure to adequately regulate access to user content) falls outside the protections of the CDA.<sup>53</sup> This holding, however, appears to elevate form over sub-

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*Chicago v. StubHub* may be narrowly viewed as a case where liability was not premised on republication of third party speech. *See, e.g., Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 n.4 (N.C. App. 2012) (distinguishing *Chicago v. StubHub* because "the issue before the Seventh Circuit in that case was the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content."). Yet, *Chicago v. StubHub* plainly was a case where liability for collecting taxes was premised on transactions between StubHub users, based on sales listings published on StubHub. Judge Easterbrook's view in *Chicago v. StubHub* that "subsection 230(c)(1) does not create an 'immunity' of any kind" plainly reflects a narrower interpretation of the scope of CDA preemption than has been applied in other circuits. On the other hand, in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), Judge Easterbrook held that the CDA barred Fair Housing Act liability for user posts, but the connection between publication and liability arguably was stronger.

The difference between *Craigslist* and *Chicago v. StubHub* therefore could be viewed as analogous to the difference between general and proximate causation. Where liability is directly premised on publication of user content, a claim will be deemed preempted in the Seventh Circuit. Where the connection between liability and publication is more attenuated, it may not be preempted in the Seventh Circuit, even if it would be elsewhere. *See infra* § 37.05[3][B] (analyzing this issue in greater detail); *see also infra* § 37.05[3][C] (analyzing *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*).

<sup>52</sup>*Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014).

<sup>53</sup>In *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), the Ninth Circuit held that the CDA did not bar a claim by an aspiring model against the owners of Model Mayhem, a social networking site for people in the modeling industry, for its alleged negligent failure to warn her about two individuals who used the website as part of a scheme to lure her to a fake audition, where they proceeded to rape her. In that case, the site owner allegedly had actual knowledge of the threat posed by two individuals (Lavont Flanders and Emerson Callum) because Internet Brands had sued the former owners of Model Mayhem in 2010 for their failure to disclose the potential for civil suits arising from Flander's and Callum's prior misconduct towards models who posted profiles on the site. The Ninth Circuit panel held that the plaintiff did not seek to hold Internet Brands liable as a publisher or speaker, but rather for its own failure to warn her about how third parties targeted and lured victims through Model Mayhem. The court explained that "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content.

stance because many claims premised on a site's alleged

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Any obligation to warn could have been satisfied without changes to the content posted by the website's users." *Id.* at 897.

The appellate panel in *Doe No. 14* distinguished *Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (Cal. App. 2009), where the court had held that claims by users who had been victimized by people they met on MySpace were preempted by the CDA, because in that case the tort duty arose from a site's alleged failure to adequately regulate access to user content, as opposed to a duty to warn. *Doe No. 14*, 767 F.3d at 899–900. In *Doe II*, the California appellate court had emphasized that offline conduct was preempted because it arose from online content. *See Doe II v. MySpace, Inc.*, 175 Cal. App. 4th at 573–74. Needless to say, any litigator could easily replead a case alleging a failure to adequately regulate conduct on a website as one based on a failure to warn. The fine distinction drawn by the *Doe No. 14* panel is one that in practice would open the floodgates to litigation against Internet sites and services over content that heretofore had been precluded by the CDA.

Judge Richard Clifton, writing for himself, Judge Mary Schroeder and Eastern District of New York Judge Brian M. Cogan (sitting by designation), conceded that posting or emailing a warning could be deemed an act of publishing information, but he explained that “section 230(c)(1) bars only liability that treats a website as a publisher or speaker of content provided by somebody else: in the words of the statute, ‘information provided by another information content provider.’” *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894, 898 (9th Cir. 2014), quoting 47 U.S.C.A. § 230(c)(1). By contrast, he argued, “[a]n alleged tort based on a duty that would require . . . a self-produced warning therefore falls outside the scope of section 230(c)(1).” *Id.* at 898. Judge Clifton conceded that Internet Brands acted as the “publisher or speaker” of user content by hosting the plaintiff's Model Mayhem profile and that this action could be described as the “but-for” cause of her injuries because “[w]ithout it Flanders and Callum would not have identified her and been able to lure her to their trap” but he explained that “[p]ublishing activity is a but-for cause of just about everything Model Mayhem is involved in” and “the CDA does not provide a general immunity against all claims derived from third-party content.” *Id.* at 899. The Ninth Circuit panel also conceded that imposing tort liability on intermediaries could have a “chilling effect” on Internet speech, but reasoned that “Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.” *Id.*

*Doe No. 14* purports to draw a distinction between negligence arising out of user content and negligence for failing to warn about offline misconduct, but this distinction invites clever pleading of claims that courts outside the Ninth Circuit have found preempted. *See infra* § 37.05[3][B][ii] (collecting cases). Plaintiff's claim against the owner of Model Mayhem plainly arose out of her user profile. It also arguably arose out of the perpetrators' communications with the plaintiff over Model Mayhem, which similarly amount to content provided by another information content provider, although it does not appear that this argument was raised by the defendant in *Doe No. 14*. It is likely that the appellate panel

negligence with respect to user content (which otherwise would be preempted by section 230(c)(1)) potentially could easily be re-pled as claims based on a failure to warn. Ultimately, the case may come to be viewed as anomalous, where a site had actual knowledge of third party misconduct and failed to warn users, and therefore construed very narrowly.<sup>54</sup> Nevertheless, *Doe No. 14* is potentially concerning because it is inconsistent with numerous other cases discussed in this subsection that broadly apply the CDA in similar circumstances and because it creates an exception that will be very easy for plaintiff's lawyers to exploit simply by recharacterizing content claims in terms of a failure to warn.

The Good Samaritan exemption has been held to immunize locations that post information about alleged spammers.<sup>55</sup> It

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failed to appreciate that the misconduct occurred not merely by virtue of a third party but because of that third party's communications, much like in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008) and the other conduct cases discussed in this subsection and in subsection 37.05[3][B][iii].

It is likely that the case would have been decided differently in other circuits or in state court. *See infra* § 37.05[3][B][iii] (collecting cases).

<sup>54</sup>The exception created by *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), could not be expanded to circumstances where an interactive computer service failed to warn about a situation that it knew or should have known about based on user content without eviscerating CDA protection.

<sup>55</sup>In *Optinrealbig.com, LLC v. Ironport Systems, Inc.*, 323 F. Supp. 2d 1037 (N.D. Cal. 2004), Judge Armstrong of the Northern District of California denied a preliminary injunction sought by a bulk commercial email service to prevent a spam complaint business from transmitting reports of alleged spam to anyone other than its ISP and from removing the email addresses of complainants in its reports. In that case, defendant SpamCop forwarded complaints from registered users to all ISPs it believed may have been used to transmit spam. SpamCop removed email addresses from reports it retransmitted to service providers (to protect the privacy of its registered users) but did not otherwise edit or alter the reports. Accordingly, the court found that it was exempt from state law liability for trade libel, intentional interference with contractual relations and unfair competition claims under the Good Samaritan exemption. As an alternative ruling, the court denied plaintiff's request for a preliminary injunction on the merits, finding in part that OptIn itself was responsible for damage to its reputation caused by the spam reports and that SpamCop could not be held accountable for what ISPs do with the information once it retransmits complaints to them. *See generally infra* § 29.08[2] (discussing the Good Samaritan exemption's application in spam-related cases).

also extends to consumer feedback and criticism<sup>56</sup> and gossip<sup>57</sup> sites, but not where a site owner creates its own content or otherwise crosses the line and acts as an information content provider.<sup>58</sup>

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<sup>56</sup>See, e.g., *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (affirming dismissal of a claim against a consumer criticism site on a Rule 12 motion to dismiss because the necessary facts justifying dismissal were apparent on the face of the complaint); *Ascensive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (holding preempted by the CDA plaintiff's claim that the defendant was liable as an information content provider for encouraging negative comments, inviting consumers to post public complaints on its website, displaying those negative posts as prominently as possible, and increasing the prominence of its webpages by various means, including using plaintiff's trademarks); *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs' extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014); *Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (holding that defendant's allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section 230 because "[i]ncreasing the visibility of a statement is not tantamount to altering its message" and, "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found."); *GW Equity LLC v. Xcentric Ventures LLC*, Civil Action No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009) (affirming the Magistrate Judge's recommendation to enter summary judgment for the defendant in a suit over postings on RipoffReport.com and BadBusinessBureau.com, where the plaintiff alleged that the defendants developed the offending content and objected that the Magistrate Judge had not considered the *Roommate.com* case); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (dismissing a claim alleging that RipoffReport.com and its owners were liable for actively soliciting defamatory material and for keeping an allegedly defamatory post on its site after the author asked that it be removed); *infra* § 37.05[3][D][ii] (analyzing CDA issues associated with gripe sites).

<sup>57</sup>See, e.g., *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating a jury verdict for the plaintiff and reversing the district court's order denying defendant's motion for judgment in a case brought against the website TheDirty.com).

<sup>58</sup>See, e.g., *Whitney Information Network, Inc. v. Xcentric Venture, LLC*, 199 F. App'x 738 (11th Cir. 2006) (vacating and remanding a lower court order dismissing the case for failing to meet the requirements of Florida's long arm statute where the plaintiff alleged that the defendants, operators of *badbusinessbureau.com*, rewrote consumer posts to add words such as "ripoff," "dishonest," and "scam," and knowingly fabricated entire consumer complaints which were then attributed to anonymous writers or



On the other hand, the operator of a pay-for-priority Internet search engine was held not eligible for CDA immunity (in the face of claims under the federal Telemarketing and Consumer Fraud and Abuse Prevention Act<sup>59</sup> and for fraud under New Jersey law) by a trademark owner who alleged that the defendant was liable for using its marks in the bidding process, and not solely for the third-party information displayed on search results pages.<sup>60</sup> In that case, the plaintiff had alleged that the search engine itself was responsible for the alleged misconduct, giving competitors' search results greater prominence without any indication that site ranking were based on paid advertising rather than actual relevance.<sup>61</sup>

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people with phony names, taking them outside the scope of the CDA exemption and therefore subject to jurisdiction based on conduct directed to a Florida resident); *Certain Approval Programs, LLC v. XCentric Ventures LLC*, No. CV08-1608-PHX-NVW, 2009 WL 596582 (D. Ariz. Mar. 9, 2009) (granting leave to amend to allow plaintiff to allege that defendant "Ripoff Report" created or developed content and was therefore acting as an information content provider, rather than merely an interactive computer service provider); *Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008) (declining to dismiss claims against an Internet publisher who was alleged to have posted statements on its website by fictitious people, creating the false impression that the postings were from bona fide disgruntled patients of the plaintiffs' hair restoration clinic); *Energy Automation Systems, Inc. v. Xcentric Ventures, LLC*, No. 3:06-1079, 2007 WL 1557202 (M.D. Tenn. May 25, 2007) (denying defendant's motion to dismiss, which the court treated as a motion for summary judgment, and lifting a stay on discovery, where the plaintiff alleged that the defendants created and developed the allegedly defamatory content at issue and therefore that the protections afforded by the CDA did not apply); *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005) (denying a motion to dismiss based on the CDA where the plaintiff alleged that the defendant had produced editorial comments, titles and other original content contained in allegedly defamatory postings); *MCW, Inc. v. Badbusinessbureau.com, LLC*, Civ. A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004) (denying defendants' motion to dismiss, holding that badbusinessbureau.com and ripoffreport.com and their owner could be liable as information content providers for the postings (titles, headlines and editorial messages) which plaintiff alleged they created as original material, developed and posted); see generally *infra* § 37.05[3][D][ii].

<sup>59</sup>15 U.S.C.A. § 6102(b).

<sup>60</sup>*800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295-96 (D.N.J. 2006).

<sup>61</sup>Major search engines such as Google, Bing and Yahoo! clearly distinguish sponsored links from natural search results. See generally *supra* § 9.11[3] (analyzing sponsored links).

In ruling on CDA defenses, some courts have conflated subparts (c)(1) and (c)(2)(A) or simply cited section 230(c) without specifically explaining the basis for a decision or the inter-relationship between the subparts, as addressed above in section 37.05[1][A]. Few have closely analyzed the structure of section 230 and what the different subparts provide.

The CDA will exempt an interactive computer service provider or user from liability if *either* section 230(c)(1) or section 230(c)(2)(A) applies. A provider or user's inability to qualify for both exemptions will not defeat protection if the provider or user meets the criteria for either one. In *Donato v. Moldow*,<sup>62</sup> for example, the court rejected the plaintiff's argument that the defendant should be held liable for third-party posts, and not protected by the CDA, because he acted with malice and had admitted that he harbored a long-standing resentment against the plaintiff, thereby negating the good faith requirement of subpart 230(c)(2)(A). The court explained that subpart 230(c)(2)(A) "was inserted not to diminish the broad general immunity provided by § 230(c)(1), but to assure that it *not* be diminished by the exercise of traditional publisher functions. If the conduct falls within the scope of the traditional publisher functions, it cannot constitute, within the context of § 230(c)(2)(A), bad faith."<sup>63</sup> While the court's analysis of what constitutes bad faith may be challenged, its recognition that subparts (c)(1) and (c)(2)(A) address potentially overlapping but fundamentally separate grounds for finding immunity is sound.

Section (c)(1) by its terms applies to defamation and other claims (such as invasion of privacy) that are premised on publisher liability or speech, so long as the interactive computer service provider or user is not an information content provider with respect to the specific material at issue. Section (c)(2)(A), by contrast, should apply more broadly to a whole range of claims (including, but not limited to, defamation)—especially those where a duty otherwise could arise from screening or monitoring a site—so long as the party asserting the exemption took *any action*, voluntarily and in good faith, that would entitle it to benefit from the exemption. The scope of subparts (c)(1) and (c)(2)(A) are analyzed in,

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<sup>62</sup>*Donato v. Moldow*, 374 N.J. Super. 475, 490, 497–98, 865 A.2d 711 (App. Div. 2005).

<sup>63</sup>374 N.J. Super. at 500, 865 A.2d at 727.

respectively, sections 37.05[3] and 37.05[4].

As noted earlier,<sup>64</sup> the Good Samaritan exemption was intended to overrule *Stratton Oakmont v. Prodigy Services, Inc.*,<sup>65</sup> discussed above in section 37.04[3], in which an interactive computer service was held to the standard of a publisher, rather than a distributor, for allegedly defamatory content posted on its service, because it had issued content guidelines, used software to delete certain offensive terms and monitored chat rooms to promote more civil, family-oriented discourse. The statute also was intended to encourage interactive computer services to do what Prodigy had done in that case and restrict access to or the availability of material deemed objectionable by a service or its users. The question left unexplained by the plain terms of the statute was just how far the exemption would reach in overruling *Stratton Oakmont* (in subpart (c)(1)) and encouraging actions voluntarily taken in good faith to restrict access to or the availability of material that the provider or user considers to objectionable (in subpart (c)(2)(A)).

The Committee Report accompanying the Telecommunications Act provides only limited guidance. Its discussion of the Good Samaritan exemption, in its entirety, reads as follows:

This section provides “Good Samaritan” protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

These protections apply to all interactive computer services, as defined in new subsection 230(e)(2),<sup>66</sup> including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software provid-

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<sup>64</sup>See *supra* § 37.05[1][A].

<sup>65</sup>*Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995).

<sup>66</sup>This provision now is codified at section 230(f)(2).

ers, as defined in new section 230(e)(5),<sup>67</sup> including providers of proxy server software.

The conferees do not intend, however, that these protections from civil liability apply to so-called “cancelbotting,” in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.<sup>68</sup>

The Report states that the Good Samaritan exemption was intended to overrule *Stratton Oakmont v. Prodigy Services, Inc.* and any other similar decisions<sup>69</sup> that had treated online “providers and users as publishers and speakers of content that is not their own because they have restricted access to objectionable material.”<sup>70</sup> The express legislative findings included in the statute itself<sup>71</sup> put in context Congress’s concern in 1996 that the then-nascent growth of the Internet could be adversely affected by a liability standard that effectively shifted to site owners and service

<sup>67</sup>This provision now is codified at section 230(f)(5).

<sup>68</sup>Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996).

<sup>69</sup>At the time of the bill’s passage there were no other similar decisions that had treated providers and users as publishers and speakers of third party content because they restricted access to the material. The only other Internet defamation case widely known at the time was *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), in which CompuServe was held to standard of a distributor, not a publisher, and did not restrict access to objectionable material. See generally *supra* § 4237.04[2] (discussing *Cubby*). The only case that fits the description in the legislative history is *Stratton Oakmont* itself.

<sup>70</sup>Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996).

<sup>71</sup>The Congressional findings are as follows:

- (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.

47 U.S.C.A. § 230(a).

providers liability for user misconduct that they could not control. Indeed, *Stratton Oakmont* itself was a case where the defendant had been sued for one of its users engaging in the very kind of behavior that Prodigy had gone to great lengths to try to prevent.

The irony that Prodigy could be afforded *less* protection for taking voluntary measures in good faith to restrict the kind of coarse communications that underlay plaintiff's claim in *Stratton Oakmont* undoubtedly was not lost on Congress. The "Good Samaritan" exemption thus was intended to serve the dual objectives of overruling *Stratton Oakmont* to strengthen the development of the Internet by protecting interactive computer services and users and to encourage them to do the very sorts of things that Prodigy had done in policing its domain for adult material or content deemed otherwise objectionable by a provider or its users. These twin purposes can be seen in the two major subparts of section 230(c) of the Good Samaritan exemption, which are discussed below (along with cases construing each provision) in sections 37.05[3] and 37.05[4].

### **37.05[2] Defining *Interactive Computer Service***

The Good Samaritan exemption applies to providers and users of *interactive computer services*. Both providers *and* users<sup>1</sup> may benefit from the exemption.

An interactive computer service is "*any* information service, system or access software provider<sup>2</sup> that provides or enables computer access by multiple users to a computer server, including specifically a service or system that

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#### **[Section 37.05[2]]**

<sup>1</sup>See, e.g., *Directory Assistants, Inc. v. Supermedia, LLC*, 884 F. Supp. 2d 446, 450–51 (E.D. Va. 2012) (dismissing with prejudice claims against an individual user who forwarded by email articles posted online); *Novins v. Cannon*, Civ. No. 09–5354, 2010 WL 1688695 (D.N.J. Apr. 27, 2010); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006); *Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (suit based on forwarding an email message); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005).

<sup>2</sup>An access software provider is defined as "a provider of software . . . or enabling tools that do any 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, or translate content." 47 U.S.C.A. § 230(f)(4).

provides access to the Internet . . . .”<sup>3</sup> By its terms, this definition is very broad. It “includes a wide range of cyberspace services, not only *internet service providers* . . . .”<sup>4</sup>

The definition is broad enough to also include providers and users of blogs, social networks, wiki, intranets, extranets and other networked computers, whether or not connected to the Internet. Indeed, almost any networked computer would qualify as an interactive computer service, as would an access software provider.

Among other things, courts have found traditional ISPs,<sup>5</sup> website hosts,<sup>6</sup> owners and operators of websites,<sup>7</sup> Internet search engines and portals,<sup>8</sup> Internet dating services,<sup>9</sup> blogs

<sup>3</sup>47 U.S.C.A. § 230(f)(2) (emphasis added).

<sup>4</sup>*Batzel v. Smith*, 333 F.3d 1018, 1030 n.15 (9th Cir. 2003); *see also Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (stating the same proposition); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010) (“As the internet communities have developed, so has the case law. Although much of the initial CDA immunity was granted to internet service providers like AOL, . . . [the defendant] incorrectly asserts that the immunity ends with such providers.”).

<sup>5</sup>*See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 (10th Cir. 2000); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (email provider); *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (email provider).

<sup>6</sup>*See, e.g., Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010).

<sup>7</sup>*See, e.g., Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (RagingBull.com site, which hosted financial message boards); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (Consumeraffairs.com, a website that allowed users to post product and business reviews); *Batzel v. Smith*, 333 F.3d 1018, 1021 (9th Cir. 2003) (non-profit website providing information on stolen art); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (PissedConsumer.com website, a commercial gripe site); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010) (university newspaper website).

<sup>8</sup>*See, e.g., Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (Ask.com); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (Google), *aff’d mem.*, 242 F. App’x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 156 (2008).

<sup>9</sup>*See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120 (9th Cir. 2003).

and other electronic bulletin boards<sup>10</sup> (including gossip sites trading in “dirt”),<sup>11</sup> social networks,<sup>12</sup> online vendors,<sup>13</sup> online marketplaces for auction-style sales<sup>14</sup> or where sellers set prices,<sup>15</sup> online book vendors,<sup>16</sup> a domain name registrar,<sup>17</sup> the owner of corporate networks, whose networks were used by individuals to post allegedly dematory statements on third party sites,<sup>18</sup> and the operator of a Kinko’s copy shop that allowed customers to pay for hourly access to computers linked to the Internet<sup>19</sup> to constitute *interactive computer service* providers. In addition, a distributor of Internet security software that filtered adware and malware was held to be an *access software provider*, which by definition qualifies as an

<sup>10</sup>See, e.g., *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005) (electronic bulletin board service).

<sup>11</sup>See, e.g., *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (the website, TheDirTy.com).

<sup>12</sup>See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801–02 (N.D. Cal. 2011); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009).

<sup>13</sup>See, e.g., *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37, 40–41 (Div. 1 2001) (online book seller).

<sup>14</sup>*Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n.7, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (writing that eBay “enables users to conduct sales transactions, as well as provide information (feedback) about other users of the service.”).

<sup>15</sup>See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 557 (N.C. App. 2012) (holding StubHub to operate an interactive computer service).

<sup>16</sup>*Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (holding Amazon.com and BarnesandNoble.com, LLC, among others, entitled to immunity under the CDA); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 461, 31 P.3d 37 (Div. 1 2001) (noting that Amazon.com “enables visitors to the site to comment about authors and their work, thus providing an information service that necessarily enables access by multiple users to a server.”).

<sup>17</sup>*Smith v. Intercosmos Media Group, Inc.*, No. Civ. A. 02–1964, 2002 WL 31844907 (E.D. La. Dec. 27, 2002) (defamation suit).

<sup>18</sup>See *Miller v. Federal Express Corp.*, 6 N.E.3d 1006, 1017 (Ind. Ct. App. 2014) (affirming summary judgment for the defendants in a suit for defamation and intentional infliction of emotional distress based on posts made to a newspaper website by employees of the two corporate defendants, whose posts were made using company computers, based on the finding that the companies qualified as interactive computer service providers and that appellants’ claims were preempted by the CDA).

<sup>19</sup>See *PatentWizard, Inc. v. Kinko’s, Inc.*, 163 F. Supp. 2d 1069 (D.S.D. 2001).

interactive computer service.<sup>20</sup>

Employer owned networks, including intranets and extranets, also qualify. The Committee Report accompanying the Act explains that the Good Samaritan “protections apply to all interactive computer services, as defined in new subsection 230(e)(2),<sup>21</sup> including non-subscriber systems such as those operated by many businesses for employee use.”<sup>22</sup> At least two state courts have also held an employer network protected by the CDA,<sup>23</sup> although strangely the court in the first case did not reference the Committee Report in support of its holding.<sup>24</sup>

In another case, third party employers were held to qualify as interactive computer services in suits brought against the companies for Internet posts by their employees.<sup>25</sup>

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<sup>20</sup>See *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173–74 (9th Cir. 2009). An interactive computer service is defined under the Act as “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 . . . .” 47 U.S.C.A. § 230(f)(2) (emphasis added).

<sup>21</sup>As a result of a 1998 amendment to the statute, the definition of interactive computer service, which originally was codified at 47 U.S.C.A. § 230(e)(2), today is found in section 230(f)(2).

<sup>22</sup>Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 208.

<sup>23</sup>See *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 805–06, 52 Cal. Rptr. 3d 376, 388–90 (6th Dist. 2006) (holding an employer immune under section 230 from an action for intentional and negligent infliction of emotional distress brought against the employer of the person who used the employer’s computer system to transmit Internet threats); *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 637 (Ill. App.) (ruling that plaintiff’s negligent supervision claim was not preempted by the CDA but citing *Delfino* and the Conference Report in holding that “under the plain language of the statute and its broad definition of an ICS, an employer like the defendant qualifies as a provider or user of an ICS because defendant uses an information system or service that multiple users, like defendant’s employees, use to access the Internet.”), appeal denied, 979 N.E. 2d 878 (Ill. 2012).

<sup>24</sup>See *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 805–06, 52 Cal. Rptr. 3d 376, 388–90 (6th Dist. 2006).

<sup>25</sup>See *Miller v. Federal Express Corp.*, 6 N.E.3d 1006, 1017 (Ind. Ct. App. 2014) (affirming summary judgment for the defendants in a suit for defamation and intentional infliction of emotional distress based on posts made to a newspaper website by employees of the two corporate defendants, whose posts were made using company computers, based on



In *FTC v. Accusearch, Inc.*,<sup>26</sup> the Federal Trade Commission argued that the term *interactive computer service* necessarily is limited to bulletin boards and other *interactive* sites and excludes websites that merely permit users to conduct the same type of retail commerce that they could in a store on *terra firma* (and by extension to sites that merely republished medical or other journals created by third parties). Although the Tenth Circuit panel in *Acusearch* found it unnecessary to reach this argument, it rightly expressed skepticism that the term should be so narrowly construed, writing that “Section 230(f)(2) does not say that an interactive computer service must facilitate action among third parties; rather, it says that an interactive computer service is one that ‘provides or enables computer access by multiple users to a computer server.’”<sup>27</sup>

In addition to exempting providers of interactive computer services, the CDA also insulates *users*.<sup>28</sup>

In at least one reported case, the owner of an interactive computer service was also held to be entitled to CDA immunity to the extent he had been sued in his capacity as a provider.<sup>29</sup>

The immunity afforded by section 230 applies to users and providers of interactive computer services, which as noted earlier in this sub-section may include both entities and individuals that republish third party content within the

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the finding that the companies qualified as interactive computer service providers and that appellants’ claims were preempted by the CDA).

<sup>26</sup>*FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

<sup>27</sup>*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009), *citing* 47 U.S.C.A. § 230(f)(2) (emphasis added by the court).

<sup>28</sup>Users were held exempt from liability in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006) and *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005). *See generally infra* § 37.05[2].

<sup>29</sup>*See Klayman v. Zuckerberg*, 753 F.3d 1354, 1357–58 (D.C. Cir. 2014) (holding Mark Zuckerberg entitled to protection as a “provider” of Facebook’s interactive computer service, in addition to Facebook, where the plaintiff had sought to hold him accountable for his role in making the service available); *see also Seldon v. Magedson*, No. 11 Civ. 6218 (PAC)(MHD), 2012 WL 4475274, at \*16 (S.D.N.Y. July 10, 2012) (holding that the individual operator of an interactive computer service was considered to be a provider of interactive computer services and thus granted section 230 immunity).

meaning of section 230(c)(1)<sup>30</sup> or restrict access to objectionable content in good faith, within the meaning of section 230(c)(2).<sup>31</sup>

At least two district courts have held that owners or officers of entities that are interactive computer service providers also may be entitled to section 230(c)(1) immunity.<sup>32</sup>

CDA immunity for the conduct by moderators of blogs and discussion forums is separately considered in section 37.05[3][D][iv].

### **37.05[3] Subpart 230(c)(1): Publisher or Speaker Liability**

#### **37.05[3][A] In General**

Section 230(c)(1) does not immunize interactive computer service providers or users *for their own defamatory communications* (or other misconduct). It merely exempts them from liability for “information provided by another content

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<sup>30</sup>See generally *infra* § 37.05[3] (analyzing the scope of section 230(c)(1) preemption).

<sup>31</sup>See generally *infra* § 37.05[4] (analyzing the scope of section 230(c)(2) preemption).

<sup>32</sup>See, e.g., *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (holding officers of the website PissedConsumer.com, which was found to be an interactive computer service, were themselves entitled to the same CDA immunity as “providers” of an interactive computer services, within the meaning of section 230(c)); *Whitney Information Network Inc. v. Xcentric Ventures, LLC*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at \*8 (M.D. Fla. Feb. 15, 2008) (granting summary judgment on plaintiff’s defamation claim based on content posted on RipOffReport.com). Cf. *MCW, Inc. v. Badbusinessbureau.com, LLC*, Civ. A.3:02-CV-2727-G, 2004 WL 833595, at \*9 (N.D. Tex. Apr. 19, 2004) (holding that an individual defendant was not entitled to CDA immunity where, among other things, he was consistently portrayed as an individual who neither owned nor operated the defendant website).

The court’s analysis in *Whitney Information Network Inc.*, an unreported decision, is not rock solid. In that case, immunity under section 230(c)(1) was premised on the individual owner of *RipOffReport.com* (Ed Magedson) being either a provider or a user of the corporate interactive computer service defendant, but the scope of section 230 plainly was not intended to reach to all users (or indeed those directly liable as information content providers also would be immunized). In *MCW*, an earlier case, the same owner of the same corporate defendant was held to not be entitled to CDA immunity based on a failure of proof that was corrected subsequently in *Whitney Information Network Inc.*

provider.”<sup>1</sup> “[T]he original culpable party” remains liable.<sup>2</sup>

Section 230(c)(1) exempts interactive computer service providers and users from third-party liability premised on their status as a publisher or speaker if, and only if, the material at issue constitutes “information provided by another information content provider.”<sup>3</sup> Some courts characterize this in terms of a three part test: a defendant is exempt from liability under section 230(c)(1) if: (a) the defendant is a provider or user of an interactive computer service; (b) the claim is based on information provided by another content provider; and (c) the asserted claim would treat the defendant as the “publisher or speaker” of the information.<sup>4</sup> This test is generally accurate as a statement of the elements of section 230(c)(1), provided the claim at issue is one that falls within the scope of section 230 (as determined by section 230(e)).<sup>5</sup> Thus, it is not a complete test for determining

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**[Section 37.05[3][A]]**

<sup>1</sup>47 U.S.C.A. § 230(c)(1).

<sup>2</sup>*Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

<sup>3</sup>47 U.S.C.A. § 230(c)(1).

<sup>4</sup>*See, e.g., Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 409 (6th Cir. 2014); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008), *aff'd*, 591 F.3d 250 (4th Cir. 2009); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002); *Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 317, 16 A.3d 1113, 1120–21 (2010); *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 556 (N.C. App. 2012); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37, 40 (Div. 1 2001).

A slightly different formulation was suggested in an earlier California trial court opinion. *See Stoner v. eBay, Inc.*, 56 U.S.P.Q.2d 1852, 2000 WL 1705637 (Cal. Super. Ct. Trial Div. 2000). In that case, San Francisco Superior Court Judge Stuart Pollack ruled that eBay, Inc., as the party asserting the exemption, was required to prove that: (a) the defendant is an interactive computer service provider; (b) the defendant is not an information content provider with respect to the material at issue or the disputed activity; and (c) the plaintiff’s claim is based on content that originated with a third party.

<sup>5</sup>*See* 47 U.S.C.A. § 230(e) (effects on other laws); *see generally supra* § 37.05[1][C] (discussing the subject matter scope of preemption); *infra* § 37.05[5] (analyzing exclusions).

whether a claim is preempted by section 230(c)(1).<sup>6</sup>

The scope of the statute and its subject matter exclusions must also be considered. A claim seemingly preempted by section 230(c)(1) may be excluded from protection by section 230(e) if it pertains to intellectual property or involves a federal criminal statute or the federal Electronic Communications Privacy Act or similar state laws. Conversely, a claim not preempted by section 230(c)(1) may nonetheless be preempted by section 230(c)(2).<sup>7</sup>

Section 230's coverage and exclusions are analyzed in sections 37.05[1] and 37.05[5]. Although infrequently an issue, what constitutes an interactive computer service is considered in section 37.05[2].

As analyzed in the following subsections (sections 37.05[3][B][ii], 37.05[3][B][iii], 37.05[3][C] and 37.05[3][D]), the Fourth and Sixth Circuits arguably provide the greatest protection for interactive computer service providers and users under section 230(c)(1). The Ninth and Tenth Circuits have broadly construed *development*, which necessarily narrows the scope of CDA immunity by expanding the circumstances under which CDA immunity may not apply, but even in the Ninth Circuit Chief Judge Kozinski made clear there is a high bar set to find *development* and questionable cases must be resolved in favor of immunity. The Seventh Circuit does not view the CDA as affording immunity and may view narrowly what constitutes liability imposed for publishing or speaking, but where applicable broadly applies protection to interactive computer service providers and users.

The following subsections address the scope of preemption under section 230(c)(1) and the exclusion from section 230(c)(1)'s coverage for information provided by another information content provider.

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<sup>6</sup>As a general proposition, courts should avoid multi-part tests or other mechanical approaches to the broadly worded provisions of section 230, which could increase the chances of reaching an incorrect conclusion, especially in a close case.

<sup>7</sup>Section 230(c)(2) is separately analyzed in section 37.05[4].

**37.05[3][B] *Zeran v. America Online* and the  
Development of Case Law on  
Preemption of Defamation and Other  
Claims**

**37.05[3][B][i] *Zeran v. America Online, Inc.* and  
Preemption of Publisher Liability**

The Good Samaritan exemption overruled *Stratton Oakmont* (in subpart (c)(1)) and went further in sub-part (c)(2)(A) in affirmatively encouraging the kind of screening and monitoring for adult material that had been undertaken by Prodigy in that case.<sup>1</sup> Congress, however, did not explicitly state what legal standard would replace the one it overruled.

In *Zeran v. America Online, Inc.*,<sup>2</sup> which generated both the first district court opinion and then the first circuit court opinion to construe the scope of section 230(c), the Fourth Circuit agreed with the district court in holding that section 230(c)(1)—in eliminating liability for *publishers* or *speakers*—not only reversed *Stratton-Oakmont*, and foreclosed online republication liability, but preempted any claims based on distributor liability (liability where a defendant knows or should have known that material was defamatory) under the common law standard applied in *Cubby, Inc. v. CompuServe, Inc.*<sup>3</sup>

In *Zeran*, a pseudonymous AOL subscriber had posted plaintiff Kenneth M. Zeran's name and home phone number on purported advertisements for highly offensive and vulgar T-shirts celebrating the 1995 bombing of the Oklahoma City federal building and praising accused bomber Timothy McVeigh.<sup>4</sup> Zeran contacted AOL to take down the message, but each time it was removed similar messages were

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**[Section 37.05[3][B][i]]**

<sup>1</sup>See *supra* §§ 37.05[1] (scope of the exemption in general), 37.04[3] (discussing *Stratton Oakmont* and the family friendly measures Prodigy implemented in that case, which led to liability).

<sup>2</sup>*Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

<sup>3</sup>*Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *supra* § 37.04[2].

<sup>4</sup>The first advertisement was posted by “Ken ZZ03” and, under the heading “Naughty Oklahoma T-Shirts,” invited AOL subscribers to call Ken—the plaintiff’s first name—at plaintiff’s actual phone number, to purchase shirts with slogans such as “Putting the Kids to Bed . . . Oklahoma 1995” and “McVeigh for President 1996.”

reposted. To make matters worse, a radio disc jockey in Oklahoma City received a copy of the bogus posting and read it on the air, urging his listeners to call “Ken” to complain. Zeran claimed to have received angry and offensive telephone calls as a result of the postings at the rate of about one every two minutes.

In affirming the district court’s judgment for AOL on Zeran’s claims, the Fourth Circuit explained, “[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”<sup>5</sup> The court also held that to effectuate Congressional policy, the scope of immunity under section 230 should be broadly construed.<sup>6</sup>

In so ruling, the Fourth Circuit rejected Zeran’s argument that AOL could be held liable because it had received notice of the allegedly defamatory postings. The Fourth Circuit also ruled that AOL was exempt from liability for allegedly delaying in removing the offending messages, failing to issue retractions, and failing to screen for similar postings.<sup>7</sup> The court elaborated that section 230 “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”<sup>8</sup>

Judge Wilkinson, writing for the panel, argued that “[i]f computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message.” This liability standard would impose an incentive for interactive service providers to censor speech:

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<sup>5</sup>*Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

<sup>6</sup>*Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998); see also, e.g., *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–419 (1st Cir. 2007) (quoting *Zeran* for the same proposition).

<sup>7</sup>*Zeran v. America Online, Inc.*, 129 F.3d 327, 328–34 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

<sup>8</sup>*Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory characters, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. *Cf. Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, . . . (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.<sup>9</sup>

*Zeran* and subsequent cases have broadly construed subpart (c)(1) of the Good Samaritan exemption to eliminate virtually any third party liability for content originating with someone else (even where a defendant is put on notice of the allegedly unlawful nature of a post),<sup>10</sup> both in defamation suits and, as discussed above in section 37.05[1], other cases where liability is premised on an interactive computer service provider or user acting as a publisher or speaker, including claims for a broad range of torts, state common

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<sup>9</sup>Judge Wilkinson further wrote:

In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . . 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." *Id.* § 230(b)(2) (emphasis added).

<sup>10</sup>*See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006).

law and statutory claims and even federal statutes.<sup>11</sup>

In view of the broad interpretation given to *publisher* and *speaker*, the question most frequently litigated in section 230(c)(1) cases is whether the defendant acted as an *information content provider*, or *developed* the content at issue, and therefore is not entitled to the Good Samaritan exemption.<sup>12</sup> Depending on the nature of the content or functions performed, a defendant, at least in the Ninth and Tenth Circuits,<sup>13</sup> potentially may be treated as an interactive computer service for some purposes (or with respect to certain content) and an information content provider for others. This issue is analyzed in sections 37.05[C] and 37.05[D].

Except where limited because an interactive computer service provider or user is also deemed an information content provider, the scope of preemption under section 230(c)(1) is very broad and even covers third party misconduct or a provider's own failure to act, provided that liability for the act or omissions is premised on information originating with another information content provider.<sup>14</sup> On the other hand, courts in the Seventh Circuit do not treat section 230(c)(1) as creating an immunity from liability and therefore, in some cases, may apply section 230(c)(1) more narrowly.<sup>15</sup>

### **37.05[3][B][ii] Third Party Conduct as Content and Alleged Failures to Act**

As analyzed more extensively in section 37.05[1][C], section 230(c)(1) has been broadly construed to preempt claims based on content that originates with another information content provider, including potentially claims based on third party *conduct*, which online usually takes the form of content, provided that the interactive computer service

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<sup>11</sup>See *supra* § 37.05[1][C] (enumerating claims); *infra* § 37.05[5] (analyzing exceptions).

<sup>12</sup>See *infra* §§ 37.05[3][C], 37.05[3][D].

<sup>13</sup>See *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (*en banc*); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009); see also *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 n.4 (10th Cir. 2000) (noting that "Defendant conceded that in an appropriate situation, an interactive computer service could also act as an information content provider by participating in the creation or development of information, and thus not qualify for § 230 immunity.").

<sup>14</sup>See *infra* § 37.05[3][B][iii].

<sup>15</sup>See *infra* § 37.05[3][B][iii].



provider's alleged liability is premised on third party content, and for failing to act to prevent harm where the service provider's liability is premised on publication of third party content. Conduct and failure to act cases have been deemed preempted by section 230(c)(1) where courts characterize a claim as amounting to an attempt to hold a provider liable as a publisher or speaker of material originating with another information content provider.

For example, in *Green v. America Online*,<sup>1</sup> the court rejected arguments that plaintiff's claim over allegedly defamatory material posted about him in a chat room and a computer virus sent to him from a third party were not preempted by section 230(c)(1) because they involved AOL's own misconduct, as opposed to content posted by third parties for which the plaintiff sought to hold AOL liable as the publisher or speaker.<sup>2</sup>

Similarly, in *Doe v. MySpace, Inc.*,<sup>3</sup> the court rejected the assertion that MySpace could be held liable for failing to implement measures that would have prevented a minor from being contacted by a predator. The Fifth Circuit panel wrote that these "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."<sup>4</sup> Likewise, in *Doe v. America Online, Inc.*,<sup>5</sup> the Florida Supreme Court held that section 230(c)(1) immunized AOL from claims that the company should have been held liable for a pedophile's sales

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**[Section 37.05[3][B][ii]]**

<sup>1</sup>*Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003).

<sup>2</sup>The plaintiff had argued that AOL had waived its immunity by its terms of membership contract and because AOL's Community Guidelines outlined standards for online speech and conduct and contained promises that AOL would protect him from other subscribers. The court treated these allegations as a claim that AOL was negligent in promulgating harmful content and in failing to address harmful content on its network, which it held was preempted.

<sup>3</sup>*Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008).

<sup>4</sup>*Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008); *see also Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (holding MySpace exempt from claims based on minors who allegedly were abused by people they met on MySpace).

<sup>5</sup>*Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001).

and marketing of photos and videotapes that depicted the minor plaintiff in an AOL chatroom, where AOL neither warned the pedophile to stop nor suspended his service.

As addressed more extensively in section 37.05[1][C], courts also have held interactive service providers immune from liability under section 230(c)(1) in a range of other cases involving third party misconduct or a provider's own failure to act, provided that liability for the underlying act or omissions is premised on information originating with another information content provider.<sup>6</sup>

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<sup>6</sup>See, e.g., *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding claims by the victim of sex trafficking against a provider of sexually oriented classified ads preempted by the CDA); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (granting eBay's motion to dismiss claims for strict product liability, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose, negligence, negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 *et seq.* and various related regulations, and breach of express warranty based on an eBay seller's alleged sale of vacuum tubes that allegedly injured the plaintiff by causing mercury poisoning because "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA."); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (granting defendant's motion for judgment on the pleadings because the CDA preempted claims alleging that Craigslist facilitated prostitution through illegal ads posted by users on the website and constituted a public nuisance); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735(RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (granting Craigslist's motion to dismiss a complaint arising out of a handgun sales ad posted on www.craigslist.org); *Murawski v. Pataki*, 514 F. Supp. 2d 577 (S.D.N.Y. 2007) (granting defendant's motion to dismiss a complaint against Ask.com for failing to remove a link to third-party content as preempted by the CDA); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 724–28 (N.D. Ohio 2007) (holding preempted claims by a member of an adult dating service who had argued that the service should be held liable for allowing a minor who pretended to be 18 years old to join, causing him to be arrested and suffer other injuries after meeting her online and engaging in consensual sexual relations with her believing that she was actually 18 years old), *aff'd on other grounds*, 551 F.3d 412, 416 (6th Cir. 2008); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446 (E.D.N.Y. 2004) (granting the defendant's motion to dismiss claims for failing to remove "objectionable" statements from online discussion groups); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 823, 121 Cal. Rptr. 2d 703, 708 (4th Dist. 2002) (holding that a claim alleging that eBay failed to provide certificates of authenticity to purchasers of sports memorabilia was preempted by the CDA); see generally *supra* § 37.05[1][C] (discussing CDA preemption of claims for content couched in terms of misconduct). *But see Chicago v. StubHub, Inc.*, 624 F.3d 363 (7th Cir. 2010) (holding the CDA inapplicable in a case

In a departure, the Ninth Circuit, in *Doe No. 14 v. Internet Brands, Inc.*,<sup>7</sup> held that a claim premised on an interactive computer service's alleged failure to warn about a danger associated with its site or service (as opposed to a tort arising from an alleged failure to adequately regulate access to user content) falls outside the protections of the CDA. The court held that the CDA did not bar a claim by an aspiring model against the owners of Model Mayhem, a social networking site for people in the modeling industry, for its alleged negligent failure to warn her about two individuals who used the website as part of a scheme to lure her to a fake audition, where they proceeded to rape her. In that case, the site owner allegedly had actual knowledge of the threat posed by two individuals (Lavont Flanders and Emerson Callum) because Internet Brands had sued the former owners of Model Mayhem in 2010 for their failure to disclose the potential for civil suits arising from Flander's and Callum's prior misconduct towards models who posted profiles on the site. The Ninth Circuit panel reasoned that the plaintiff did not seek to hold Internet Brands liable as a publisher or speaker, but rather for its own failure to warn her about how third parties targeted and lured victims through Model Mayhem. The court explained that "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content. Any obligation to warn could have been satisfied without changes to the content posted by the website's users."<sup>8</sup>

The appellate panel in *Doe No. 14* sought to distinguish *Doe II v. MySpace, Inc.*,<sup>9</sup> where the court had held that claims by users who had been victimized by people they met on MySpace were preempted by the CDA, because in that

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brought to force StubHub to collect taxes for user transactions that occurred on its website); *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014) (holding that the CDA did not bar a claim against the social networking site for models, Model Mayhem, based on the site's failure to warn the plaintiff, a user of the site, of prior attacks on users by the two men who contacted her for an audition and then raped her); see generally *infra* § 37.05[6] (discussing *Doe No. 14* in the context of social media case); *supra* § 37.05[1][C] (criticizing the opinion).

<sup>7</sup>*Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014).

<sup>8</sup>*Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894, 897 (9th Cir. 2014).

<sup>9</sup>*Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (Cal. App. 2009).

case the tort duty arose from a site's alleged failure to adequately regulate access to user content, as opposed to a duty to warn.<sup>10</sup> The fine distinction drawn by the Ninth Circuit panel in *Doe No. 14* is in many respects a distinction without a difference. In *Doe II*, the California appellate court had emphasized that offline conduct was preempted because it arose from online content.<sup>11</sup> But the plaintiff in *Doe II* could just as easily have recast its negligence claim from one based on the social network's alleged acts or omissions in operating its network to a failure to warn users about those alleged deficiencies. A failure to warn, after all, is merely the mirror opposite of a negligent failure to act.

Ultimately, *Doe No. 14* may come to be viewed as anomalous, where a site had actual knowledge of third party misconduct and failed to warn users, and therefore construed very narrowly.<sup>12</sup> Nevertheless, while courts across the country have been nearly unanimous in holding claims based on misconduct arising from third party content on interactive computer service provider sites preempted by the CDA—as underscored by the cases cited in this subsection and in section 37.05[1][C]—*Doe No. 14* suggests a possible loophole that could open the floodgates to suits against service providers (at least in the Ninth Circuit) for failing to warn about hazards that ultimately relate to user content. In *Doe No. 14*, liability—regardless of how characterized by the court—ultimately arose out of information provided by another information content provider (the plaintiff's social media profile and her subsequent communications with the

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<sup>10</sup>*Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894, 899–900 (9th Cir. 2014).

<sup>11</sup>*Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561, 573–74, 96 Cal. Rptr. 3d 148 (Cal. App. 2009). In its Ninth Circuit brief as appellee, the defendant had also cited to the Fifth Circuit's decision in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008), but the Ninth Circuit panel in *Doe No. 14* did not address that case in its opinion. The appellee did not cite any of the many other cases noted in this subsection and in this chapter that contradict the Ninth Circuit's ultimate holding in *Doe No. 14*. In fairness, however, the defendant had prevailed in the trial court below and likely had not anticipated the panel's analysis in light of the weight of authority supporting affirmance.

<sup>12</sup>The exception created by *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), could not be expanded to circumstances where an interactive computer service failed to warn about a situation that it knew or *should have known* about based on user content without eviscerating CDA protection.

third parties who victimized her) and potential liability was premised on Model Mayhem’s failure to warn—even though the decision about whether to publish or not publish a warning is itself a traditional editorial function protected by the CDA.<sup>13</sup>

*Doe No. 14* purports to draw a distinction between negligence arising out of user content and negligence for failing to warn about offline misconduct, but this distinction invites clever pleading of claims that courts outside the Ninth Circuit have found preempted.

*Doe No. 14* is discussed further in sections 37.05[1][C] and 37.05[6].

### 37.05[3][B][iii] Seventh Circuit CDA Analysis

The Seventh Circuit arguably takes a narrower approach than other courts in applying section 230(c)(1), although the difference in emphasis may not affect the outcome of most cases. As of late 2012, all Seventh Circuit opinions analyzing

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<sup>13</sup>See *supra* §§ 37.05[1], 37.05[3][B]. Judge Richard Clifton, writing for himself, Judge Mary Schroeder and Eastern District of New York Judge Brian M. Cogan (sitting by designation), conceded that posting or emailing a warning could be deemed an act of publishing information, but he explained that “section 230(c)(1) bars only liability that treats a website as a publisher or speaker of content provided by somebody else: in the words of the statute, ‘information provided by another information content provider.’” *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894, 898 (9th Cir. 2014), quoting 47 U.S.C.A. § 230(c)(1). By contrast, he argued, “[a]n alleged tort based on a duty that would require . . . a self-produced warning therefore falls outside the scope of section 230(c)(1).” *Id.* at 898. Judge Clifton acknowledged that Internet Brands acted as the “publisher or speaker” of user content by hosting the plaintiff’s Model Mayhem profile and that this action could be described as the “but-for” cause of her injuries because “[w]ithout it Flanders and Callum would not have identified her and been able to lure her to their trap” but he explained that “[p]ublishing activity is a but-for cause of just about everything Model Mayhem is involved in” and “the CDA does not provide a general immunity against all claims derived from third-party content.” *Id.* at 899. The panel conceded that imposing tort liability on intermediaries could have a “chilling effect” on Internet speech, but reasoned that “Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.” *Id.*

the CDA were written by Judge Easterbrook.<sup>1</sup> In contrast to rulings from some other circuits,<sup>2</sup> Justice Easterbrook has rejected the argument that the CDA creates an *immunity* from liability.<sup>3</sup>

In *Chicago v. StubHub, Inc.*,<sup>4</sup> Judge Easterbrook narrowly construed section 230(c)(1), holding that a suit by the City of Chicago asserting that a platform used by buyers and sellers to resell event tickets was responsible for collecting a special city amusement tax on ticket sales was not preempted by the CDA. In rejecting StubHub's characterization of the CDA as creating an immunity from liability, Judge Easterbrook explained that section 230(c)(1) "limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement."<sup>5</sup> But Chicago's amusement tax does not depend on who 'pub-

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**[Section 37.05[3][B][iii]]**

<sup>1</sup>See *Chicago v. StubHub, Inc.*, 624 F.3d 363 (7th Cir. 2010) (holding the CDA inapplicable in a case brought to force StubHub to collect taxes for user transactions that occurred on its website); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (holding a claim under the Fair Housing Act preempted by section 230(c)(1)); *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (affirming dismissal of a claim by college athletes who were secretly video-recorded in locker rooms, bathrooms and showers, against the companies that provided Internet access and web hosting services to sites that sold copies of these videos; discussing the CDA extensively in *dicta*).

<sup>2</sup>See, e.g., *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254 n.4 (4th Cir. 2009); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (*en banc*) (characterizing the CDA as a "grant of immunity [that] applies only if the interactive computer service provider is not also an 'information content provider' . . ."); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006).

<sup>3</sup>See *Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("subsection (c)(1) does not create an 'immunity' of any kind."); see also *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669–71 (7th Cir. 2008); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

<sup>4</sup>*Chicago v. StubHub, Inc.*, 624 F.3d 363 (7th Cir. 2010).

<sup>5</sup>Federal copyright claims (and in a number of courts outside the Ninth Circuit, common law claims), and obscenity prosecutions, to the extent based on federal law, are excluded from the scope of CDA preemption. See 47 U.S.C.A. §§ 230(e)(2) (intellectual property law), 230(e)(1) (obscenity and federal criminal law); *infra* § 37.05[5] (analyzing exclusions).

lishes' any information or is a 'speaker.'<sup>6</sup>

*Chicago v. StubHub* was distinguished in a subsequent case brought against StubHub in a different venue as a case where the plaintiff's claim was not premised on republica-

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<sup>6</sup>*Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010); see also *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 638–39 (Ill. App.) (applying Seventh Circuit law in ruling that plaintiff's negligent supervision claim was not preempted by the CDA because section 230(c)(1) "limits who may be called the publisher or speaker of information that appears online . . . [and therefore] could foreclose any liability that depends on deeming the ICS user or provider a publisher or speaker . . . [but] was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve use of the Internet."), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012).

In *Lansing*, the court evaluated a negligent supervision claim brought against a company whose employee allegedly harassed the plaintiff by phone, email and text messages. The district court had allowed the plaintiff to proceed to trial based only on evidence of harassing phone calls. The intermediate appellate court reversed, however, holding that liability in the case was premised on the defendant's own failure to supervise, not the employee's specific electronic messages. The court explained that "[t]he CDA does not bar plaintiff's cause of action simply because defendant's employee used the Internet access provided by defendant as one vehicle to harass and threaten plaintiff." *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 639 (Ill. App.), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012). In so ruling, the court made clear it was applying Seventh Circuit law and disagreed with cases that applied "blanket immunity to an ICS user or provider from any cause of action involving content posted on or transmitted over the Internet by a third party." *Id.* at 640.

*Lansing* is perhaps best understood as a case based on an employment relationship that existed in the physical world. If the case for negligent supervision was based entirely on conduct occurring online, a negligent supervision claim would be preempted, at least outside the Seventh Circuit. See, e.g., *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) ("Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role. Section 230 'specifically proscribes liability' in such circumstances."); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir.) (rejecting the assertion that MySpace could be held liable for failing to implement measures that would have prevented a minor from being contacted by a predator, and stating that these "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."), *cert. denied*, 555 U.S. 1031 (2008); see generally *supra* § 37.01 (collecting cases).

Courts outside the Seventh Circuit nevertheless likely would have found *Lansing's* claims at least partially preempted—to the extent based on email communications—consistent with the district court's ruling in that case.

tion of third party speech.<sup>7</sup> In *Hill v. StubHub, Inc.*,<sup>8</sup> an appellate court in North Carolina held that StubHub was immune from liability under the CDA in a suit alleging violation of a North Carolina ticket scalping statute because liability was premised on the prices charged by StubHub users, not StubHub itself.

While *Chicago v. StubHub* may be distinguished on the grounds suggested in *Hill v. StubHub* by courts outside the Seventh Circuit, this distinction does not fully explain *Chicago v. StubHub*. In *Chicago v. StubHub*, the City of Chicago sought to impose tax liability on StubHub for user transactions arising from user sales listings published by StubHub. One could argue that Chicago sought to impose a tax based on StubHub's operation of a marketplace, rather than on the sales listings themselves, although courts in other jurisdictions may well have found Chicago's claims preempted on these facts. Alternatively, it may be that the connection between liability for failing to act and publication may need to be more direct in the Seventh Circuit for CDA immunity to apply.

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,<sup>9</sup> Judge Easterbrook held that the CDA barred a claim against an interactive computer service provider for Fair Housing Act liability for user posts, but the connection between publication and alleged liability arguably was stronger.<sup>10</sup> The difference between *Craigslist* and *Chicago v. StubHub* could be viewed as analogous to the difference between general and proximate causation. Where liability is directly premised on publication of user content, a claim will be deemed preempted in the Seventh Circuit. Where the connection between liability and publication is more attenuated—such as in *Chicago v. StubHub*, where the city sought to collect tax for StubHub's own online activities, even though no tax would have been owing but for StubHub's publication of listings by users—a claim may not be pre-

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<sup>7</sup>See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 n.4 (N.C. App. 2012) (distinguishing *Chicago v. StubHub* because “the issue before the Seventh Circuit in that case was the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content.”).

<sup>8</sup>727 S.E.2d 550 (N.C. App. 2012).

<sup>9</sup>519 F.3d 666 (7th Cir. 2008); *infra* § 37.05[3][C].

<sup>10</sup>See *infra* § 37.05[3][C].



empted in the Seventh Circuit, even if it would be elsewhere. Judge Easterbrook's view in *Chicago v. StubHub* that "subsection 230(c)(1) does not create an 'immunity' of any kind" plainly reflects a narrower interpretation of the scope of CDA preemption, albeit not necessarily one that may affect the outcome in most cases. Ultimately, *Chicago v. StubHub* is a case that Judge Easterbrook viewed as involving an online ticket vendor—not a marketplace where third parties bought and sold tickets.

It remains to be seen whether *Chicago v. StubHub* is limited to its unique facts or given broader application in the Seventh Circuit.

**37.05[3][C] Determining When an Interactive Computer Service Provider or User Also May Be Held Liable As An Information Content Provider: From *Zeran* to *Roommate.com* and *Accusearch* and Beyond**

Many cases since *Zeran* have considered the extent to which an interactive computer service may edit or assist in the creation of third party content without itself being deemed an information content provider. In the context of defamation claims, courts have generally held that liability may not be imposed on interactive computer service providers or users by virtue of section 230 even if a person or entity pays for the content, retains the right to edit it or even in fact lightly edits it, so long as that person's contribution does not rise to the level of an information content provider.<sup>1</sup> Following *Zeran*, courts outside the Fourth Circuit similarly

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**[Section 37.05[3][C]]**

<sup>1</sup>*See, e.g., Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (dismissing with prejudice as preempted by the CDA claims for negligence and gross negligence over MySpace's alleged deletion of celebrity imposter user profiles); *Batzel v. Smith*, 333 F.3d 1018, 1022, 1031, (9th Cir. 2003) (rejecting the argument that by minor wording changes and the addition of a "moderator's message" to a third party posting (and by his decision to publish or not publish certain messages) a website owner was jointly responsible as an information content provider); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) ("By deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect."); *Russell v. Implode-Explode Heavy Industries, Inc.*, Civil Action No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013) (distinguishing *Roommate.com* based on its unique facts and granting summary judgment).

have held that interactive computer service providers (or users) are under no duty to remove or prevent the posting of allegedly defamatory statements<sup>2</sup> or verify their accuracy.<sup>3</sup>

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ment for the defendant on claims for libel and defamation where the defendant “was not completely uninvolved with the allegedly defamatory article, but his involvement was limited to editorial work, which is insufficient to transform IEHI into an ‘information content provider’ . . .”). *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding editorial discretion an insufficient basis for conferring liability and finding that America Online’s payments to Drudge did not change the fact that America Online was not an information content provider); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (holding that eBay’s practice of actively soliciting and then compiling user comments (and ranking sellers with stars or the “Power Seller” designation) did not mean that eBay was acting as an information content provider); *Donato v. Moldow*, 374 N.J. Super. 475, 490, 497–98, 499–500, 865 A.2d 711 (App. Div. 2005) (rejecting the argument that defendant’s conduct in “shaping” the content of a discussion forum by removing some but not other messages could be equated with responsibility for developing it); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 465–66, 31 P.3d 37 (Div. 1 2001) (rejecting the argument that Amazon.com lost the exemption provided by the CDA because it had the right to edit and affirmatively claimed valuable licensing rights in third party content); *infra* § 37.05[3][D].

<sup>2</sup>See, e.g., *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (“Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher’s role. Section 230 ‘specifically proscribes liability’ in such circumstances.”); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir.) (rejecting the assertion that MySpace could be held liable for failing to implement measures that would have prevented a minor from being contacted by a predator, and stating that these “allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace’s role as a publisher of online third-party-generated content.”), *cert. denied*, 555 U.S. 1031 (2008); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (quoting *Zeran* for the propositions that “[a]t its core, § 230 bars ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.’”); *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 885 (E.D. Wis. 2009) (ruling that pursuant to section 230, Yahoo! was not liable for failing to remove offending search results that appeared when the plaintiff used Yahoo!’s search engine to perform a search using her name, where “Yahoo! did not create the offending content and did not exert any control over the third party websites” allegedly responsible for the offending content), *aff’d on other grounds*, 623 F.3d 436 (7th Cir. 2010); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (holding a claim by the Independent party candidate for governor to compel Ask.com to block from its search engine an allegedly defamatory page that included him in a list of individuals that, when viewed as a snippet, appeared to identify him with the Com-

In so holding, courts have considered whether an interactive computer service provider or user's action (or failure to take action) is akin to the traditional role played by an editor or publisher.

As explained by the Ninth Circuit in *Batzel v. Smith*,<sup>4</sup> interactive computer service providers and users who "take some affirmative steps to edit the material posted" are protected by section 230, which precludes liability "for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published

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unist Party, barred by the CDA); *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 401, 405, 163 Cal. Rptr. 3d 919, 920, 924 (4th Dist. 2013) (affirming grant of anti-SLAPP motion in favor of the owner of the Orange County Register based on a claim that the newspaper breached its user agreement with the plaintiff by failing to remove user comments about the plaintiff from its website); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of a defamation claim where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (Sup. 2010) (dismissing a defamation claim brought against Yelp! Inc. by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, and dismissing on the merits a deceptive acts or practices claim based on the allegation that for \$300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback); see also *Stayart v. Google Inc.*, 783 F. Supp. 2d 1055 (E.D. Wis. 2011) (dismissing claims against Google similar to the ones asserted against Yahoo! in the earlier case noted above, where the court observed that the plaintiff had alleged that Google had wrongfully used her name for advertising purposes to circumvent the CDA since section 230 "effectively immunizes search engines like Yahoo and Google from claims that they displayed information created by third parties which presents an individual in an unfavorable light."), *aff'd on other grounds*, 710 F.3d 719 (7th Cir. 2013) (affirming dismissal of plaintiff's misappropriation claims arising out of the alleged use of her name in conjunction with searches for an erectile dysfunction drug because plaintiff made the search request a matter of public interest by suing Yahoo! over it in 2010 and therefore Google was shielded from liability by the incidental use exception for claims that its algorithms generated the suggestion to search for the drug Levitra when plaintiff's name was input into its search engine or displayed sponsored link advertisements for the drug).

<sup>3</sup>See *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Tex. 2006); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App. Beaumont 2010).

<sup>4</sup>*Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

while retaining its basic form and message.”<sup>5</sup> A “publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it.”<sup>6</sup> The CDA insulates both “affirmative acts of publication [and] . . . the refusal to remove . . . material.”<sup>7</sup> “The ‘development of information’ therefore means something more substantial than merely editing portions of an email and selecting material for publication.”<sup>8</sup>

The term *information content provider* is broadly defined to mean “any person or entity that is responsible, *in whole or part*, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>9</sup> On the other hand, section 230(c)(1) also expansively provides that interactive computer service providers and users potentially may avoid liability literally for “*any* information provided by another information content provider,”<sup>10</sup> where at least part of the content did not originate with the user or provider. While the issue is not entirely free from doubt, the Ninth and Tenth Circuits have made clear that an interactive computer service may be deemed an information content provider for some material or functions on its site or service, but not others. “Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.”<sup>11</sup>

In *Ben Ezra, Weinstein & Co. v. America Online, Inc.*,<sup>12</sup> the Tenth Circuit affirmed a New Mexico district court’s entry of summary judgment in favor of America Online in a defamation suit arising from a claim that the plaintiff, a designer and manufacturer of corporate finance software, had been

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<sup>5</sup>*Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>6</sup>*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

<sup>7</sup>*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 n.11 (9th Cir. 2009).

<sup>8</sup>*Batzel v. Smith*, 333 F.3d at 1031.

<sup>9</sup>47 U.S.C.A. § 230(f)(3) (emphasis added).

<sup>10</sup>47 U.S.C.A. § 230(c)(1) (emphasis added).

<sup>11</sup>*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008) (*en banc*); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009). In its discussion on this point, the Ninth Circuit uses the terms “service provider” and “content provider” in place of “interactive computer service” and “information content provider”.

<sup>12</sup>*Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

defamed by inaccurate information published on AOL by two independent third parties—S&P ComStock, Inc., a stock quote provider, and Townsend Analytics, Ltd., a software provider designated by ComStock to provide this information to AOL.

The plaintiff in *Ben Ezra, Weinstein & Co.* had argued that AOL was both an interactive computer service *and* an information content provider to the extent it participated in the creation and development of stock quote information.<sup>13</sup> Although AOL conceded that “in an appropriate situation, an interactive computer service could also act as an information content provider by participating in the creation or development of information, and thus not qualify for § 230 immunity,”<sup>14</sup> the appellate court agreed with AOL that the plaintiff had not demonstrated that AOL “worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that Defendant became an information content provider.”<sup>15</sup> Circuit Judge Baldock wrote that

while defendant did communicate with ComStock and Townsend each time errors in the stock information came to its attention, such communications simply do not constitute the development or creation of the stock quotation information. Rather, the evidence plaintiff presented indicated that the communications consisted of emails from defendant requesting ComStock correct the allegedly inaccurate information.<sup>16</sup>

The Tenth Circuit held that section 230 had been enacted “to forbid the imposition of publisher liability on a service provider [merely] for the exercise of its editorial and self-regulatory functions.”<sup>17</sup> The panel concluded that “[b]y deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect.”<sup>18</sup>

In *Universal Communication Systems, Inc. v. Lycos*,<sup>19</sup> the First Circuit affirmed the dismissal of a defamation claim under subpart (c)(1) over the plaintiff’s objection that Lycos

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<sup>13</sup>See 206 F.3d at 984.

<sup>14</sup>206 F.3d at 985 n.4.

<sup>15</sup>206 F.3d at 985.

<sup>16</sup>206 F.3d at 985.

<sup>17</sup>206 F.3d at 986.

<sup>18</sup>206 F.3d at 986.

<sup>19</sup>*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

had “rendered culpable assistance” in creating the allegedly defamatory posts “through the construct and operation” of its website, including a feature that allowed a single individual to post under multiple screen names.<sup>20</sup> The court characterized these features as “standard,” concluding that imposing liability on this basis would “eviscerate Section 230 immunity.”<sup>21</sup> The First Circuit also ruled that Lycos’s immunity was not compromised by the fact that it regularly took legal action to protect the anonymity of its subscribers.<sup>22</sup>

The Ninth Circuit has issued two reported opinions in cases in which social networking sites were sued over material that appeared in user profiles. In *Carafano v. Metrosplash.com, Inc.*,<sup>23</sup> the Ninth Circuit ruled that the exemption applies even where an interactive computer service “lightly” edits content before it is made available online. In *Carafano*, the defendants operated matchmaker.com, an online dating service, which provided users with sixty-two multiple-choice questions and a series of essay questions tailored for each of its seventy-two virtual communities, which were used to create user profiles. However, five years later, in *Fair Housing Council v. Roommate.com, LLC*,<sup>24</sup> the Ninth Circuit, in an *en banc* decision, found that an interactive computer service acted in part as an information content provider (along with its users) with respect to multiple choice questions it wrote for users, whose answers were automatically posted to their profiles. By contrast, the Ninth Circuit concluded that the provider was not responsible for narrative text written by users on its site.

In *Fair Housing Council v. Roommate.com, LLC*, Roommate.com, the company that operated the

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<sup>20</sup>*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007).

<sup>21</sup>*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007).

<sup>22</sup>*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 421 (1st Cir. 2007). With respect to this last point, the court wrote that “[a]ctions taken to protect subscribers’ legal rights . . . cannot be construed as inducement of unlawful activity, and UCS does not allege that Lycos lacked a reasonable basis for its legal activities.” *Id.*

<sup>23</sup>*Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

<sup>24</sup>*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*).

Roommates.com website,<sup>25</sup> was sued by the Fair Housing Councils of the San Fernando Valley and San Diego, alleging violations of the Fair Housing Act<sup>26</sup> and California housing discrimination laws.<sup>27</sup> Roommate.com was an Internet site that allowed users to create profiles in order to match people renting out spare rooms with people looking for a place to live. Like many social networks, Roommate.com required its users to create a profile in order to search listings or post one. In addition to basic information such as name, location and email address, Roommate.com required its subscribers to disclose their sex, sexual orientation and whether the user would bring children to a household. Each subscriber also was required to describe their preference in roommates with respect to the same criteria. This information was provided by pull down menus that forced users to select from among the options provided, which were used by Roommate.com to automatically generate user profile pages. However, users were also encouraged to describe themselves and their desired roommate in an open-ended essay posted under “Additional Comments.”

Chief Judge Kozinski, writing for the majority,<sup>28</sup> ruled that Roommate.com was protected in part by the CDA but potentially liable as an information content provider for some aspects of its site. He held that because Roommate.com created the questions and choice of answers, forced users to provide answers, and designed its website registration pro-

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<sup>25</sup>The name of the defendant, Roommate.com, LLC, was different from the website it operated, Roommates.com. See *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1161 n.2 (9th Cir. 2008) (*en banc*). As readers will note, some courts quoted in this chapter mistakenly cite the case by the name of the website, Roommates.com, rather than its proper case name.

<sup>26</sup>42 U.S.C.A. §§ 3601 *et seq.*

<sup>27</sup>In a later decision, the Ninth Circuit ultimately concluded that Roommate.com was not liable for violating the Fair Housing Act or the California Fair Employment and Housing Act. See *Fair Housing Council v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) (vacating the entry of judgment for the plaintiff and remanding for the entry of judgment for the defendant).

<sup>28</sup>The majority opinion, which is almost twenty pages long with forty separate footnotes, includes a great deal of *dicta* intended to rebuff the arguments of the three dissenting judges, as well as to clarify the contours of the court’s holding. In the majority opinion, Chief Judge Kozinski also recasts two earlier Ninth Circuit opinions in light of the *Roommate.com* ruling and offers his interpretation of major CDA opinions from other circuits.

cess around them, it was an information content provider for those questions and could claim no immunity for posting them on its site or requiring subscribers to answer them as a condition of service.<sup>29</sup> He explained, “[t]he CDA does not grant immunity for inducing third parties to express illegal preferences.”<sup>30</sup>

With respect to the actual profiles, Judge Kozinski held that the fact that users were information content providers did not preclude Roommate.com from also being liable as an information content provider. By creating the questions and answers and forcing users to select from among the provided answers, Roommate.com helped develop the profiles in his view and therefore was “responsible . . . in part . . . for the creation or development of information provided through the Internet or any other interactive computer service” within the meaning of section 230(f)(3). He explained:

By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not “creat[e] or develop” the information “in whole or in part.” 47 U.S.C.A. § 230(f)(3).<sup>31</sup>

The majority held that Roommate.com likewise was not

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<sup>29</sup>521 F.3d at 1164, 1170 n.26. In so ruling, Judge Kozinski clarified that he was not considering whether Roommate.com in fact could be held liable for these posts, or whether it might have a First Amendment defense; merely, whether section 230(c)(1) immunity applied.

<sup>30</sup>521 F.3d at 1165. The content at issue in *Roommate.com* ultimately was held not to be actionable. See *Fair Housing Council v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) (vacating the entry of judgment for the plaintiff and remanding for the entry of judgment for the defendant).

For purposes of CDA analysis in the Ninth Circuit under *Roommate.com*, however, the operative question is whether the *allegedly* illegal content was developed by the interactive computer service provider or user that published it or is entirely attributable to a third party (another *information content provider*).

<sup>31</sup>521 F.3d at 1166. Judge Kozinski noted that section 230(c) uses both the terms *create* and *develop* as separate bases for loss of immunity. See 521 F.3d at 1168. He defined *development* for purposes of section 230(f)(3)’s definition of information content provider, “as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.” 521 F.3d at 1167–68. He also cited Wikipedia approvingly for the definition of *development* as “the process of researching, writing, gathering, organizing and editing information for publication on web sites.” 521 F.3d at 1168.



entitled to the CDA exemption for the operation of its search feature, which filtered listings, or for its email notification system, which directed emails to subscribers according to the preferences and personal characteristics that Roommate.com itself developed (and forced subscribers to disclose). Judge Kozinski explained, “[i]f Roommate has no immunity for asking the discriminatory questions, as we concluded above, . . . it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing.”<sup>32</sup> By contrast, he explained in *dicta*, “generic search engines such as Google, Yahoo! and MSN Live Search” would not lose their immunity because they provide “neutral tools.”<sup>33</sup>

The majority held that Roommate.com was not an information content provider and therefore not liable for user comments made in the “Additional Comments” box, which was a blank area where users could type essays about themselves. Roommate.com published comments as written and did not provide any specific guidance on what should be

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<sup>32</sup>521 F.3d at 1167.

<sup>33</sup>521 F.3d at 1167–69. He explained that Roommate.com’s search function was designed to steer users based on discriminatory criteria. 521 F.3d at 1167. By contrast:

If an individual users an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any unlawfulness in the individual’s conduct; providing neutral tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception. A dating website that requires users to enter their sex, race, religion and marital status through drop-down menu, and that provides means for users to search along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality; this immunity is retained even if the website is sued for libel based on these characteristics because the website would not have contributed materially to any alleged defamation. Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of user-defined criteria might help some users exclude email from other users of a particular race or sex. However, that website would be immune so long as it does not require the use of discriminatory criteria. A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user’s message reading “[Name] did *not* steal the artwork” in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.

521 F.3d at 1169 (emphasis in original). As a further explanation, Chief Judge Kozinski clarified that these are all examples where a business would be held liable for its own conduct, not vicariously for third party conduct. See 521 F.3d at 1169 n.24.

included. The fact that Roommate.com encouraged subscribers to post *something* in response to the prompt was not enough to make it a *developer* of the information.<sup>34</sup>

The majority further rejected the argument that by encouraging some allegedly discriminatory preferences in its user form, Roommate.com encouraged further discriminatory preferences when it gave subscribers the opportunity to describe themselves in the “Additional Comments” section. The court held that “[s]uch weak encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter.”<sup>35</sup>

Judge Kozinski cautioned:

Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operate did encouraged the illegality. Such close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by 10,000 duck-bites, fighting off claims that they promoted or encouraged or at least tacitly assented to the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality—as it is clear here with respect to Roommate’s questions, answers and the resulting profile pages—immunity will be lost. But in cases of enhancement by implication or development by inference—such as with respect to the “Additional Comments” here—section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.<sup>36</sup>

To further elaborate on the contours of the majority holding, Judge Kozinski recast earlier Ninth Circuit cases and explained the significance of the major Good Samaritan decisions from other circuits. He emphasized that the *Roommate.com* opinion was consistent with *Batzel*, which held that an editor’s minor changes to the spelling, grammar and length of third party content do not strip an interactive

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<sup>34</sup>See 521 F.3d at 1173–75.

<sup>35</sup>521 F.3d at 1174. To further clarify the distinction drawn, Judge Kozinski offered that if Roommate.com had filtered for obscenity or spam it would not make any difference because “minor editing and selection . . .” would not change the outcome. 521 F.3d at 1173 n.36. Similarly, Roommate.com would not be deemed the developer of discriminatory content “if it provided a free-text search that enabled users to find key words in the ‘Additional Comments’ of others, even if users utilized it to search for discriminatory keywords.” 521 F.3d at 1174 n.37.

<sup>36</sup>521 F.3d at 1174–75.

computer service or user from liability. “None of those changes contributed to the libelousness of the message, so they do not add up to ‘development’” within the meaning of section 230(f)(3).<sup>37</sup> Judge Kozinski conceded that the dissent at least scored a debater’s point in noting that the same activity might amount to *development* or not, under the majority’s analysis depending on whether it contributed materially to the illegality of the content.<sup>38</sup> He responded, however, that the court was “not defining ‘development’ for all purposes; we are defining the term only for purposes of determining whether the defendant is entitled to immunity for a particular act.”<sup>39</sup> Judge Kozinski further explained that the definition “does not depend on finding substantive liability, but merely requires analyzing the context in which a claim is brought. A finding that a defendant is not immune is quite different from finding liability . . . .”<sup>40</sup> In short, under the Ninth Circuit’s conception of *development* depends on the particular claim made, which in turn determines what content or parts of a site or service are at issue (and then, whether the defendant *developed* those parts).

*Carafano v. Metrosplash.com, Inc.*,<sup>41</sup> Judge Kozinski explained, was decided correctly but the opinion included language that was unduly broad. In that case, an unknown imposter impersonating actress Christianne Carafano created a profile for her on the defendant’s online dating site. When she received threatening calls, she called the dating site to complain but the profile was not immediately removed. He wrote that the Ninth Circuit correctly ruled that the website was immune, but incorrectly suggested that it could *never* have been liable because “no [dating] profile

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<sup>37</sup>521 F.3d at 1170–71. Judge Kozinski explained:

[I]f the tipster tendered the material for posting online, then the editor’s job was, essentially, to determine whether or not to prevent its posting—precisely the kind of activity for which section 230 was means to provide immunity. And any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230 . . . . But if the editor publishes material that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination.

521 F.3d 1157.

<sup>38</sup>521 F.3d at 1171 n.30.

<sup>39</sup>521 F.3d at 1171 n.30.

<sup>40</sup>521 F.3d at 1171 n.30.

<sup>41</sup>*Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

has any comment until a user generated activity creates it.”<sup>42</sup> Judge Kozinski explained that “even if the data are supplied by third parties, a website operator may still contribute to the content’s illegality and thus be liable as the developer. Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for ‘develop[ing]’ unlawful content ‘in whole or in part.’”<sup>43</sup> Likewise, he disavowed “any suggestion that *Carafano* holds an information content provider *automatically* immune so long as the content originated with another information content provider.”<sup>44</sup> On the other hand, “[t]he mere fact that an interactive computer service ‘classifies user characteristics . . . does not transform [it] into a ‘developer’ or the ‘underlying misfortune.’”<sup>45</sup> He emphasized that the allegedly libelous content in that case—“the false implication that Carafano was unchaste—was created and developed entirely by the malevolent user, without prompting or help from the website operator.”<sup>46</sup> Judge Kozinski explained:

To be sure, the website provided neutral tools, which the anonymous dastard used to publish his libel, but the website did absolutely nothing to encourage the posting of defamatory content—indeed, the . . . posting was contrary to the website’s express policies. The claim against the website was, in effect, that it failed to review each user-created profile to ensure that it wasn’t defamatory. This is precisely the kind of activity for which Congress intended to grant absolution with the passage of section 230.<sup>47</sup>

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<sup>42</sup>521 F.3d at 1171, *quoting* Carafano, 339 F.3d at 1124.

<sup>43</sup>521 F.3d at 1171.

<sup>44</sup>521 F.3d at 1171 n.31.

<sup>45</sup>521 F.3d at 1172 n.30. According to the court:

The salient fact in *Carafano* was that the website’s classifications of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners depending on their voluntary inputs. By sharp contrast, Roommate’s website is designed to force subscribers to divulge protected characteristics and discriminatory preferences, and to match those who have rooms with those who are looking for rooms based on the criteria that appear to be prohibited by the FHA.

521 F.3d at 1172.

<sup>46</sup>521 F.3d at 1171.

<sup>47</sup>521 F.3d at 1171–72.

*Universal Communication Systems, Inc. v. Lycos*,<sup>48</sup> in Judge Kozinski's view, involved defamatory comments made without any prompting or encouragement from the defendant. Likewise, in *Green v. America Online*<sup>49</sup> there was no suggestion that AOL solicited the content, encouraged users to post harmful content or otherwise had any involvement whatsoever with the harmful content, other than through providing 'chat rooms' for general use.<sup>50</sup> With respect to *Ben Ezra, Weinstein & Co. v. America Online, Inc.*,<sup>51</sup> Judge Kozinski wrote that "[w]hile AOL undoubtedly participated in the decision to make stock quotations available to members, it did not cause the errors in the stock data, nor did it encourage or solicit otherwise to provide inaccurate data. AOL was immune because 'Plaintiff could not identify any evidence indicating Defendant [AOL] developed or created the stock quotation information.'<sup>52</sup> Finally, with respect to *Zeran v. America Online, Inc.*,<sup>53</sup> Judge Kozinski wrote, "[a]gain, AOL did not solicit the harassing content, did not encourage others to post it, and had nothing to do with its creation other than through AOL's role as the provider of a generic message board for general discussions."<sup>54</sup>

The dissent criticized the majority for focusing on ultimate liability in evaluating whether the exemption applied.<sup>55</sup> Judge Kozinski countered that under *Roommate.com* busi-

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<sup>48</sup>*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

<sup>49</sup>*Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003).

<sup>50</sup>521 F.3d at 1172 n.33. Despite the language used by Chief Judge Kozinski in footnote 33, he makes clear in his opinion that mere solicitation or encouragement, without more, would not be sufficient to strip an interactive computer service of CDA protection.

<sup>51</sup>*Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

<sup>52</sup>521 F.3d at 1172 n.33, quoting *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 n.5 (10th Cir. 2000).

<sup>53</sup>*Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

<sup>54</sup>521 F.3d at 1172 n.33.

<sup>55</sup>Judge McKeown, joined by Judges Rymer and Bea, concurred with the majority to the extent it found CDA immunity but dissented from the result holding *Roommate.com* not exempt for claims arising out of those portions of user profiles generated by pull down menu questions written by the defendants and a search engine that focused on the same criteria. They wrote that "[t]he majority's unprecedented expansion of liability for

nesses would be “held liable only for their own conduct; there is no vicarious liability for the misconduct of their customers.”<sup>56</sup> He emphasized that Roommate.com was not being sued for removing some harmful messages while failing to remove others—which was the type of activity under *Stratton Oakmont* that section 230 was intended to preempt—rather, it was being sued for its own actions. While it is true that a court must analyze very specifically the particular content or features challenged to evaluate immunity under the Ninth Circuit’s *Roommate.com* test, finding that the exemption does not apply is not tantamount to a finding of liability. Nonetheless, with the *en banc* decision in *Roommate.com*, the Ninth Circuit replaced the bright line test applied in *Carafano* with a fact-specific analysis that in some instances may require extensive discovery. The end result is a test that could be more difficult to apply in particular cases.

The dissent would have held that Roommate.com was not an information content provider because: (1) providing a drop-down menu does not constitute ‘creating’ or ‘developing’ information; and (2) the structure and text of the statute make plain that Congress intended to immunize Roommate’s sorting, displaying, and transmitting . . . third-party content.”<sup>57</sup>

In contrast to the majority’s opinion in *Roommate.com*, a Seventh Circuit panel, in *Chicago Lawyers’ Committee for*

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Internet service providers threatens to chill the robust development of the Internet that Congress envisioned. By exposing every interactive service provider to liability for sorting, searching, and utilizing the all too familiar drop-down menus, . . . providers are left scratching their heads and wondering where immunity ends and liability begins.” 521 F.3d at 1176 (McKeown, C.J. concurring in part dissenting in part). The dissent criticized the majority for conflating the standards under subparts (c)(1) and (c)(2)(A) and for offering “no bright lines . . . . The result in this case is driven by the distaste for housing discrimination, a laudable endgame” but not something that allows courts to make policy decisions best left to Congress. 521 F.3d at 1177. The dissent was also critical of the majority “rewrit[ing] the statute with its definition of ‘information content provider,’” and labeling “the search function ‘information development’. . . .” 521 F.3d at 1177.

<sup>56</sup>521 F.3d at 1169 n.24.

<sup>57</sup>521 F.3d at 1182.

*Civil Rights Under Law, Inc. v. Craigslist, Inc.*,<sup>58</sup> upheld summary judgment for Craigslist in a case that, like *Roommate.com*, had been brought under section 804(a) of the federal Fair Housing Act. In that case, a public interest group had sued Craigslist, which provides an electronic meeting place for those who want to buy, sell or rent housing (as well as many other goods and services). Some of the listings posted by users included notices such as “‘NO MINORITIES’ and ‘No children’, along with multiple variations, bald or subtle.”<sup>59</sup> Chief Judge Easterbrook, writing for the panel, observed that the plaintiff could

identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination . . . . It can assemble a list of names to send to the Attorney General for prosecution. But given § 230(c)(1) it cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.<sup>60</sup>

As the court noted at the outset of the opinion, courts regularly enforce the Fair Housing Act against newspapers that accept advertisements for four or more rental properties that are discriminatory. The CDA, however, preempts claims for computer-related conduct that potentially could be actionable in the physical world.

The panel’s holding—that plaintiff’s claim was preempted—was based on its conclusion that “only in a capacity as publisher could craigslist be liable” for the postings of its users.<sup>61</sup>

*Craigslist* can be reconciled with *Roommate.com* but

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<sup>58</sup>*Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

<sup>59</sup>*Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

<sup>60</sup>*Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008).

<sup>61</sup>*Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008). In so ruling, the court expressly rejected the argument that subsection (c)(1) should be limited to sexual material. Judge Easterbrook wrote:

Although the impetus for the enactment of section 230 as a whole was a court’s opinion holding an information content provide liable, as a publisher, because it had exercised some selectivity with respect to the sexually oriented material it would host for customers, a law’s scope often differs from its genesis. Once the legislative process gets rolling, interest groups seek (and often obtain) other provisions. Congress could have written something like: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any sexually oriented material provided by another information

ultimately reflects a different analytical approach. Both cases found that an interactive computer service could not be held liable for comments written entirely by users that were alleged to violate the Fair Housing Act.<sup>62</sup> *Roommate.com* went further, however, in holding an interactive computer service liable as an information content provider for authoring a multiple choice test that was used to generate content on user profiles. Taken together, these cases suggest that an Internet site or service that offers its users a blank box (or “white space”) to write their own creative expression is will not lose Good Samaritan protection, but a business (or user) that creates an elaborate multiple choice test or otherwise develops user content may be liable to the extent of that *developed* content (at least to the extent that the plaintiff’s claim is based in part on it and to the extent responses to questions or other use of developed content is mandatory). On the other hand, between the lines readers are left with the sense that while Judge Kozinski might have ruled the same way as Judge Easterbrook in *Craigslist* based on the distinctions he suggested in the *Roommate.com* opinion, the Seventh Circuit might well have found the defendant fully protected from liability in *Roommate.com* based on a more expansive vision of CDA immunity (including the Ninth Circuit’s own earlier decision in *Metrosplash.com*).<sup>63</sup>

The *Roommate.com* case represented more of a departure

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content provider.” That is not, however, what it enacted. Where the phrase “sexually oriented material” appears in our rephrasing, the actual statute has the word “information.” That covers ads for housing, auctions of paintings that may have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians’ promises, and everything else that third parties may post a website; “information” is the stock in trade of online service providers.

*Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

<sup>62</sup>Chief Judge Kozinski, in his opinion in *Roommate.com*, characterized *Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist* as consistent with *Roommate.com* because, in his view, Craigslist’s service worked very much like the “Additional Comments” section of the Roommates.com website, “in that users are given an open text prompt in which to enter any description of the rental property without any structure imposed on their content or any requirement to enter discriminatory information . . . .” 521 F.3d at 1172 n.33.

<sup>63</sup>While the Seventh Circuit in *Craigslist* appears to have taken a broader view of the scope of CDA immunity (where applicable) than Chief Judge Kozinski in *Roommate.com*, the Seventh Circuit potentially takes a narrower view of when the CDA in fact applies to a given claim. In *Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010), which like other



from, rather than a natural extension of, prior case law, in giving life to the term *development* in the definition of an *information content provider*. While the Ninth Circuit nominally did not narrow the ambit of section 230(c)(1) immunity, it effectively did so by broadening the scope of conduct that could make a party liable as an information content provider. Indeed, the Ninth Circuit's focus on *development* may make it even more difficult for interactive computer service providers and users to dispose of cases prior to trial. Whether or not a person or entity contributed to the development of content may be a close and fact-specific question in many cases that previously (and potentially outside the Ninth Circuit) could be resolved in the defendant's favor on summary judgment or even earlier in a case.

Since the Ninth Circuit's *en banc* decision in *Roommate.com*, it has become common for plaintiffs to seek to plead around section 230(c)(1) by alleging *development*.<sup>64</sup> To date, district courts following *Roommate.com* generally have construed the case reasonably narrowly, consistent

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Seventh Circuit CDA opinions to date was authored by Judge Easterbrook, the court held that a suit by the City of Chicago asserting that an Internet ticket resale service was responsible for collecting a special city amusement tax on ticket sales was not preempted by the CDA. In so holding, Judge Easterbrook wrote that "subsection (c)(1) does not create an 'immunity' of any kind." *Id.* Rather, it "limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.'" *Id.*; see generally *supra* §§ 37.05[1][C], 37.05[3][B] (analyzing *City of Chicago* in greater detail).

<sup>64</sup>See, e.g., *Robins v. Spokeo, Inc.*, No. CV 10-05306 ODW (AGRx), 2011 WL 1793334 (C.D. Cal. May 11, 2011) (denying in part the defendant's motion to dismiss based on the CDA where the plaintiff alleged that the defendant "develops original content based on information obtained from a variety of sources and posts it online"); *Swift v. Zynga Game Network, Inc.*, 51 Communications Reg. (P & F) 1118, 2010 WL 4569889 (N.D. Cal. Nov. 3, 2010) (denying defendants' motion to dismiss where the plaintiff alleged development based on Zynga's provision of virtual currency for third party ad offers); *Certain Approval Programs, LLC v. XCentric Ventures LLC*, No. CV08-1608-PHX-NVW, 2009 WL 596582 (D. Ariz. Mar. 9, 2009) (granting leave to amend to allow plaintiff to allege that defendant "Ripoff Report" created or developed content and was therefore acting as an information content provider, rather than merely an interactive computer service provider); *Perfect 10, Inc. v. Google, Inc.*, 2008 Copr. L. Dec. ¶ 26,909, 2008 WL 4217837 (C.D. Cal. July 16, 2008) (denying defendant's motion to dismiss state law claims because "preemption under the CDA is an affirmative defense that is not proper to raise in a Rule 12(b)(6) motion" even though "it is highly likely that P10

with its specific holding<sup>65</sup> (although two district courts

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will encounter difficulty in establishing that Google engaged in the ‘creation or development in whole or in part’ of unlawful content . . .”).

<sup>65</sup>See, e.g., *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs’ extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014); *Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (holding that defendant’s allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section 230 and that “[a]bsent a changing of the disputed reports’ substantive content that is visible to consumers, liability cannot be found.”); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009) (dismissing with prejudice plaintiff’s complaint based on alleged harm from click fraud, holding that Google’s Keyword Tool was a neutral tool that could not subject Google to liability for developing whatever word combinations users generated with the tool); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (dismissing plaintiff’s complaint, noting that in *Roommate.com* the website required its users to provide certain information as a condition of use, whereas MySpace users were not required to supply additional information to their profiles); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009) (“key to the Ninth Circuit’s decision was the fact that Roommates.com was actively participating in creating the objectionable content, by providing the questions and by requiring users to answer them. In this case, . . . Playlist merely provides the interface for accessing that content—by providing users to listen to the songs on Playlist’s website—and provides links so users can download the songs on third-party websites . . . . At best, Playlist is guilty of ‘passive acquiescence in the misconduct of its users,’ and, even under *Roommates.com*, Playlist is entitled to immunity under Section 230(c)(1).”); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (concluding that in *Roommate.com* the lawsuit revolved around a portion of profiles generated by responses to a mandatory questionnaire, whereas here the responses were not at issue); *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing the entry of summary judgment for the plaintiff, finding that the defendant was entitled to CDA immunity). As explained in *Doe II*:

*Roommates.com* presents us with two ends of the spectrum with respect to how much discretion a third party user has in the content he posts on the site. A subscriber writing in the additional comments section is given almost unfettered discretion as to content. On the other hand, the subscriber must select one answer from a limited number of choices in the question and answer profile section. Our situation falls somewhere in between. MySpace members are not allowed unfettered discretion as to what they put in their profile. Instead, it is alleged that MySpace users are urged to follow the on-screen prompts to enter a name, email address, gender, postal code, and date of birth. Users are also “encouraged” to enter personal information such as schools, interests, and personality and background and lifestyle . . . . Unlike the questions and answers in *Roommates.com*, however, Appellants do not allege that the

outside the Ninth Circuit allowed cases to proceed based merely on allegations of solicitation and shaping of content<sup>66</sup>).

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MySpace profile questions are discriminatory or otherwise illegal. Nor do they allege that MySpace requires its members to answer the profile questions as a condition of using the site.

96 Cal. Rptr. 3d at 158.

<sup>66</sup>See, e.g., *Doctor's Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010) (denying defendant's motion for summary judgment in a case where Quiznos held an Internet contest for customers to submit their own advertisements comparing Quiznos sandwiches to those of Subway, where the plaintiff alleged that defendants "went beyond the role of a traditional publisher by 'soliciting disparaging material' and 'shaping the eventual content'" by using a domain name for the contest (meatnomeat.com) that arguably falsely implied that Subway sandwiches had no meat and posted four "sample videos" on the user submission site that allegedly shaped user submissions; holding that a reasonable jury might conclude that defendants "did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos."); *New England Patriots, L.P. v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009).

*QIP* arguably presented a close case where the line between user content and website-developed content was difficult to draw without a full presentation of the evidence at trial.

In *New England Patriots*, a widely discussed unreported trial court decision from a state court judge in Massachusetts, the court concluded that StubHub was not entitled to the CDA exemption for liability based on the conduct of its users in re-selling tickets to New England Patriots games in alleged violation of a state law. Although the court accepted that StubHub did not sell the tickets itself, and merely provided an online forum for others to do so, the court concluded that the plaintiffs could prove that StubHub "induced a breach of contract by improper means if they can show that StubHub intentionally induced or encouraged others to violate [state law] . . . or profited from such violations while declining to stop or limit it." *New England Patriots, L.P. v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009). In so ruling, however, the court relied on the standard for secondary copyright liability set forth in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); see generally *supra* § 4.11[7]. Copyright law obviously has no bearing on the CDA. Citing *Roommate.com*, the court then concluded that there was "evidence in the record that StubHub materially contributed to the illegal 'ticket scalping' of its sellers" which could support a claim that it developed the material under *Roommate.com* based on "knowing participation in illegal 'ticket scalping'." . . . *New England Patriots, L.P. v. StubHub, Inc.*, 2009 WL 995483, at \*13.

The Sixth Circuit subsequently rejected the argument that soliciting or shaping content could deprive an interactive computer service of CDA protection in *Jones v. Dirty World Entertainment Recordings, LLC*,

Indeed, some courts outside the Ninth Circuit have been affirmatively skeptical of *Roommate.com*'s complex analysis and applied the CDA more broadly.<sup>67</sup>

In *FTC v. Accusearch, Inc.*,<sup>68</sup> the Tenth Circuit went even further than the Ninth Circuit in broadly construing *information content provider*, thereby effectively narrowing the scope of the exemption potentially available to interactive computer service providers and users under section 230(c)(1). In *Accusearch*, the majority held that the defendant *developed* confidential telephone records originating with third parties merely by publishing them on its site and was *responsible* for this development because it solicited and then paid for them. The defendant had argued that because the phone records provided to its customers originated with telecommunications carriers, it made nothing new and brought nothing new into existence. The majority, however, defined *develop* to mean “the act of drawing something out, making it ‘visible,’ ‘active,’ or ‘useable’” or “to make actually available or usable (something previously only potentially available or usable).”<sup>69</sup> When confidential phone records were exposed to public view on the defendant’s site, the majority concluded

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755 F.3d 398 (6th Cir. 2014), which is discussed later in this section and in section 37.05[3][D][ii].

<sup>67</sup>See, e.g., *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (purporting to distinguish *Roommate.com* but in fact arguably applying the CDA more broadly than under *Roommate.com*'s development analysis because “‘immunity is an immunity from suit rather than a mere defense to liability’ and ‘it is effectively lost if a case is erroneously permitted to go to trial . . . .’”) (citations omitted); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff’s picture superimposed on an image of Jesus with the statement “King of the Token Jews” next to negative user posts about the plaintiff); see generally *infra* § 37.05[3][D] (and cases discussed in that section).

In *Shiamili v. Real Estate Group*, the New York Court of Appeals, over a strong dissent by Chief Judge Lippman, concluded that it “need not decide whether to apply the Ninth Circuit’s relatively broad view of ‘development’ since, even under that court’s analysis, Shiamili’s claim fail[ed].”

<sup>68</sup>*FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

<sup>69</sup>*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009), quoting Webster’s Third New International Dictionary 618 (2002).

that the information was *developed*.<sup>70</sup>

Judge Hartz, writing for the majority, emphasized that evidence of *development* alone was insufficient to make a site or service an information content provider, which depends on a showing that it was “‘responsible in whole or in part, for the . . . development of’ the offending content.”<sup>71</sup> *Responsible*, like *development*, is not specifically defined in the statute.

The majority held that “a service provider is ‘responsible’ for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content.”<sup>72</sup> Judge Hartz explained that “to be ‘responsible’ for the development of offensive content, one must be more than a neutral conduit for that content.”<sup>73</sup> This construction, he wrote, “comports with the clear purpose of the CDA—to encourage Internet services that increase the flow of information by protecting them from liability when independent persons negligently or intentionally use those services to supply harmful content.”<sup>74</sup>

In holding that Accusearch was an information content provider because it solicited the requests for the confidential information and then paid researchers to obtain it, the majority sought to distinguish other cases where mere solicitation was insufficient to lead to liability.

Judge Hartz distinguished *BenEzra, Weinstein & Co. v.*

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<sup>70</sup>The majority broadly construed *develop* in part because cardinal principles of statutory construction require that *develop* mean something different than *create* based on the CDA definition of an information content provider to mean “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.” 47 U.S.C.A. § 230(f)(3) (emphasis added). The majority explained that “[u]nder a long-standing canon of statutory construction, one should avoid construing a statute so as to render statutory language superfluous.” 570 F.3d at 1198, quoting *McCloy v. U.S. Dept. of Agriculture*, 351 F.3d 447, 451 (10th Cir. 2003) and citing *Roommate.com*, 521 F.3d at 1168.

<sup>71</sup>570 F.3d at 1198, quoting *Roommate.com*, 521 F.3d at 1162 (quoting 47 U.S.C.A. § 230(f)(3)).

<sup>72</sup>570 F.3d at 1199.

<sup>73</sup>570 F.3d at 1199. By analogy, the majority explained that one who builds a highway ordinarily is not responsible “for the use of that highway by a fleeing bank robber, even though the culprit’s escape was facilitated by the availability of the highway.” 570 F.3d at 1199.

<sup>74</sup>570 F.3d at 1199.

*America Online, Inc.*<sup>75</sup> because even though AOL had solicited stock quotations in that case, the plaintiff's claim was based on inaccuracies in the solicited quotations. AOL had not solicited the errors, which was the offending content at issue in that case. On the other hand, "[i]f the information solicited by America Online had been inherently unlawful, for example, if it were protected by contract or was child pornography . . . [the court's] reasoning would necessarily have been different."<sup>76</sup>

The majority also contrasted its holding with the Ninth Circuit's decision in *Carafano v. Metrosplash.com, Inc.*,<sup>77</sup> where a dating site was sued for a phony profile posted by a user. Although members were required to respond to multiple choice questions in setting up their profiles (in addition to submitting an essay), the website's classifications of user characteristics did nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier.<sup>78</sup> By contrast, Judge Hartz ruled that Accusearch was not merely a provider of neutral tools. It "solicited requests for confidential information protected by law, paid researchers to find it, knew that the researchers were likely to use improper methods, and charged customers who wished the information to be disclosed."<sup>79</sup> In the words of Judge Hartz, "Accusearch's actions were not 'neutral' with respect to generating offensive content; on the contrary, its actions were intended to generate such content."<sup>80</sup>

In his concurring opinion, Judge Tymkovich criticized the majority for reaching the issue of the CDA's applicability when he believed it was not necessary to do so, for narrowing the scope of the CDA's exemption and ultimately for making it more difficult to distinguish when the exemption afforded by section 230(c)(1) may apply. Judge Tymkovich lamented the majority's "unnecessary extension of the CDA's terms 'responsible' and 'development,' thereby widening the scope of what constitutes an 'information content provider'

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<sup>75</sup>*Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

<sup>76</sup>570 F.3d at 1199.

<sup>77</sup>*Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

<sup>78</sup>570 F.3d at 1200, quoting *Roommate.com*, 521 F.3d at 1172.

<sup>79</sup>570 F.3d at 1201.

<sup>80</sup>570 F.3d at 1201.

with respect to particular information under the Act.”<sup>81</sup> By holding that Accusearch was responsible, at least in part, for developing the material at issue by soliciting third parties to obtain confidential telephone records and then exposing them to public view, Judge Tymkovich wrote that “the line between passive posting of tortious or unlawful commentary, news articles, or other previously unpublished information and content development depends on an amorphous analysis of the motivations of the content provider in soliciting or acquiring that information.”<sup>82</sup> The majority’s test turns on whether the interactive service provider was acting in good faith. “If the provider’s motivations are not in good faith,” he wrote, “the majority’s approach transforms the provider into a developer of that information.”<sup>83</sup>

Judge Tymkovich would not have reached the issue of the CDA’s applicability, believing that the FTC sought and ultimately held Accusearch liable for its own misconduct, rather than the content it had made available online.

*Accusearch* arguably applies a broader interpretation of *development* than *Roommate.com*, which itself may be viewed as a departure from, rather than necessarily a logical outgrowth of, earlier case law.

Although the majority in *Accusearch* emphasized both the terms *development* and *responsible*, the fact is that the phone records at issue existed independently of anything Accusearch had done. Accusearch unquestionably solicited the material, but it did not contribute to its creation. Under *Roommate.com* solicitation alone is not enough to support liability where the content originates with another information content provider.<sup>84</sup> Solicitation, shaping of content or encouragement also subsequently were rejected by the Sixth Circuit as grounds for taking an interactive computer service outside the CDA.<sup>85</sup>

*Accusearch* alternatively may be viewed narrowly as a case involving solicitation of and payment for specific content

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<sup>81</sup>570 F.3d at 1204 (Tymkovich, J. concurring).

<sup>82</sup>570 F.3d at 1204 (Tymkovich, J. concurring).

<sup>83</sup>570 F.3d at 1204 (Tymkovich, J. concurring).

<sup>84</sup>See *infra* § 37.05[3][D][ii]

<sup>85</sup>See *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 413–15 (6th Cir. 2014); see *generally infra* § 37.05[3][D][ii] (discussing the case in greater detail).

(third party phone records) that was uniformly illegal. At least one court has narrowly construed *Accusearch* as standing for the proposition that soliciting and paying researchers for personal phone records amounted to development because obtaining the personal phone records of third parties is almost always unlawful. In *Hill v. StubHub, Inc.*,<sup>86</sup> the North Carolina Court of Appeals distinguished *Accusearch* on this basis, ruling that StubHub did not lose CDA protection and was not liable for violating a North Carolina law prohibiting the re-sale of concert tickets for more than \$3 over the face value of the tickets where StubHub allegedly knew about the law and that users of the site were ignoring it, and had a suggestion tool that displayed similar ticket sales to help sellers decide what price to set for their tickets, because the individual seller, not StubHub, had “complete control” over the price actually charged (with StubHub merely earning 10% on each sale). In so ruling, the court made clear that liability could not be imposed under the CDA simply (1) for having notice of the illegal conduct, (2) for making a profit from the illegal conduct, or (3) if the conduct was “reasonably foreseeable” or for “willful blindness.”<sup>87</sup> Rather, the court emphasized that to “materially contribute” to the creation of unlawful content, “a website must effectively control the content posted by those third parties or take other actions which essentially ensure the creation of unlawful content.”<sup>88</sup>

The court in *Hill v. StubHub, Inc.* similarly held that acting as a broker or hosting a site where third parties may post material does not make the site the agent for the individual directly responsible for the content.<sup>89</sup>

In *Jones v. Dirty World Entertainment Recordings, LLC*,<sup>90</sup> the Sixth Circuit interpreted *Accusearch* as a case where “the website was responsible for the illegal purchase and resale of confidential telephone records.”<sup>91</sup> In *Jones*, the Sixth Circuit vacated a jury award for the plaintiff and reversed the lower court’s denial of the defendant’s motion for judg-

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<sup>86</sup>*Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012).

<sup>87</sup>*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 (N.C. App. 2012).

<sup>88</sup>*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 561 (N.C. App. 2012).

<sup>89</sup>*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 (N.C. App. 2012).

<sup>90</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014).

<sup>91</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014).



ment in a case involving comments on a gossip site. The appellate court explained that “[t]he district court elided the crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable.”<sup>92</sup> It was also on this basis that the Sixth Circuit distinguished *Accusearch* and *Roommate.com* (to the extent immunity was denied) from those aspects of the service entitled to CDA protection in *Roommate.com* and *Chicago Lawyers’ Committee v. Craigslist, Johnson, Batzel, Nemet, and Zeran*, where courts found the interactive computer service entitled to CDA protection.

*Accusearch* ultimately may be seen as an outlier decision perhaps reflecting the defendant’s egregious misconduct and therefore limited to circumstances where a site solicits and pays for the specific content at issue, where that content is almost always illegal, as *Hill v. StubHub, Inc.* suggests, or an overly broad extension of *Roommate.com* that finds *development* based on preexisting content, perhaps arrived at because the plaintiff in *Accusearch*, the Federal Trade Commission, sought an expansive ruling in a case involving bad facts. Under either interpretation, a general solicitation (or solicitation of neutral content) would not be sufficient to strip away CDA immunity. The solicitation at issue must be specifically for the content at issue (and in the view of *Hill v. StubHub* would have to involve content that is almost always unlawful).

In practice, the fact patterns reflected by *Roommate.com* and *Accusearch* are not typical of most CDA section 230(c)(1) cases, which largely are decided in favor of immunity.

Which circuit’s approach to CDA preemption, however, may determine whether the issue of immunity is resolved at the outset of a case, on a motion to dismiss, or later, at greater expense to the interactive computer service provider or user.<sup>93</sup> At the margin, it remains to be seen to what extent the narrower view of the scope of CDA immunity reflected in the *Roommate.com* and *Accusearch* cases gain currency outside the Ninth and Tenth Circuits and in state courts. In

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<sup>92</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014); see generally *infra* § 37.05[3][D][ii] (discussing the case in greater detail).

<sup>93</sup>See *infra* § 37.05[7] (procedural issues).

the Fourth and Sixth Circuits and elsewhere, courts may be more likely to be influenced by the more traditional approach to CDA immunity,<sup>94</sup> while in the Seventh Circuit courts will broadly apply the CDA to cases where it applies but will more narrowly evaluate when a case in fact seeks to hold a defendant liable as a publisher or speaker of information provided by another information content provider.<sup>95</sup>

Typical CDA cases involving publication of third party material are likely to be decided the same in all circuits. What test is applied may make a difference, however, in cases involving commercial gripe sites, which are considered in section 37.05[3][D]. That section also analyzes payment for content and editing, which is a traditional editorial function and in most cases should not affect section 230(c)(1) analysis.

### **37.05[3][D] Commercial Gripe Sites, Editing, Soliciting and Paying for Content**

#### **37.05[3][D][i] Overview**

The circumstances under which an information content provider may be ineligible for CDA immunity pursuant to section 230(c)(1) for particular content that it is deemed to have *developed* are analyzed in the preceding section.<sup>1</sup> As set forth in that section, and as analyzed below in section 37.05[3][D][ii] a party may not be deemed to have *developed* third party material under *Fair Housing Council v. Roommate.com, LLC*<sup>2</sup> merely by hosting, lightly editing or even soliciting actionable content. Where development is found, it may apply only to particular material and only

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<sup>94</sup>See, e.g., *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (holding that CDA determinations must be made as early as possible in a case because “immunity is an *immunity from suit* rather than a mere defense to liability’ and ‘it is effectively lost if a case is erroneously permitted to go to trial.’ . . . .”; citations omitted); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014) (rejecting encouragement as a basis for imposing liability and broadly applying the CDA); *supra* § 37.05[3][B]; *infra* § 37.05[3][D].

<sup>95</sup>See *supra* § 37.05[3][B][iii] (analyzing Seventh Circuit law on this point).

#### **[Section 37.05[3][D][i]]**

<sup>1</sup>See *supra* § 37.05[3][C].

<sup>2</sup>*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*); *supra* § 37.05[3][C].

where that material is at issue in a given suit.<sup>3</sup> Similarly, where a defendant adds additional content to material from another information content provider, the defendant's own contribution should not be sufficient to expose it to liability unless the added portion is itself actionable.<sup>4</sup>

In *FTC v. Accusearch, Inc.*,<sup>5</sup> the Tenth Circuit found that soliciting and paying for content amounted to *development*, even though the third party phone records at issue in that case existed independently of anything Accusearch had done. If a site specifically encourages actionable content or activity, it could be deemed *responsible* in whole or part for the *development* and thus liable as an information content provider under *Accusearch*.<sup>6</sup> Other circuits and state courts to date have not gone that far.

A compelling argument may be made that the Tenth Circuit panel in *Accusearch* did not properly distinguish between preexisting content such as a phone record, which originated with the phone company—another information content provider—and could not have been *developed* since it already existed, and material *developed* by an information content provider, which arguably implies new material that is created, rather than preexisting content that is merely

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<sup>3</sup>See *supra* § 37.05[3][C].

<sup>4</sup>See, e.g., *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (*en banc*) (“we interpret the term ‘development’ as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct”); see also *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 415–17 (6th Cir. 2014) (rejecting arguments that selecting and editing content for display or ratifying or adopting the content could disqualify an interactive computer service from CDA protection and holding that the defendant was not liable for its own added commentary); *Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding plaintiff's defamation claim barred by section 230(c)(1) where the plaintiff had alleged that the defendant was liable for adding additional information to an allegedly defamatory email that the defendant re-circulated; holding that the defendant did not make a material contribution where nothing he added was itself defamatory).

<sup>5</sup>*FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

<sup>6</sup>See *supra* § 37.05[3][C].

republished.<sup>7</sup> *Accusearch* thus may be seen either as a misapplication of *Roommate.com* or an extension of its holding that is controlling in the Tenth Circuit, but not elsewhere.

On the other hand, one court construed *Accusearch* narrowly as holding merely that soliciting and paying researchers for personal phone records amounted to development in that case because obtaining the personal phone records of third parties is almost always unlawful.<sup>8</sup> Read this way, *Accusearch* is limited to instances where a site solicits and pays for specific content that is almost always actionable. In the Ninth Circuit under *Roommate.com*, payment plus solicitation is not sufficient to amount to development (as opposed to soliciting neutral content that in a particular case happens to be actionable).<sup>9</sup>

Outside the Ninth and Tenth Circuits, there is no authority at all that solicitation would be sufficient<sup>10</sup> (other than a district court opinion or two purporting to follow *Accusearch*, which are discussed later in this section).

Whether and to what extent *development* may be found ultimately may depend in part on where suit is filed.

The Fourth and Sixth Circuits arguably provide the greatest protection for interactive computer service providers and users under section 230(c)(1).<sup>11</sup> The Ninth and Tenth Circuits have broadly construed *development*, which necessarily narrows the scope of CDA immunity in some cases, but even in the Ninth Circuit Chief Judge Kozinski made clear there is a high bar set to find *development* and questionable cases are to be resolved in favor of immunity.<sup>12</sup> The Seventh Circuit does not consider the CDA as affording immunity and may view narrowly what constitutes liability imposed for publishing or speaking, but where applicable broadly applies protection to interactive computer service providers and users.<sup>13</sup>

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<sup>7</sup>See *supra* § 37.05[3][C].

<sup>8</sup>*Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012); *supra* § 37.05[3][B][iii].

<sup>9</sup>See *supra* § 37.05[3][C].

<sup>10</sup>See *supra* § 37.05[3][C].

<sup>11</sup>See *supra* §§ 37.05[3][B], 37.05[3][C]; *infra* § 37.05[3][D][ii].

<sup>12</sup>See *supra* § 37.05[3][C]; *infra* § 37.05[3][D][ii].

<sup>13</sup>See *supra* § 37.05[3][B][iii].

**37.05[3][D][ii] Commercial Gripe Sites and Other Sites and Services that Solicit Potentially Actionable Content**

The line between an exempt interactive computer service provider and a potentially liable information content provider may be hardest to draw in cases involving commercial gripe sites such as *RipoffReport.com*, *Badbusinessbureau.com* and *PissedConsumer.com*, which actively solicit, and earn money by hosting, stridently negative information about companies and have been accused of promoting negative comments and deleting positive ones unless a company pays for a premium membership (which allegedly allows companies to respond to the negative comments solicited about them from consumers in ways not afforded to non-paying customers).<sup>1</sup> Plaintiffs in suits against commercial gripe sites have alleged that some interactive computer service providers actually write some of the content

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**[Section 37.05[3][D][ii]]**

<sup>1</sup>The practices of *RipOffReport* and *PissedConsumer.com* in seeking to charge companies for the opportunity to respond to negative comments posted against them have led to suits alleging, among other things, RICO violations based on extortion. Courts to date have not been receptive to extortion claims, to the extent based on *RipoffReport*'s alleged solicitation to pay to join its "Corporate Advocacy Program" as the only way to mitigate the effect of negative comments about a company ostensibly posted by users on the *RipoffReport.com* site, on the threat that *RipoffReport.com* otherwise would vigorously defend all claims against it based on the CDA, or similar assertions leveled against *PissedConsumer.com*'s "Reputation Management Service." See *Asia Economic Institute v. Xcentric Ventures, LLC*, CV 10-1360 SVW (C.D. Cal. Order Granting in Part and Denying in Part Motion for Summary Judgment on RICO Claims Based on Predicate Acts of Extortion July 19, 2010); see also *Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PjWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (granting summary judgment for the defendant on claims for defamation, false light and intentional and negligent interference with economic relations based on the CDA); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (finding plaintiffs unlikely to prevail on their RICO or other claims against the owners of *PissedConsumer.com*, in denying plaintiffs' motion for preliminary injunction); *Ascentive, LLC v. Opinion Corp.*, No. 10 Civ. 4433 (ILG) (SMG), 2012 WL 1569573 (E.D.N.Y. May 3, 2012) (granting plaintiffs' motion for voluntary dismissal, over defendants' objections, and denying defendants' motion for sanctions). Courts, however, have allowed other claims to proceed. See, e.g., *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012) (denying defendant's motion to dismiss state claims based on CDA preemption or plaintiff's trademark claims).

they host, edit user submissions to make them more sharply negative and allegedly defamatory, and actively and specifically solicit particular defamatory comments. Under *Roommate.com*, merely hosting,<sup>2</sup> editing,<sup>3</sup> ratifying or adopt-

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Perhaps somewhat ironically, Ripoff Report itself apparently was ripped off by another site based in Latvia, [www.complaintsboard.com](http://www.complaintsboard.com), which allegedly copied Ripoff Report content. See *Xcentric Ventures, LLC v. Arden*, No. C 10-80058 (SI) (N.D. Cal. June 22, 2010) (refusing to vacate a default judgment entered against [complaintsboard.com](http://complaintsboard.com), in a suit by Xcentric, the owner of RipoffReport.com, to collect on the default judgment).

<sup>2</sup>See, e.g., *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 (N.C. App. 2012).

<sup>3</sup>See *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (*en banc*) (holding that section 230 allows interactive computer services “to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they edit or delete.”); *id.* at 1169 (approving of “editing user-created content—such as by correcting spelling, removing obscenity or trimming for length.”); *id.* at 1170 (“an editor’s minor changes to the spelling, grammar and length of third-party content do not strip him of section 230 immunity.”), *id.* at 1171 n.29 (“there can be no meaningful difference between an editor starting with a default rule of publishing all submissions and then manually selecting material to be removed from publication, and a default rule of publishing no submissions and manually selecting material to be published—they are flip sides of precisely the same coin.”); see also, e.g., *Riggs v. MySpace, Inc.*, 444 F. App’x 986 (9th Cir. 2011) (dismissing with prejudice as preempted by the CDA claims for negligence and gross negligence over MySpace’s alleged deletion of celebrity imposter user profiles); *Batzel v. Smith*, 333 F.3d 1018, 1022, 1031, (9th Cir. 2003) (rejecting the argument that by minor wording changes and the addition of a “moderator’s message” to a third party posting (and by his decision to publish or not publish certain messages) a website owner was jointly responsible as an information content provider); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (“By deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect.”); *Russell v. Implode-Explode Heavy Industries, Inc.*, Civil Action No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013) (distinguishing *Roommate.com* based on its unique facts and granting summary judgment for the defendant on claims for libel and defamation where the defendant “was not completely uninvolved with the allegedly defamatory article, but his involvement was limited to editorial work, which is insufficient to transform IEHI into an ‘information content provider’ . . .”). *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding editorial discretion an insufficient basis for conferring liability and finding that America Online’s payments to Drudge did not change the fact that America Online was not an information content provider); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (holding that eBay’s practice of actively soliciting and then compiling user

ing,<sup>4</sup> and even encouraging or soliciting<sup>5</sup> actionable content do not amount to development, although interactive com-

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ments (and ranking sellers with stars or the “Power Seller” designation) did not mean that eBay was acting as an information content provider); *Donato v. Moldow*, 374 N.J. Super. 475, 490, 497–98, 499–500, 865 A.2d 711 (App. Div. 2005) (rejecting the argument that defendant’s conduct in “shaping” the content of a discussion forum by removing some but not other messages could be equated with responsibility for developing it); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 465–66, 31 P.3d 37 (Div. 1 2001) (rejecting the argument that Amazon.com lost the exemption provided by the CDA because it had the right to edit and affirmatively claimed valuable licensing rights in third party content). In *Roommate.com* Chief Judge Kozinski explained:

A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user’s message reading “[Name] did *not* steal the artwork” in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.

*Id.* at 1169 (emphasis in original). He further noted that “Congress sought to immunize the removal of user-generated content, not the creation of content.” *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (*en banc*).

<sup>4</sup>See, e.g., *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 415 (6th Cir. 2014); *Parisi v. Sinclair*, 774 F. Supp. 2d 310, 316 (D.D.C. 2011).

<sup>5</sup>See *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 413–15 (6th Cir. 2014); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1166 n.19 (9th Cir. 2008) (*en banc*) (rejecting the dissent’s argument that the majority found Roommate.com ineligible for section 230(c)(1) immunity for mere *encouragement* or *solicitation*, writing that “Roommate . . . does much more than encourage or solicit; it forces users to answer certain questions and thereby provide information that other clients can use to discriminate unlawfully.”); *id.* at 1174 (“The fact that Roommate encourages subscribers to provide *something* in response to the prompt is not enough to make it a ‘develop[er]’ of the information.”; emphasis in the original); *id.* at 1174 (“weak encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter”).

In *Roommate.com*, Chief Judge Kozinski further made clear that *solicitation* alone is not the same as *development* by the way he used the term. See *id.* at 1171 n.30 (“[o]ur holding is limited to a determination that the CDA provides no immunity to Roommate’s actions in soliciting and developing the content of its website”; emphasis added); *id.* at 1170 (writing that Roommate.com was sued for “creating a website designed to solicit and enforce housing preferences that are alleged to be illegal”; emphasis added).

As Chief Judge Kozinski explained:

puter service providers or users potentially may be held liable for material they actually write themselves,<sup>6</sup> but only if their contribution is itself actionable.<sup>7</sup> In the Tenth Circuit, under *Accusearch*, solicitation and payment alone may be enough to amount to development, at least if the content solicited is almost always illegal, although this would not be enough in the Ninth Circuit under *Roommate.com*.<sup>8</sup>

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We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content . . . . Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality—as it is clear here with respect to Roommate’s questions, answers and the resulting profile pages—immunity will be lost. But in cases of enhancement by implication or development by inference . . . section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

*Id.* at 1174–75; *see also Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (applying *Roommate.com* in holding that encouraging users to post on a message board is not enough for the message board operator to be deemed a “developer” of content and hence an information content provider).

<sup>6</sup>*See, e.g., Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008) (declining to dismiss claims against an Internet publisher who was alleged to have posted statements on its website by fictitious people, creating the false impression that the postings were from bona fide disgruntled patients of the plaintiffs’ hair restoration clinic).

<sup>7</sup>*See, e.g., Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 415–17 (6th Cir. 2014) (rejecting arguments that selecting and editing content for display or ratifying or adopting the content could disqualify an interactive computer service from CDA protection and holding that the defendant was not liable for its own added commentary); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (*en banc*) (“we interpret the term ‘development’ as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct”); *see also Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding plaintiff’s defamation claim barred by section 230(c)(1) where the plaintiff had alleged that the defendant was liable for adding additional information to an allegedly defamatory email that the defendant re-circulated; holding that the defendant did not make a material contribution where nothing he added was itself defamatory).

<sup>8</sup>*See supra* § 37.05[3][C] (analyzing Ninth and Tenth Circuit law).



A number of courts have held commercial gripe sites (or consumer review sites alleged to solicit and potentially develop or pay for negative content<sup>9</sup>) to be immune from liability under the CDA,<sup>10</sup> while others prior to *Roommate.com*

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<sup>9</sup>Cases brought against legitimate consumer review sites are grouped with gripe sites to the extent the plaintiff alleged that the site *developed* actionable content. While a neutral blog or consumer review site is less likely to risk losing CDA protection than a site that actively solicits specific negative commentary, under *Roommate.com* the legal standard applied by courts is the same, and mere solicitation, payment and light editing, without more, should not be sufficient to strip away CDA immunity.

<sup>10</sup>*See, e.g., Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (affirming dismissal of a claim against a consumer criticism site on a Rule 12 motion to dismiss); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating a jury award and reversing the lower court's denial of the defendant's motion for judgment in a defamation suit brought against the owners of *TheDirty.com*); *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs' extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014); *Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PjWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (holding that defendant's allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section 230 and that "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found."); *GW Equity LLC v. Xcentric Ventures LLC*, Civil Action No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009) (affirming the Magistrate Judge's recommendation to enter summary judgment for the defendant in a suit over postings on RipoffReport.com and BadBusinessBureau.com, where the plaintiff alleged that the defendants developed the offending content and objected that the Magistrate Judge had not considered the *Roommate.com* cases); *Whitney Information Network Inc. v. Xcentric Ventures, LLC*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008) (granting summary judgment on plaintiff's defamation claim based on content posted on RipOffReport.com); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (dismissing a claim alleging that RipoffReport.com and its owners were liable for actively soliciting defamatory material and for keeping an allegedly defamatory post on its site after the author asked that it be removed); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. 2010) (dismissing a defamation claim brought against Yelp! Inc. by a

had suggested that they might lie outside it (although some of those cases were decided on motions to dismiss, rather

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dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, and dismissing on the merits a deceptive acts or practices claim based on the allegation that for \$300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback); *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (N.Y. Sup. 2009) (dismissing defamation and products liability claims brought against Xcentric Ventures, LLC, the operator of RipOffReport.com, based on user posts, in an unreported opinion).

In *Shaiamili*, the New York Court of Appeals concluded that the content alleged to have been created by the defendant itself (a picture of the plaintiff superimposed over an image of Jesus next to the statement “King of the Token Jews”—what the court referred to as “the heading, sub-heading and illustration that accompanied the reposting” of an objectionable user comment) was not defamatory, and therefore not actionable. The court further held that the defendants did not become content providers merely by virtue of moving a user post from one location to their own website (which the court characterized as “well-within ‘a publisher’s traditional editorial functions.’”). Moreover, unlike *Doctor’s Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010), which is discussed later in this section, there was no allegation that the defamatory comments were posted in response to any specific invitation for users to bash the plaintiff or his business.

With respect to *Roommate.com*, New York’s highest court concluded that it “need not decide whether to apply the Ninth Circuit’s relatively broad view of ‘development’ since, even under that court’s analysis, Shiamili’s claim fail[ed].”

In a strong dissent, however, Chief Judge Lippman argued that under *Roommate.com* and *Accusearch* plaintiff’s complaint should not have been dismissed. According to the complaint, Chief Judge Lippman wrote, defendants “not only moved defamatory comments to an independent post entitled ‘Ardor Reality and Those People,’ but embellished the comment thread by attaching a large, doctored photograph of plaintiff depicted as Jesus Christ, with the heading: ‘Chris Shiamili: King of the Token Jews.’” He further emphasized that the defamatory statements were preceded by a disparaging editor’s note that allegedly was written by one of the defendants. In conclusion he wrote that “an interpretation that immunizes a business’s complicity in defaming a direct competitor takes us so far afield from the purpose of the CDA as to make it unrecognizable. Dismissing this action on the pleadings is not required by the letter of the law and does not honor its spirit.”

In *GW Equity*, the court approved of a Magistrate Judge’s recommendation over objections that *Roommate.com* compelled a different result. The trial court gave little credence to evidence that defendant’s employees modified the text of user submissions to add words such as “Ripoff,” which it characterized as not material because all but one of the employees who admitted engaging in this practice testified that they had not done so recently.

than on summary judgment or at trial with developed evidentiary records).<sup>11</sup>

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In dismissing plaintiff's claim in *Global Royalties*, Judge Frederick Martone, in a controversial passage, wrote that:

It is obvious that a website entitled Ripoff Report encourages the publication of defamatory content. However, there is no authority for the proposition that this makes the website operator responsible, in whole or in part, for the "creation or development" of every post on the site.

*Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008).

Judge Martone seemed to suggest that a different case might be presented if the defendants had solicited defamatory posts about the plaintiff (as opposed to defamatory posts in general) in noting that plaintiffs did not allege that defendants solicited the particular posts at issue or any targeted at plaintiff nor did they allege that plaintiffs altered the allegedly defamatory comments or had "any more than the most passive involvement (providing a list of possible titles) in composing them." *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008).

<sup>11</sup>See, e.g., *Whitney Information Network, Inc. v. Xcentric Venture, LLC*, 199 F. App'x 738 (11th Cir. 2006) (vacating and remanding a lower court order dismissing the case for failing to meet the requirements of Florida's long arm statute where the plaintiff alleged that the defendants, operators of badbusinessbureau.com, rewrote consumer posts to add words such as "ripoff," "dishonest," and "scam," and knowingly fabricated entire consumer complaints which were then attributed to anonymous writers or people with phony names, taking them outside the scope of the CDA exemption and therefore subject to jurisdiction based on conduct directed to a Florida resident); *Energy Automation Systems, Inc. v. Xcentric Ventures, LLC*, No. 3:06-1079, 2007 WL 1557202 (M.D. Tenn. May 27, 2007) (denying defendant's motion to dismiss, which the court treated as a motion for summary judgment, and lifting a stay on discovery, where the plaintiff alleged that the defendants created and developed the allegedly defamatory content at issue and therefore that the protections afforded by the CDA did not apply); *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005) (denying a motion to dismiss based on the CDA where the plaintiff alleged that the defendant had produced editorial comments, titles and other original content contained in allegedly defamatory postings); *MCW, Inc. v. Badbusinessbureau.com, LLC*, Civ. A.3:02-CV-2727-G, 2004-1 Trade Cas. ¶ 74,391 (N.D. Tex. Apr. 19, 2004) (denying defendants' motion to dismiss, holding that badbusinessbureau.com and ripoffreport.com and their owner could be liable as information content providers for the postings (titles, headlines and editorial messages) which plaintiff alleged they created as original material, developed and posted).

In *MCW, Inc.*, the court also ruled that "actively encouraging and instructing a consumer to gather specific detailed information" was an activity that went "substantially beyond the traditional publisher's editorial role" and therefore left them exposed to liability for "developing" the material.

Since *Roommate.com*, some state<sup>12</sup> and federal<sup>13</sup> courts

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In *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544 (E.D. Va. 2008), *aff'd*, 591 F.3d 250 (4th Cir. 2009), *MCW* was distinguished and explained by the district court as a case where “the defendants were encouraging posters to take pictures to add to the website, and were actively soliciting postings.” 564 F. Supp. 2d at 550.

<sup>12</sup>See, e.g., *Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294, 313, 175 Cal. Rptr. 3d 131, 145 (2d Dist. 2014) (reversing the lower court and holding that a California false advertising claim against Yelp was not preempted by the CDA because it was not premised on user reviews but on Yelp’s own statements about the accuracy of its review filter); *New England Patriots, L.P. v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009) (declining to dismiss plaintiff’s complaint based on “evidence in the record that StubHub materially contributed to the illegal ‘ticket scalping’ of its sellers” which could support a claim that it developed the material under *Roommate.com* based on “knowing participation in illegal ‘ticket scalping’ . . . .”); *Woodhull v. Meinel*, 145 N.M. 533, 202 P.3d 126 (Ct. App. 2008) (broadly construing the scope of section 230(c)(1) but finding defendant’s entitlement to the exemption presented a factual question precluding summary judgment based on defendant’s requests that users post potentially defamatory material for the purpose of “making fun of” the plaintiff, in a post-*Roommate.com* case that does not actually cite to *Roommate.com*).

None of these cases, of course, was decided on the merits. Allowing a case to proceed—either past a motion to dismiss to discovery, or past a summary judgment motion to trial—is different from entering judgment for the plaintiff following consideration of all of the underlying evidence. Nevertheless, courts evaluating dispositive motions, including motions to dismiss or for judgment on the pleadings at the outset of a case, should consider that section 230 “‘immunity is an *immunity from suit* rather than a mere defense to liability’ and ‘it is effectively lost if a case is erroneously permitted to go to trial.’ . . . .” *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (emphasis in original; citations omitted); see *infra* § 37.05[7] (analyzing procedural issues).

<sup>13</sup>See, e.g., *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012) (denying defendant’s motion to dismiss state claims based on CDA preemption without addressing either *Roommate.com* or development, finding that the plaintiff had alleged sufficient conduct by the defendant itself); *Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012) (denying defendant’s motion for judgment as a matter of law in a defamation suit where the defendant operated a website called *TheDirt.com*, which the court found operated for the purpose of encouraging defamatory statements, and had personally appended a tagline to the postings of others and supplemented user submissions with his own comments in a way that the court found adopted the defamatory statements as his own; applying *Accusearch* and relying in part on a law review article that criticized *Roommate.com* for affording interactive computer service providers too much immunity); *Certain Approval Programs, LLC v. XCentric Ventures*

have been more receptive to the argument that a gripe site or Internet location that hosts critical material may be liable for development of user content, making a site that is otherwise eligible for protection as an interactive computer service potentially liable as an information content provider, at least at the pleadings stage where a claim need only be alleged, not proven by admissible evidence.

In some instances, the issue of development may present a factual dispute that cannot be resolved short of trial. For example, in *Doctor's Associates, Inc. v. QIP Holder LLC*,<sup>14</sup> the court denied defendant's motion for summary judgment based on the CDA in a case involving user submitted videos, where Quiznos had held an Internet contest for customers to submit their own advertisements comparing Quiznos sandwiches to those of Subway. The plaintiff had alleged that defendants "went beyond the role of a traditional publisher by 'soliciting disparaging material' and 'shaping the eventual content'" by using a domain name for the contest (meatnomeat.com) that arguably falsely implied that Subway sandwiches had no meat and posted four "sample videos" on the user submission site that allegedly shaped user submissions. The court held that a reasonable jury might conclude that defendants "did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos."

Most courts, especially those outside of the Ninth Circuit, ultimately have read *Roommate.com* narrowly, based on its unique facts.<sup>15</sup> This trend may be accelerated as a result of the Sixth Circuit's 2014 opinion in *Jones v. Dirty World*

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*LLC*, No. CV08-1608-PHX-NVW, 2009 WL 596582 (D. Ariz. Mar. 9, 2009) (granting leave to amend to allow plaintiff to allege that defendant "Ripoff Report" created or developed content and was therefore acting as an information content provider, rather than merely an interactive computer service provider).

<sup>14</sup>*Doctor's Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010).

<sup>15</sup>See, e.g., *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (affirming dismissal of a defamation claim based on critical comments on a website); *Seldon v. Magedson*, No. CV-13-00072-PHX-DGC, 2014 WL 1456316 (D. Ariz. Apr. 15, 2014) (granting summary judgment to the defendant on claims for defamation and intentional infliction of emotional distress where the defendant website reviewed, screened and posted third party content but did not write the material itself);

*Entertainment Recordings, LLC*,<sup>16</sup> which vacated a jury award and effectively mooted two years worth of earlier opinions in the case, which had been widely relied upon by plaintiffs seeking to avoid CDA preemption in suits involving consumer criticism. In *Jones v. Dirty World Entertainment Recordings, LLC*,<sup>17</sup> the district court in Kentucky had denied defendant's motion for judgment as a matter of law in a defamation suit where the defendants ran a website called *TheDirt.com*, which the court found operated for the purpose of encouraging defamatory statements, and where the site's owner had personally appended a tagline to the postings of others and supplemented user submissions with his own comments in a way that the court found adopted the defamatory statements as his own. The court held that "by reason of the very name of the site, the manner in which it is managed, and the personal comments of defendant Richie, the defendants have specifically encouraged development of what is offensive about the content of the site."<sup>18</sup> Senior District Court Judge Bertelsman explained, "[o]ne could hardly be more encouraging of the posting of such content than by saying to one's fans (known not coincidentally as 'the Dirty

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*Small Justice LLC v. Xcentric Ventures LLC*, Civil Action No. 13-cv-11701, 2014 WL 1214828, at \*7–8 (D. Mass. Mar. 24, 2014) (dismissing libel and tortious interference claims as preempted by the CDA and dismissing in part plaintiff's unfair competition claim under Mass. Gen. L. c. 93A § 11 to the extent based on Xcentric's continued display and refusal to take down reports from the Ripoff Report website, but holding that plaintiff's allegation about Xcentric's CAP and VIP Arbitration services could proceed based on the allegation that it was unfair for Xcentric to refuse to take down defamatory reports while simultaneously advertising services by which the plaintiff could pay Xcentric to restore his reputation); *Russell v. Implode-Explode Heavy Industries, Inc.*, Civil Action No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013) (distinguishing *Roommate.com* based on its unique facts and granting summary judgment for the defendant on claims for libel and defamation where the defendant "was not completely uninvolved with the allegedly defamatory article, but his involvement was limited to editorial work, which is insufficient to transform IEHI into an 'information content provider' . . .").

<sup>16</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014).

<sup>17</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012).

<sup>18</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008, 1012–13 (E.D. Ky. 2012).

Army’): ‘I love how the Dirty Army has war mentality.’”<sup>19</sup>

*Jones* was a suit by a teacher and cheerleader brought against a foul-mouthed individual who ran a crass website where the teacher’s sexual morality had been questioned, and was decided by a senior judge in Kentucky. At the time of the decision there was no controlling Sixth Circuit precedent construing the CDA and the judge, in his brief opinion, specifically cited as authority, in addition to *Roommate.com* and *Accusearch*, the dissenting opinion in the New York Court of Appeals’ decision in *Shiamili v. Real Estate Group*<sup>20</sup> and a law review article advocating a narrower scope of CDA immunity than even the Ninth Circuit recognized in *Roommate.com*,<sup>21</sup> underscoring that the *Jones* court was applying a standard for evaluating *development* that was broader than any circuit court had ever recognized.

In a subsequent ruling on defendants’ post-trial motion for judgment as a matter of law pursuant to Rule 50, after a jury trial in which the plaintiff was awarded \$38,000.00 in compensatory damages and \$300,000.00 in punitive damages, Judge Bertelsman sought to cast the jury award in terms of existing case law, relying in particular on the Ninth Circuit’s decision in *Roommate.com* and Seventh Circuit criticism of case law holding that the CDA creates immunity or an exemption from liability.<sup>22</sup> In rejecting cases cited by the defendant, Judge Bertelsman explained that they were “entirely distinguishable because none involve[d] facts where a website contributed to the development of actionable content by adding its own comments implicitly adopting an

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<sup>19</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008, 1012 (E.D. Ky. 2012).

<sup>20</sup>*Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011, 1020–21 (2011) (Lippman, C.J. dissenting).

<sup>21</sup>See *Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008, 1012–13 & n.5 (E.D. Ky. 2012), citing *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011, 1020–21 (2011) (Lippman, C.J. dissenting); and Ali Grace Ziegrowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of The Communications Decency Act*, 61 Hastings L.J. 1307 (2010).

<sup>22</sup>See *Jones v. Dirty World Entertainment Recordings, LLC*, 965 F. Supp. 2d 818 (E.D. Ky. 2013), *rev’d*, 755 F.3d 398 (6th Cir. 2014).

offensive posting and encouraging similar posts.”<sup>23</sup> He wrote that “a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or adopting the posts becomes a ‘creator’ or ‘developer’ of that content and is not entitled to immunity.”<sup>24</sup>

The Sixth Circuit, however, vacated the jury verdict and reversed the district court’s denial of defendants’ motion for judgment, ruling that the defendants were insulated by the CDA from liability. In so ruling, the court adopted what it referred to as “the material contribution test to determine whether a website operator is ‘responsible, in whole or part, for the creation or development of [allegedly tortious

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<sup>23</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 965 F. Supp. 2d 818, 821(E.D. Ky. 2013), *rev’d*, 755 F.3d 398 (6th Cir. 2014).

<sup>24</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 965 F. Supp. 2d 818, 821(E.D. Ky. 2013) (*citing Hare v. Richie*, Civil Action No. ELH–11–3488, 2012 WL 3773116, at \*19 (D. Md. Aug. 29, 2012)), *rev’d*, 755 F.3d 398 (6th Cir. 2014). *Hare* was another case arising out of posts on *TheDirty.com*. The plaintiff in that case had sued the company that owned *TheDirty.com*, its editor, Nik Richie, and an investor over five message strings that referred to plaintiff as “The Baltimore Stalker” and included extensive commentary from users and from Richie himself. The court denied the motion to dismiss made by the website owner in *Hare* because it was not clear whether all of the potentially actionable posts had been written by users or by the site itself. The *Hare* court cited to both *Jones* and *S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012), in which a different court granted summary judgment for the owner of *TheDirty.com* under the CDA, noting that in denying defendant’s motion it was not pre-judging the applicability of the CDA. The court explained that:

[I]f Dirty World is the creator or developer, in whole or in part, of the content at issue, it is not entitled to immunity under § 230(c)(1) as to that content. To be sure, Dirty World contends that it is not responsible for the actions of Nik Richie. . . . However, “Section 230 does not preclude joint liability for the joint development of content.” *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998). If Dirty World were merely a passive provider of Mr. Richie’s material, then Dirty World’s argument might have some weight. But, Richie is the founder and editor-in-chief of *thedirty.com*. Moreover, “a corporation can only act through its agents.” *Western Md. Wireless Connection v. Zini*, 601 F. Supp. 2d 634, 643 (D. Md. 2009). At this stage of the litigation at least, when reasonable factual inferences must be resolved in the plaintiff’s favor, I must conclude that Richie was acting on behalf of Dirty World in authoring his comments. This distinguishes Dirty World from *Blumenthal*, 992 F. Supp. at 50, where a publisher had immunity under the CDA for distributing a gossip column because there was no support for the allegation that the publisher “had some role in writing or editing the material.”

*Hare v. Richie*, Civil Action No. ELH–11–3488, 2012 WL 3773116, at \*17 (D. Md. Aug. 29, 2012).



information.’”<sup>25</sup>

Judge Julia Smith Gibbons, on behalf of herself and Judges Ralph B. Guy, Jr. and Richard Allen Griffin, in the first reported Sixth Circuit opinion to construe the CDA, explained that section 230, “[a]t its core, . . . bars lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to withdraw, postpone or alter content.’”<sup>26</sup> She explained that “barring publisher-liability and notice-liability defamation claims lodged against interactive computer service providers . . .” serves three main purposes: (1) maintaining “the robust nature of Internet communication and, accordingly . . . keep[ing] government interference in the medium to a minimum”; (2) protecting “against the ‘heckler’s veto’ that would chill free speech . . .;” and (3) encouraging interactive computer service providers to self-regulate.”<sup>27</sup> She also observed that the protection provided by section 230 has merited expansion,<sup>28</sup> that courts have construed its immunity provisions broadly<sup>29</sup> and that close cases must be resolved in favor of immunity.<sup>30</sup>

Judge Gibbons wrote that resolution of *Jones* depended on “how narrowly or capaciously the statutory term ‘develop-

<sup>25</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 413 (6th Cir. 2014), citing 47 U.S.C.A. § 230(f)(3).

<sup>26</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 407 (6th Cir. 2014), quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

<sup>27</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 407–08 (6th Cir. 2014), quoting and citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330–21 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998) and 47 U.S.C.A. § 230(b)(2).

<sup>28</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014), citing 28 U.S.C.A. § 4102(c)(1) (providing that U.S. courts “shall not recognize or enforce” foreign defamation judgments that are inconsistent with section 230); 47 U.S.C.A. § 941(e)(1) (extending section 230 protection to new class of entities); see generally *infra* § 37.09[3] (analyzing the SPEECH Act).

<sup>29</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014), citing *Nemet Chevrolet, Ltd. v. Consumer Affairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (collecting cases).

<sup>30</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014), quoting *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*).

ment’ in § 230(f)(3) is read.”<sup>31</sup> The Sixth Circuit panel ultimately concluded that *development* refers “not merely to augmenting the content generally, but to *materially contributing to its alleged unlawfulness*. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, *if it contributes materially to the alleged illegality of the conduct*.”<sup>32</sup> Judge Gibbons explained that a “material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed

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<sup>31</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 409 (6th Cir. 2014). The court explained that:

An overly inclusive interpretation of “development” in § 230(f)(3) would posit that a website operator is responsible for the development of content created by a third party merely by displaying or allowing access to it. *Cf. Roommates*, 521 F.3d at 1167 (“It’s true that the broadest sense of the term ‘develop’ could include the functions of an ordinary search engine—indeed, just about any function performed by a website.”). But to read the term so broadly would defeat the purposes of the CDA and swallow the core immunity that § 230(c) provides for the “exercise of a publisher’s traditional editorial functions.” *See Zeran*, 129 F.3d at 330; *see also Roommates*, 521 F.3d at 1167 (stating that “development” cannot be read to swallow § 230 immunity). Our recognition that the CDA affords immunity forecloses this overbroad reading of “development.”

By contrast, an overly exclusive interpretation of “development” would exclude all the publishing, editorial, and screening functions of a website operator from the set of actions that the term denotes. Some courts have implied this interpretation, however. *See, e.g., Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 727 (N.D. Ohio 2007), *aff’d*, 551 F.3d 412 (6th Cir. 2008). But we have refused to adopt it. *See Doe*, 551 F.3d at 415 (“[W]e do not reach the question of whether the [CDA] provides SexSearch with immunity from suit. We do not adopt the district court’s discussion of the Act, which would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services.”). We have maintained that, despite the CDA, *some* state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities.

Therefore, . . . the proper interpretation of “*development* of information provided through the Internet,” § 230(f)(3), means something more involved than merely displaying or allowing access to content created by a third party; otherwise § 230(c)(1) would be meaningless. And instances of development *may* include some functions a website operator may conduct with respect to content originating from a third party. *See SexSearch.com*, 551 F.3d at 415.

*Id.* at 409–10.

<sup>32</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 410 (6th Cir. 2014), *quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (*en banc*) (emphasis added by the Sixth Circuit in *Jones*).

content allegedly unlawful.”<sup>33</sup>

Applying the material contribution test, which largely follows the CDA opinions of other circuits, the Sixth Circuit rejected the definition of *development* applied by the district court, which the appellate panel characterized as a misapprehension “of how other circuits, particularly the Ninth Circuit in *Roommates*, have separated what constitutes ‘development’ . . . from what does not.”<sup>34</sup> Judge Gibbons explained that “[t]he district court elided the crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable . . . . This is the distinction that divides the holdings in *Roommates* and *Accusearch*, which stripped the respective defendants of the CDA’s protection, from the holdings in *Roommates*, *Chicago Lawyers’ Committee*, *Johnson*, *Batzel*, *Nemet*, and *Zeran*, which barred the respective plaintiffs’ claims.”<sup>35</sup> The panel explained that “an encouragement theory of ‘development’ [as applied by the district court] does not obviously capture what was allegedly unlawful about the

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<sup>33</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 410 (6th Cir. 2014).

<sup>34</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014).

<sup>35</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014), citing *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1169–74 (9th Cir. 2008) (*en banc*). The panel explained that:

In *Roommates*, the website was responsible for the alleged discrimination by requiring users to submit protected characteristics and hiding listings based on those submissions. 521 F.3d at 1165–68. In *Accusearch*, the website was responsible for the illegal purchase and resale of confidential telephone records. 570 F.3d at 1200–01. But in *Chicago Lawyers’ Committee*, 519 F.3d at 671–72, and *Nemet*, 591 F.3d at 256–57, for example, the website operators provided a forum for user posts, did not require users to violate the law as a condition of posting, did not compensate for the posting of actionable speech, did not post actionable content themselves, and therefore were not responsible for the actionable speech that was displayed on their websites. The district court’s rule does not neatly divide these cases. An encouragement theory of “development” does not obviously capture what was allegedly unlawful about the design of Roommate’s website, particularly its search engine, or Accusearch’s payment for unlawful conduct. And it does not obviously leave out the neutral fora created by the commercially oriented websites targeted by the claims in *Chicago Lawyers’ Committee* and *Nemet* (craigslist.com and www.consumeraffairs.com, respectively).

*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014).

design of Roommate’s website, particularly its search engine, or Accusearch’s payment for unlawful conduct. And it does not obviously leave out the neutral fora created by the commercially oriented websites targeted by the claims in *Chicago Lawyers’ Committee* and *Nemet* (craigslist.com and www.consumeraffairs.com, respectively).<sup>36</sup> The court elaborated:

More importantly, an encouragement test would inflate the meaning of “development” to the point of eclipsing the immunity from publisher-liability that Congress established. Many websites not only allow but also actively invite and encourage users to post particular types of content. Some of this content will be unwelcome to others—*e.g.*, unfavorable reviews of consumer products and services, allegations of price gouging, complaints of fraud on consumers, reports of bed bugs, collections of cease-and-desist notices relating to online speech. And much of this content is commented upon by the website operators who make the forum available. Indeed, much of it is “adopted” by website operators, gathered into reports, and republished online. Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers’ suits aimed at the publisher. Moreover, under the district court’s rule, courts would then have to decide what constitutes “encouragement” in order to determine immunity under the CDA—a concept that is certainly more difficult to define and apply than the Ninth Circuit’s material contribution test. *See Zeran*, 129 F.3d at 333. Congress envisioned an uninhibited, robust, and wide-open internet, *see* § 230(a)(1)-(5), but the muddiness of an encouragement rule would cloud that vision.<sup>37</sup>

The Sixth Circuit in *Jones* likewise rejected the district court’s suggestion that “when an interactive computer service provider adds commentary to third-party content that ‘ratifies or adopts’ that content, then the provider becomes a ‘creator’ or ‘developer’ of that content and is not entitled to the CDA’s protection.”<sup>38</sup> Judge Gibbons explained that:

An adoption or ratification theory . . . is not only inconsistent with the material contribution standard of “development” but also abuses the concept of responsibility. A website operator cannot be responsible for what makes another party’s statement actionable by commenting on that statement *post hoc*.

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<sup>36</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014).

<sup>37</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414–15 (6th Cir. 2014).

<sup>38</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 415 (6th Cir. 2014).

To be sure, a website operator's previous comments on prior postings could encourage subsequent invidious postings, but that loose understanding of responsibility collapses into the encouragement measure of "development," which we reject. *See, e.g., Roommates*, 521 F.3d at 1174; *Batzel*, 333 F.3d at 1031. As other courts have recognized, the adoption theory of "development" would undermine the CDA for the same reasons as an encouragement theory. *See Parisi v. Sinclair*, 774 F. Supp. 2d 310, 316 (D.D.C. 2011) (dismissing plaintiffs' claims as barred by the CDA despite their argument that defendant "adopted" the statements at issue as its own and finding that "it would be contrary to the purpose of the CDA, which sought to encourage the vibrant and competitive free market of ideas on the Internet, by establishing immunity for internet publication of third-party content to require a fact-based analysis of if and when a defendant adopted particular statements and revoke immunity on that basis"; internal citations and quotation marks omitted).

Applying the material contribution test to the facts of *Jones*, the Sixth Circuit held that the defendants did not materially contribute to the illegality of third party postings because they did not author the statements at issue and could not be found to have materially contributed to the defamatory content simply by selecting the posts for publication, which is a traditional editorial function.<sup>39</sup> Nor could they be found to have materially contributed to the defamatory content through the decision not to remove the posts.<sup>40</sup> The Sixth Circuit explained:

Unlike in *Roommates*, the website that Richie operated did not require users to post illegal or actionable content as a condition of use. *Cf. Roommates*, 521 F.3d at 1165–68. Nor does the name of the website, *www.The Dirty.com*, suggest that only illegal or actionable content will be published. Unlike in *Accusearch*, Richie or Dirty World did not compensate users for the submission of unlawful content. *Cf. Accusearch*, 570 F.3d at 1200–01. The website's content submission form simply instructs users to "[t]ell us what's happening. Remember to tell us who, what, when, where, why." The form additionally provides labels by which to categorize the submission. These tools, neutral (both in orientation and design) as to what third parties submit, do not constitute a material contribution to any defamatory speech that is uploaded. *See Nemet*, 591 F.3d at 256 (finding that the

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<sup>39</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 415–16 (6th Cir. 2014).

<sup>40</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

“structure and design of [defendant’s] website” and the website’s “solicit[ion of] its customers’ complaints [and] steer[ing] them into specific categor[ies]” did not constitute development under § 230(f)(3)<sup>41</sup> (fifth alteration in original) (internal quotation marks omitted); *Roommates*, 521 F.3d at 1173–74 (holding that § 230 barred the fair housing councils’ claims grounded on the discriminatory statements displayed through Roommate’s operation of the “additional comments” section of its website).<sup>41</sup>

The appellate panel similarly found that Richie’s comment on a user’s December 7 post—“Why are all high school teachers freaks in the sack?”—“although absurd, did not materially contribute to the defamatory content of the statements uploaded on October 27 and December 7, 2009. Richie’s remark was made after each of the defamatory postings had already been displayed.”<sup>42</sup> Judge Gibbons explained that “[i]t would break the concepts of responsibility and material contribution to hold Richie responsible for the defamatory content of speech because he later commented on that speech. Although ludicrous, Richie’s remarks did not materially contribute to the defamatory content of the posts appearing on the website. More importantly, the CDA bars claims lodged against website operators for their editorial functions, such as the posting of comments concerning third-party posts, so long as those comments are not themselves actionable.”<sup>43</sup> The appellate panel clarified that Richie was an information content provider with respect to his comment on the December 7 post, but Jones had not alleged that Richie’s comments were defamatory – only that the defendants encouraged and ratified the statements posted by users.<sup>44</sup> The Sixth Circuit reiterated that the “district court’s adoption or ratification test . . . is inconsistent with the material contribution standard of ‘development’ and, if established, would undermine the CDA.”<sup>45</sup>

Prior to the Sixth Circuit’s ruling in *Jones*, the owners of

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<sup>41</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

<sup>42</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

<sup>43</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

<sup>44</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

<sup>45</sup>*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 417 (6th Cir. 2014).

TheDirty.com had prevailed in other CDA challenges. In *S.C. v. Dirty World, LLC*,<sup>46</sup> a court in Missouri applying Eighth Circuit law granted summary judgment for the owners of TheDirty.com in a defamation case brought in the Western District of Missouri, concluding both that the court in *Jones* applied an unduly narrow interpretation of the CDA that was inconsistent with Eighth Circuit law and that the two cases were factually distinguishable.<sup>47</sup> District Court Judge Dean Whipple, who had written the district court opinion that was subsequently affirmed in the first Eighth Circuit case applying the CDA, *Johnson v. Arden*,<sup>48</sup> sought to distance himself in *S.C. v. Dirty World, LLC* from Judge Bertelsman's initial ruling in *Jones*, explaining:

This Court . . . distances itself from certain legal implications set forth in *Jones*. In particular, Jones appears to adopt a relatively narrow interpretation of CDA immunity. *Id.* at \*3, 5. This is in conflict with the “broad” interpretation recognized in this circuit. *See Johnson*, 614 F.3d at 791. Additionally, *Jones* found that “**the name of the site in and of itself** encourages the posting only of ‘dirt,’ that is material which is potentially defamatory . . . .” *Jones*, 2012 WL 70426, at \*4 (emphasis supplied). As explained above, however, the CDA focuses on the specific content at issue and not the name of a website. *See Global Royalties, Ltd.*, 544 F. Supp. 2d at 933 (finding that although a website entitled “Ripoff Report” encourages defamatory content, this does not make the website operator liable for every post). As also explained above, the Website is not devoted entirely to “dirt.”<sup>49</sup>

Judge Whipple underscored that “merely encouraging defamatory posts is not sufficient to defeat CDA immunity.”<sup>50</sup>

In addition to disagreeing with the district court opinion in *Jones* on the law (which the Sixth Circuit eventually did as well), Judge Whipple distinguished the two cases on their facts (at least as alleged, because *S.C.* was decided prior to the trial and post-trial Rule 50 ruling in *Jones*). Judge Whipple explained that:

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<sup>46</sup>*S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012).

<sup>47</sup>*S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012).

<sup>48</sup>*Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010).

<sup>49</sup>*S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284, at \*5 (W.D. Mo. Mar. 12, 2012).

<sup>50</sup>*S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284, at \*4 (W.D. Mo. Mar. 12, 2012).

*Jones* is factually distinguishable. The plaintiff in that case was a high school teacher. Among other posts about the plaintiff, one third party posted that her “ex” had “tested positive for [two sexually transmitted diseases] . . . so im sure [plaintiff] also has both.” The third party also posted that the plaintiff’s ex “brags about doing [plaintiff] in the gym . . . football field . . . her class room at the school where she teaches . . .” In response to this post, Richie stated “Why are all high school teachers freaks in the sack?” Richie made other comments about the plaintiff, including a comment to her that “[y]ou dug your own grave here . . . . It was also undisputed that Richie refused to remove the posts despite the plaintiff’s requests.

Here, the Plaintiff has not identified any posts by Richie that could be seen as ratifying the Church Girl Post or encouraging further development of it. For example, this case could have been different if, as in *Jones*, Richie had responded to the Church Girl Post with “Why are all church girls freaks in the sack?” Instead, Richie simply made an opinion about the Plaintiff’s appearance that did not relate to the alleged defamatory statements. Unlike *Jones*, Richie also removed the Church Girl Post. Again, this suggests that the Defendants neither adopted nor encouraged further development of the post. Given these significant factual differences, *Jones* is not persuasive.<sup>51</sup>

The district court’s ruling in *Jones* previously was construed narrowly by one court, along with *Accuseach*, as cases where “liability was predicated upon the website’s decision to affirmatively adopt or ensure the presentation of unlawful material.”<sup>52</sup> Both opinions, however, could equally be seen as applying a more expansive view of *development*—and hence

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<sup>51</sup>*S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284, at \*5 (W.D. Mo. Mar. 12, 2012) (footnote omitted). Judge Whipple noted that “Richie’s comment about the size of Plaintiff’s gumline is a non-actionable statement of opinion regarding the Plaintiff’s physical appearance. It had nothing to do with whether the Plaintiff is unchaste.” *Id.* at \*5 n.4.

<sup>52</sup>*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. App. 2012). *Jones* was explained as a case where

the website operator was found to have participated in the development of defamatory posts by appending a “tagline” to the postings of others and adding his own comments, actions ‘which the jury could certainly interpret as adopting the preceding allegedly defamatory comments.

*Id.* The *StubHub* court similarly construed *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009) as holding merely that soliciting and paying researchers for personal phone records amounted to development in that case because obtaining the personal phone records of third parties is almost always unlawful. See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. App. 2012).



a narrower scope of CDA immunity—than even what was delineated by the Ninth Circuit in *Roommate.com*, which is eventually what the Sixth Circuit itself concluded on appeal.

A number of courts that have read *Roommate.com* narrowly, based on its unique facts, have been tough in evaluating claims that allege development in light of the heightened pleading requirements to state a claim set by the U.S. Supreme Court in *Ashcroft v. Iqbal*<sup>53</sup> and *Bell Atlantic Corp. v. Twombly*.<sup>54</sup>

In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,<sup>55</sup> for example, the Fourth Circuit affirmed the dismissal of a defamation claim brought by a car dealership against a commercial gripe site for 20 statements posted on its website. The plaintiff had alleged Consumeraffairs.com should be held liable as an information content provider based on: (1) the structure and design of its website, and (2) its participation in the preparation of consumer complaints, including soliciting complaints, steering them into specific categories designed to attract attention by class action lawyers, contacting users to ask questions about their complaints, helping users draft or revise their complaints and promising customers that they could obtain a financial recovery by joining a class action suit.

The court ruled that the plaintiff failed to plead facts sufficient to show responsibility for development of the posts, where the complaint alleged that Consumeraffairs.com developed consumer complaints by allegedly “soliciting” them, “contacting the consumer” to ask questions and help draft or revise complaints, or structuring and designing its website to develop information related to class-action lawsuits, which is not illegal content.<sup>56</sup> The Fourth Circuit panel made clear that these actions did not amount to responsibility for development under the CDA where the content allegedly developed related to class action suits, not

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<sup>53</sup>*Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

<sup>54</sup>*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007); *infra* § 37.05[7] (procedural issues on when to raise the CDA defense and pleading requirements); *see generally infra* § 57.04[1] (analyzing *Iqbal* and *Twombly* and their impact on pleading standards).

<sup>55</sup>*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

<sup>56</sup>*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256–57 (4th Cir. 2009).

the 20 posts at issue, and encouraging discussions about class action suits was not illegal.

By contrast, the court noted that the website in *Roommate.com* required users to input illegal content as a necessary condition of use. Moreover, developing content to further a class action lawsuit, the appellate panel wrote, did not amount to “materially contributing” to a given piece of information’s “alleged unlawfulness.”<sup>57</sup>

The majority also found insufficient the allegation that Consumeraffairs.com itself fabricated eight posts, based on the fact that Nemet could not match eight of the twenty posts with specific people in its database. Chief District Judge Jones, sitting by designation, concurred in part, but dissented with respect to the eight posts that Nemet alleged Consumeraffairs.com itself fabricated, arguing that the court, in evaluating a motion to dismiss, was required to accept as true the allegation that these posts were not made by real customers.<sup>58</sup> In the Ninth Circuit, under *Roommate.com*, composing eight posts could well have been found to amount to development, provided the posts were actionable. If the posts merely promoted class action litigation, which the court noted was not illegal, then even in the Ninth Circuit this allegation would not have been sufficient to avoid dismissal.

The Fourth Circuit emphasized that “‘immunity is an *immunity from suit* rather than a mere defense to liability’ and ‘it is effectively lost if a case is erroneously permitted to go to trial.’ . . . .”<sup>59</sup> For this reason, the court explained that entitlement to section 230 immunity should be resolved “at the earliest possible stage of the case because that immunity protects websites not only from ‘ultimate liability,’ but also

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<sup>57</sup>*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009), quoting *Roommate.com*, 521 F.3d at 1167–68.

<sup>58</sup>He wrote:

It is true that there may be alternative explanations for these posts that show that they are not attributable to Consumeraffairs.com. Nemet may have simply overlooked eight actual customers in its review of the company sales documents. The fictitious posts may have come from mischief makers unrelated to Consumeraffairs.com, or from real consumers who wished to remain anonymous by falsifying the details of their transactions. But I don’t believe that any of these alternatives are any more plausible than Nemet’s claim.

591 F.3d at 262 (Jones, J. concurring in part, dissenting in part).

<sup>59</sup>*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (citations omitted).

from ‘having to fight costly and protracted legal battles.’”<sup>60</sup>

Similarly, in *Dart v. Craigslist, Inc.*,<sup>61</sup> the court rejected conclusory allegations intended to plead around *Roommate.com*. In *Dart*, Thomas Dart, the Cook County Sheriff, sued Craigslist alleging that it was maintaining a public nuisance by hosting an “adult” section of its site where users could post sexually suggestive advertisements, including, Sheriff Dart alleged, a large number of advertisements for prostitutes in the Chicago area. The court noted that “[a]lthough he carefully avoids using the word ‘publish,’ Sheriff Dart’s complaint could be construed to allege ‘negligent publishing.’”<sup>62</sup> Among other things, Sheriff Dart alleged that Craigslist itself caused or induced illegal content, but the court rejected this assertion based on Craigslist’s repeated warnings to users not to post such material.<sup>63</sup> Similarly, Sheriff Dart alleged that Craigslist knowingly “arranged” meetings for purposes of prostitution and “direct[ed]” people to places of prostitution, but the court found “these allegations [to] strain the ordinary meaning of the terms ‘arrange’ and ‘direct’ unless Craigslist itself created the offending ads” which plaintiff did not allege.<sup>64</sup> In rejecting Sheriff Dart’s “conclusory allegations” and granting judgment on the pleadings, the court ruled that “[e]ven at this stage of the case we are not required to accept those allegations at face value . . . .”<sup>65</sup>

The court in *Dart* emphasized that nothing “Craigslist offers induces anyone to post any particular listing.”<sup>66</sup> The court made clear that offering an adult services section was not itself unlawful, nor did it necessarily call for unlawful content.<sup>67</sup> Although the court accepted as true for purposes of the motion the allegation that users routinely flout

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<sup>60</sup>*Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

<sup>61</sup>*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

<sup>62</sup>*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009).

<sup>63</sup>*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009).

<sup>64</sup>*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009).

<sup>65</sup>*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009).

<sup>66</sup>*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009), quoting *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

<sup>67</sup>665 F. Supp. 2d at 968, citing *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (*en banc*) (concluding that

Craigslist's guidelines, the court emphasized that it was "not because Craigslist has caused them to do so."<sup>68</sup> It also rejected the argument that liability could be imposed because Craigslist had a search function, which the court characterized as a neutral tool. Ultimately, the court concluded that "Sheriff Dart may continue to use Craigslist's website to identify and pursue individuals who post allegedly unlawful content . . . . But he cannot sue Craigslist for their conduct."<sup>69</sup>

Following *Dart*, the court in *M.A. v. Village Voice Media Holdings LLC*,<sup>70</sup> held that the claims of a victim of a child sex trafficker under 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595, against the publisher of Backpage, where sexually explicit ads of the minor plaintiff were placed, were preempted by the CDA.

Likewise, in *Collins v. Purdue University*,<sup>71</sup> the court, in granting judgment on the pleadings on libel and false light claims that sought to hold the defendant liable for user comments posted to its interactive website, based on plaintiff's assertion that the defendant solicited and encouraged message board community members to engage in defamatory statements, the court observed that "[a]lthough Collins goes to great lengths in his response to argue (albeit, without a single supporting case cite) that Federated is not an interactive computer service but a content provider, and therefore is not entitled to the CDA immunity, Federated's website . . . fits the CDA scheme."<sup>72</sup>

In *Levitt v. Yelp! Inc.*,<sup>73</sup> Judge Edward Chen of the Northern District of California dismissed plaintiffs' extortion and unfair competition claims against Yelp based on the al-

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section 230(c)(1) did not protect a website operator whose roommate-matching service "require[d]" users to answer discriminatory questions from a menu of answers that the defendant supplied).

<sup>68</sup>665 F. Supp.]2d at 969.

<sup>69</sup>665 F. Supp. 2d at 969.

<sup>70</sup>*M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

<sup>71</sup>*Collins v. Purdue University*, 703 F. Supp. 2d 862 (N.D. Ind. 2010).

<sup>72</sup>*Collins v. Purdue University*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010).

<sup>73</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

legation that it had unlawfully manipulated the content of its business review pages to induce plaintiffs to pay for advertising. Plaintiffs had alleged that Wheel Techniques had noticed negative reviews on its Yelp page that did not correspond with its records of actual customers. Around the same time, it alleged that it had received a call from Yelp! requesting that it advertise its business on Yelp. Plaintiffs alleged that the “false” reviews were created and posted by Yelp “as a threat to induce Wheel Techniques to advertise.” Also in 2009, plaintiffs alleged that when Wheel Techniques contacted Yelp to ask why a competitor had a high rating on Yelp, a Yelp representative told him that the competitor advertised and “we work with your reviews if you advertise with us.” In 2010, Wheel Techniques was again contacted to purchase advertising. Upon declining, plaintiffs alleged that a 1-star review was moved to the top of the business page “within minutes” as a threat to induce the company to purchase advertising. Plaintiffs also alleged that Wheel Techniques’ owner was told that several Yelp employees had been fired and their computers had been frozen “as a result of scamming related to advertising.” While Yelp denied these allegations, the court, in dismissing plaintiffs’ claims, assumed the allegations to be true, consistent with the standard for evaluating a motion to dismiss.

In dismissing plaintiffs’ claims Judge Chen characterized plaintiffs’ allegations that Yelp manufactured its own negative reviews or deliberately manipulated reviews to the detriment of businesses that refuse to purchase advertising as “entirely speculative.” Judge Chen explained “[t]hat Yelp employees have written reviews, even for pay, does not raise more than a mere possibility that Yelp has authored or manipulated content related to Plaintiffs in furtherance of an attempt to ‘extort’ advertising revenue.”<sup>74</sup> Similarly, Judge Chen wrote “that Wheel Techniques noticed negative reviews of its business that did not match its customer records does not support the logical leap that Yelp created those reviews. Nor does an allegation that . . . Wheel Techniques’ owner . . . ‘was told’ by an unnamed source ‘that a former Yelp employee stated that Yelp, upon information and belief, terminated a group of sales employees . . . as a result of scamming related to advertising’ . . .

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<sup>74</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*5 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

raise more than a speculative possibility that Yelp employees created or substantively manipulated the content of Plaintiff's reviews in this case."<sup>75</sup>

Judge Chen similarly rejected the allegation that Yelp manipulated user generated content as barred by the CDA. The court explained that removing content was immunized by the CDA.<sup>76</sup> Judge Chen further held that Yelp could not be held liable for creating or "developing" plaintiff's aggregate business rating (a star rating at the top of each company's review page) since a company's rating was determined by user generated data,<sup>77</sup> notwithstanding allegations that Yelp manipulated the aggregate rating by including and excluding particular reviews.<sup>78</sup> The court held that "the text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith"<sup>79</sup>—noting that, unlike section 230(c)(2),<sup>80</sup> which expressly requires a showing of good faith, the immunity created by section 230(c)(1) "contains no ex-

<sup>75</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*5 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>76</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*6 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>77</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*6 (N.D. Cal. Oct. 26, 2011) (*citing Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 834, 121 Cal. Rptr. 2d 703 (2002) (holding that eBay's star ratings based on user generated data did not render eBay a content provider because such as construction "would treat eBay as the publisher or speaker of the individual defendants' materials, and thereby conflict with section 230.")), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>78</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*7 (N.D. Cal. Oct. 26, 2011) (*citing Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>79</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*7 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>80</sup>Section 230(c)(2)(A) provides that:

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, las-

licit exception for impermissible editorial motive . . . .”<sup>81</sup> Indeed, citing a consumer gripe case, Judge Chen noted that courts have found that section 230(c)(1) immunity applies even “to conduct that arguably constitute[s] bad faith.”<sup>82</sup> Before the case had been reassigned to Judge Chen, following the retirement of former Chief Judge Marilyn Hall Patel, Judge Patel had suggested, in dismissing an earlier complaint in the case, that wrongfully manipulating a business’s review page for the purpose of soliciting advertising revenues would seem distinct from “the traditional editorial functions of a publisher.” Judge Chen, however, emphasized that CDA cases immunize, rather than scrutinize the purposes behind, an editor’s exercise of those functions. He wrote that “traditional editorial functions often include subjective judgments informed by political and financial considerations” and that because one purpose of enacting section 230(c) was “to avoid the chilling effect of imposing liability on providers by both safeguarding the ‘diversity of political discourse . . . and myriad avenues for intellectual activity’ on the one hand, and ‘remov[ing] disincentives for the development and utilization of blocking and filtering technologies’ on the other hand”<sup>83</sup> that, as Chief Judge Kozinski wrote in *Roommate.com*, “close cases . . . must be resolved in favor of immunity.”<sup>84</sup>

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civious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .

47 U.S.C.A. § 230(c)(2)(A); *see generally infra* § 37.05[4].

<sup>81</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*7 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>82</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*6 (N.D. Cal. Oct. 26, 2011) (*citing Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at \*6 (C.D. Cal. May 4, 2011) (holding that defendant’s allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section 230 and that “[a]bsent a changing of the disputed reports’ substantive content that is visible to consumers, liability cannot be found.”)), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>83</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*8 (N.D. Cal. Oct. 26, 2011) (*quoting* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 86 (1996)), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>84</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*8 (N.D. Cal. Oct. 26, 2011) (*quoting Roommate.com*, 521 F.3d

Similarly, in *Ascentive, LLC v. Opinion Corp.*,<sup>85</sup> Senior District Court Judge Glaser of the Eastern District of New York held that plaintiffs were unlikely to succeed on the merits on claims against the company that operated PissedConsumer.com and its officers under Pennsylvania's unfair trade practices and consumer protection law and for interference with contractual and prospective economic advantage and unjust enrichment, based on CDA immunity. In that case, one of the plaintiffs in two consolidated actions had alleged that PissedConsumer encouraged and created negative postings on its site. In ruling for the defendants, Judge Glaser rejected the mere assertion that the defendants created negative content, explaining that "[w]hile . . . 'Section 230(c) immunity is not so broad as to extend to an interactive computer service that . . . takes an active role in creating or developing the content at issue,' . . . [a]sserting or implying the mere possibility that PissedConsumer did so is insufficient to overcome the immunity granted by the CDA."<sup>86</sup>

Judge Glaser also rejected plaintiffs' contention that PissedConsumer.com was liable for developing the content of its users by (1) encouraging negative complaints; (2) inviting consumers to post public complaints on its website; (3) displaying those negative postings as prominently as possible absent participation in its "Reputation Management Service" (a paid service that allowed companies to directly respond to negative comments about them); and (4) increasing the prominence of PissedConsumer webpages by various allegedly improper means, including by using plaintiffs' trademarks.

In so ruling the court contrasted PissedConsumer with the BadBusinessBureau website at issue in *MCW, Inc. v. Badbusinessbureau.com, LLC*,<sup>87</sup> which Judge Glaser explained involved a consumer forum that did not dispute that

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at 1174), *aff'd on other grounds*, 765 F.3d 1123 (9th Cir. 2014); *see infra* § 37.05[3][D][iii] (further discussing the case in the context of editorial function).

<sup>85</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (denying plaintiffs' motion for a preliminary injunction).

<sup>86</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 475 (E.D.N.Y. 2011), *quoting MCW, Inc. v. Badbusinessbureau.com, LLC*, Civ. A.3:02-CV-2727-G, 2004 WL 833595, at \*8 (N.D. Tex. Apr. 19, 2004).

<sup>87</sup>*MCW, Inc. v. Badbusinessbureau.com, LLC*, Civ. A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004).



it created, developed and posted defamatory information and further actively encouraged by email a consumer to take photos of a business owner, his car, and his license plate in front of his store, so that the defendant could include those photos on its website beside headings such as “Con Artists,” “Scam” and “Ripoff.” Judge Glaser explained, while “Pissed-Consumer does invite third-party content providers to submit negative reviews . . . its actions are not unlike the targeted solicitation of editorial material engaged in by a narrow genre of publishers and are nothing like those in *Badbusinessbureau.com*.”<sup>88</sup> Further, the court ruled, “there is simply ‘no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site . . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage.’”<sup>89</sup>

The court also rejected the notion that modifying user posts could amount to development. Judge Glaser wrote in *dicta* that there may be circumstances where modifying the display of content constitutes development, but held that “[t]he fact that the defendants invite postings and then in certain circumstances alter the way those postings are displayed is not ‘development’ of information for Section 230 purposes.”<sup>90</sup>

Judge Glaser further held that PissedConsumer’s “SEO

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<sup>88</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 475–76 (E.D.N.Y. 2011).

<sup>89</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011), quoting *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (holding the consumer review site *RipOffReport.com* not liable as an information content provider where the plaintiff alleged defendants used reviews as leverage to coerce targeted businesses to pay for defendants’ Corporate Advocacy Program, which purported to help investigate and resolve posted consumer complaints, and argued that defendants encouraged defamatory postings from others for their own financial gain and, therefore are partly responsible for the “creation or development” of the messages).

<sup>90</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011), citing *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*6 (N.D. Cal. Oct. 26, 2011) (“[A]llegations of extortion based on [consumer review site] Yelp’s alleged manipulation of their review pages—by removing certain reviews and publishing others or changing their order of appearance—falls within the conduct immunized by § 230(c)(1).”), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014) and

tactics and its use of plaintiffs' marks to make PissedConsumer's pages appear higher in search engine results list[s]" similarly did not render PissedConsumer.com an information content provider.<sup>91</sup> He wrote that "[a]t best, increasing the visibility of a website in internet searches amounts to "enhancement by implication," which is insufficient to remove PissedConsumer from the shelter of the CDA."<sup>92</sup> Judge Glaser, in conclusion, explained that "[w]hile the Court finds some aspects of PissedConsumer's business practices troubling and perhaps unethical, it has been unable to find a legal remedy for conduct that may offend generally accepted standards of behavior."<sup>93</sup>

By contrast, in *Amerigas Propane, L.P. v. Opinion Corp.*,<sup>94</sup> Senior District Judge Ronald Buckwalter of the Eastern District of Pennsylvania denied PissedConsumer's motion to dismiss similar claims raised in a similar lawsuit by propane distributor, Amerigas. Without discussing *Roommate.com*, which was not binding in the Third Circuit, or the concept of development, Judge Buckwalter found that the Complaint explicitly alleged that PissedCompany.com not only allowed third parties to post complaints but actually created some

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*Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."), *cert. denied*, 524 U.S. 937 (1998).

<sup>91</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011), *citing Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at \*6 (C.D. Cal. May 4, 2011) (holding that the defendant consumer report website's deliberate manipulation of webpage code to make certain reports more visible in online search results was immune under section 230(c)(1) because "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found.").

<sup>92</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011), *citing Asia Economic Institute v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at \*6 (C.D. Cal. May 4, 2011) ((quoting *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (*en banc*)).

<sup>93</sup>*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 478 (E.D.N.Y. 2011). Plaintiffs ultimately dismissed their case without prejudice, over defendants' objection. *See Ascentive, LLC v. Opinion Corp.*, No. 10 Civ. 4433 (ILG) (SMG), 2012 WL 1569573 (E.D.N.Y. May 3, 2012).

<sup>94</sup>*Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012).

them as well.<sup>95</sup> Although Judge Buckwalter did not cite to the CDA analysis in *Ascentive*, he distinguished Judge Glaser’s analysis of plaintiffs’ trademark claims in *Ascentive* by noting that in that case Judge Glaser had considered claims against PissedConsumer.com in the context of a preliminary injunction motion, where the relevant standard was whether the plaintiffs were likely to prevail on the merits, and following a period of discovery and two evidentiary hearings, whereas in *Amerigas* Judge Buckwalter was ruling on a motion to dismiss, where the plaintiff merely needed to show that it could state a claim for relief.<sup>96</sup> The court also found that the plaintiff had sufficiently alleged that the defendant controlled ads on its site to benefit from ad sales to competitors to be used in conjunction with negative comments about the plaintiff.<sup>97</sup> Judge Buckwalter made clear, however, that the ruling did not preclude the defendant from asserting CDA immunity as a defense later in the litigation.<sup>98</sup>

Judge Buckwalter’s unreported opinion reflects the reluctance of some judges to dismiss cases based on CDA preemption at the outset of a case, rather than on summary judgment after the parties have engaged in discovery.<sup>99</sup> However, as the Fourth Circuit emphasized in *Nemet Chevrolet*, “‘immunity is an *immunity from suit* rather than a mere defense to liability’. . .” and entitlement to section 230 immunity should be resolved “at the earliest possible stage of the case because that immunity protects websites not only from ‘ultimate liability,’ but also from ‘having to fight costly

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<sup>95</sup>See *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788, at \*13 (E.D. Pa. June 19, 2012).

<sup>96</sup>See *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788, at \*9 (E.D. Pa. June 19, 2012).

<sup>97</sup>See *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788, at \*13 (E.D. Pa. June 19, 2012) (distinguishing *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628, 633 (E.D. Va. 2010), *aff’d in relevant part on other grounds*, 676 F.3d 144, 165–66 (4th Cir. 2012), where third party advertisers were responsible for selecting the terms that triggered the appearance of their advertisements).

<sup>98</sup>See *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788, at \*13 (E.D. Pa. June 19, 2012).

<sup>99</sup>See *infra* § 37.05[7] (analyzing procedural issues surrounding when a CDA defense is raised in litigation).

and protracted legal battles.’”<sup>100</sup> As Ninth Circuit Chief Judge Kozinski admonished in *Roommate.com*, courts “must keep firmly in mind that this is an immunity statute we are expounding . . . and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230.”<sup>101</sup>

### 37.05[3][D][iii] Payment and Editorial Control

Paying for and editing user content constitute traditional editorial functions that should not result in a loss of section 230(c)(1) immunity, even in the Ninth Circuit under *Roommate.com*.<sup>1</sup> In the Tenth Circuit, under *Accusearch*, payment plus solicitation may amount to responsibility for development, at least in those circumstances where the content solicited is almost always unlawful.<sup>2</sup> Nevertheless, as Chief Judge Kozinski made clear in *Roommate.com*, which the Tenth Circuit relied upon in *Accusearch*, courts, in close cases, must err on the side of finding immunity.<sup>3</sup> Outside the Ninth and Tenth Circuits, courts may be more reticent to even undertake the kind of substantive analysis that *Roommate.com* may require if a plaintiff credibly alleges development on the part of a site that hosts user generated content (as perhaps underscored by the Fourth Circuit’s approach and decision in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*<sup>4</sup>).

In *Roommate.com*, the Ninth Circuit implied that payment

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<sup>100</sup>*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (citations omitted).

<sup>101</sup>*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*) (emphasis in original).

#### [Section 37.05[3][D][iii]]

<sup>1</sup>See *supra* § 37.05[3][D][ii] (discussing *Roommate.com*).

<sup>2</sup>See *supra* § 37.05[3][D][i] (analyzing *Accusearch*).

<sup>3</sup>See *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*) (admonishing that courts “must keep firmly in mind that this is an immunity statute we are expounding . . . and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230.”; emphasis in original).

<sup>4</sup>*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009); *supra* § 37.05[3][D][ii].

is not determinative inasmuch as Roommate.com was held partially immune from liability as an information content provider for some of its activities even though the site “sought to profit by collecting revenue from advertisers and subscribers.”<sup>5</sup> Since *Roommate.com*, at least one district court from within the Ninth Circuit has ruled that payment is irrelevant to development.<sup>6</sup> Writers and editors, after all, are paid for their work. Payment, *per se*, should not be a determining factor in evaluating whether material is developed by a site or obtained from another information content provider (albeit, for payment).

Another court has held that taking an exclusive license in a work does not deprive an interactive computer service provider from the protections of the CDA because a service provider does not “adopt[] content by virtue of copyright ownership” and the issue of whether a service provider specifically encouraged the development of offensive content does not turn on ownership.<sup>7</sup> The court concluded that “acquisition of an exclusive license to the content . . . is an insufficient level of involvement in the development of the content to nullify CDA immunity.”<sup>8</sup>

Earlier cases had established that payment, like light editing, was protected (or at least immaterial to the issue of whether an interactive computer service provider or user was entitled to the CDA defense).<sup>9</sup> In *Blumenthal v. Drudge*,<sup>10</sup> which was the first case to address the circumstances under which an interactive computer service could be held to be liable as an information content provider, White House advi-

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<sup>5</sup>521 F.3d at 1174–75.

<sup>6</sup>*See Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. 2008) (“[T]he fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider ‘creates’ or ‘develops’ that content.”).

<sup>7</sup>*Small Justice LLC v. Xcentric Ventures LLC*, Civil Action No. 13-cv-11701, 2014 WL 1214828, at \*7 (D. Mass. Mar. 24, 2014).

<sup>8</sup>*Small Justice LLC v. Xcentric Ventures LLC*, Civil Action No. 13-cv-11701, 2014 WL 1214828, at \*7 (D. Mass. Mar. 24, 2014).

<sup>9</sup>*See, e.g., Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (granting summary judgment for AOL under the CDA); *see also Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 823, 121 Cal. Rptr. 2d 703, 708 (4th Dist. 2002) (dismissing claims against eBay on demurrer under the CDA where “eBay charged placement fees to dealers listing an item for auction, and success fees (percentage fees) when items were sold.”).

<sup>10</sup>*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

sor Sidney Blumenthal sued Matt Drudge, publisher of the Drudge Report, an online political gossip service, and America Online, which hosted the Drudge Report. Mr. Blumenthal alleged that Drudge published two false reports that he had a history of spousal abuse. He further alleged that AOL was liable because it paid Drudge \$3,000 per month to disseminate the Drudge Report to its 8.6 million subscribers (pursuant to a May 1997 contract to provide AOL with proprietary content) and AOL touted the report in press releases intended to attract subscribers.<sup>11</sup>

Judge Paul Friedman of the District of the District of Columbia ultimately entered summary judgment in favor of AOL based on the finding that there was “no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of AOL . . . .”<sup>12</sup> Although the court found that the Blumenthal story was written by Drudge without any substantive or editorial involvement by AOL, AOL acknowledged in court papers that under different facts an interactive service provider would not be immunized by subpart (1) of the Good Samaritan exemption with respect to information “developed or created entirely by itself” and that there were “situations in which there may be two or more information content providers responsible for material disseminated on the Internet . . . .”<sup>13</sup>

As articulated by the court in *Blumenthal v. Drudge*,<sup>14</sup> merely because a service provider retains editorial discretion to modify a work disseminated by it is an insufficient basis to impose liability because Congress provided “immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.”<sup>15</sup>

Similarly, in *Schneider v. Amazon.com, Inc.*,<sup>16</sup> an intermediate appellate court in Washington state rejected the argument that Amazon.com could be held liable for a third-party posting because it had the right to edit it and claimed licens-

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<sup>11</sup>AP, “Clinton Adviser: AOL Responsible for Drudge Comments,” Mercury Center, Jan. 28, 1998.

<sup>12</sup>992 F. Supp. at 50.

<sup>13</sup>992 F. Supp. at 50.

<sup>14</sup>*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

<sup>15</sup>992 F. Supp. at 52.

<sup>16</sup>*Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 465–66, 31 P.3d 37 (Div. 1 2001).

ing rights in the posted material.

As with minor edits, an intermediate appellate court in California ruled in *Gentry v. eBay, Inc.*<sup>17</sup> that e-Bay's practice of soliciting and then compiling user comments (and ranking sellers with stars or the "Power Seller" designation) as part of its Feedback Forum did not mean that eBay was acting as an information content provider. The court reasoned that, based on these facts, "enforcing appellants' negligence claim would place liability on eBay for simply compiling false and/or misleading content created by the individual defendants and other . . ." third parties.

Since *Roommate.com*, plaintiffs have sought to avoid dismissal or judgment on the pleadings by alleging development based on an interactive computer service provider editing third party content. In *Cornelius v. Deluca*,<sup>18</sup> for example, the court denied Bodybuilding.com's motion to dismiss where the plaintiff alleged that it appointed moderators to act as representatives of the company to control and edit content on the Forum message board and that the person who posted the messages at issue was a moderator acting within the scope of her representation. Oddly, in analyzing plaintiff's Lanham Act claim and the defendant's CDA defense, the court overlooked the fact that the CDA does not preempt Lanham Act claims.<sup>19</sup> This failure to appreciate the exclusion for laws pertaining to intellectual property<sup>20</sup> was a glaring oversight.

The district court in *Cornelius v. Deluca* noted that exercising editorial functions does not take an interactive computer provider outside the scope of CDA immunity by making it liable as an information content provider, but held that, for purposes of a motion to dismiss, it would accept as plausible plaintiff's allegation that board moderators were agents for the site.<sup>21</sup> The court ultimately granted summary judgment for the defendant on plaintiff's Lanham Act unfair competition claim, finding that the forum moderator did not have

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<sup>17</sup>*Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002).

<sup>18</sup>*Cornelius v. DeLuca*, 709 F. Supp. 2d 1003 (D. Idaho 2010).

<sup>19</sup>See *infra* § 37.05[5].

<sup>20</sup>47 U.S.C.A. § 230(e)(2); *infra* § 37.05[5].

<sup>21</sup>*Cornelius v. DeLuca*, 709 F. Supp. 2d 1003, 1022–23 (D. Idaho 2010).

authorization to speak on the defendant's behalf,<sup>22</sup> underscoring that *Roommate.com* allows plaintiffs who offer plausible theories of development a way to get past a motion to dismiss, and obtain discovery, at least in some courts.

*Cornelius v. Deluca* also points up the particular risk faced by blogs, discussion forums, chat rooms and online communities that use moderators to help focus the discussion or enforce community rules, at least in cases where courts do not closely scrutinize claims in light of the heightened pleading standards imposed by *Ashcroft v. Iqbal*<sup>23</sup> and *Bell Atlantic Corp. v. Twombly*.<sup>24</sup> This issue is separately addressed below in subsection 37.05[3][D][iv].

In *Shiamili v. Real Estate Group*,<sup>25</sup> the New York Court of Appeals, over a strong dissent by the Chief Judge,<sup>26</sup> held that defendants could not be held liable for defamation or unfair competition for moving allegedly defamatory posts from one location to another and surrounding the posts with a negative heading, sub-heading and illustration. The Court of Appeals, which declined to “decide whether to apply the Ninth Circuit’s relatively broad view of ‘development’ since, even under that court’s analysis, Shiamili’s claim fail[ed,]” noted that “[r]eposting content created and initially posted by a third party is well-within ‘a publisher’s traditional edito-

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<sup>22</sup>See *Cornelius v. Bodybuilding.com, LLC*, No. 1:10-cv-027-BLW, 2011 WL 2160358, at \*5–6 (D. Idaho June 1, 2011) (granting summary judgment where plaintiff’s unfair competition claim was based on a post by a forum moderator who lacked authority to speak on the defendant’s behalf).

<sup>23</sup>*Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

<sup>24</sup>*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007); see generally *infra* § 37.05[7] (analyzing procedural issues associated with raising the CDA defense in a motion to dismiss, motion for judgment on the pleadings or summary judgment motion).

<sup>25</sup>*Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011).

<sup>26</sup>Chief Judge Lippman argued that under *Roommate.com* and *Accusearch*, plaintiff’s complaint should not have been dismissed because, according to the complaint, defendants “not only moved defamatory comments to an independent post entitled ‘Ardor Reality and Those People,’ but embellished the comment thread by attaching a large, doctored photograph of plaintiff depicted as Jesus Christ, with the heading: ‘Chris Shiamili: King of the Token Jews.’” In addition, the defamatory statements were preceded by a disparaging editor’s note that allegedly was written by one of the defendants, which in the Chief Judge’s view was at least sufficient to state a claim.



rial functions . . . .”<sup>27</sup> The majority conceded that the defendants appeared to be content providers with respect to the heading, subheading and illustration, but since that content was not defamatory as a matter of law they were not actionable. Likewise, unlike *Doctor’s Associates, Inc. v. QIP Holder LLC*,<sup>28</sup> there was no allegation that the defamatory comments were posted in response to any specific invitation for users to bash the plaintiff or his business.

Similarly, in *Reit v. Yelp! Inc.*,<sup>29</sup> a lower court in New York dismissed a defamation claim brought against Yelp! by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, in a case where the plaintiff also alleged that the site would remove negative user feedback only if a business subscribed to its services for \$300 per month. The court concluded that Yelp’s alleged decision to publish only “bad” posts was “quintessentially related to a publisher’s role” and that Yelp’s alleged use of bad posts in its marketing strategy did not change this conclusion.<sup>30</sup> The court held that plaintiff’s deceptive acts and practices claim was not preempted by the CDA because it alleged misconduct by the defendant itself,<sup>31</sup> but dismissed that claim on the merits.

In *Levitt v. Yelp! Inc.*,<sup>32</sup> which is discussed more extensively in the preceding subsection,<sup>33</sup> Judge Edward Chen of the Northern District of California, in dismissing plaintiffs’ claims for extortion and unfair competition based on the CDA, rejected the argument that plaintiffs’ allegation that Yelp manipulated user generated content put it outside the scope of CDA immunity. Judge Chen explained that remov-

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<sup>27</sup>*Id.*, citing *Zeran*, 129 F.3d at 330.

<sup>28</sup>*Doctor’s Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010).

<sup>29</sup>*Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (Sup. 2010).

<sup>30</sup>29 Misc. 3d at 717, 907 N.Y.S.2d at 413-14, quoting *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003).

<sup>31</sup>The court reasoned that “[t]he CDA protects Yelp from liability for defamation, but does not contemplate protecting Yelp’s usage of that speech as leverage in its business model.” 29 Misc. 3d at 717, 907 N.Y.S.2d at 414.

<sup>32</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>33</sup>*See supra* § 37.05[3][D][ii].

ing content was immunized by the CDA<sup>34</sup> and, as discussed in section 37.05[3][D][ii], that liability could not be imposed for edits that allegedly manipulated the outcome of a business’s rating on the site or which allegedly were undertaken in bad faith.<sup>35</sup> The court held that “the text of the two subsections of § 230(c) indicates that (c)(1)’s immunity applies regardless of whether the publisher acts in good faith”<sup>36</sup>—noting that, unlike section 230(c)(2),<sup>37</sup> which expressly requires a showing of good faith, the immunity created by section 230(c)(1) “contains no explicit exception for impermissible editorial motive . . . .”<sup>38</sup> Judge Chen also rejected the argument that wrongfully manipulating a business’s review page for the purpose of soliciting advertising revenues was distinct from “the traditional editorial functions of a publisher” that are immunized by section 230(c)(1).

Judge Chen wrote that “traditional editorial functions often include subjective judgments informed by political and financial considerations” and that because one purpose of enacting section 230(c) was “to avoid the chilling effect of imposing liability on providers by both safeguarding the ‘diversity of political discourse . . . and myriad avenues for intellectual activity’ on the one hand, and ‘remov[ing] disincentives for the development and utilization of blocking

<sup>34</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*6 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>35</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*7-8 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>36</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*7 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>37</sup>Section 230(c)(2)(A) provides that

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 . . . .

47 U.S.C.A. § 230(c)(2)(A); *see generally infra* § 37.05[4].

<sup>38</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*7 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

and filtering technologies’ on the other hand”<sup>39</sup> that, as Chief Judge Kozinski wrote in *Roommate.com*, “close cases . . . must be resolved in favor of immunity.”<sup>40</sup> As Judge Chen explained:

As illustrated by the case at bar, finding a bad faith exception to immunity under § 230(c)(1) could force Yelp to defend its editorial decisions in the future on a case by case basis and reveal how it decides what to publish and what not to publish. Such exposure could lead Yelp to resist filtering out false/unreliable reviews (as someone could claim an improper motive for its decision), or to immediately remove all negative reviews about which businesses complained (as failure to do so could expose Yelp to a business’s claim that Yelp was strong-arming the business for advertising money). The Ninth Circuit has made it clear that the need to defend against a proliferation of lawsuits, regardless of whether the provider ultimately prevails, undermines the purpose of section 230. See *Roommates.com*, 521 F.3d at 1174 (cautioning that section 230 should be “interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles”); *Carafano*, 339 F.3d at 1124 (“Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.”) (quotations omitted); see also *Zeran*, 129 F.3d at 331–33 (explaining that even a notice-based standard for defamation liability—as opposed to a strict liability standard—would create a chilling effect on providers).<sup>41</sup>

In contrast to claims based on editing or manipulating user content, Judge Chen noted in *dicta* that claims of “misrepresentation, false advertising or other causes of action based not on Yelp’s publishing conduct but on its representations regarding such conduct, would not be immunized . . .”

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<sup>39</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*8 (N.D. Cal. Oct. 26, 2011) (quoting S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 86 (1996)), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>40</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*8 (N.D. Cal. Oct. 26, 2011) (quoting *Roommate.com*, 521 F.3d at 1174), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>41</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*8 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

by section 230(c)(1).<sup>42</sup>

In *Fraleley v. Facebook, Inc.*,<sup>43</sup> Judge Lucy Koh, also of the Northern District of California, held that Facebook was not entitled to CDA immunity in a right of publicity case where the plaintiffs alleged that Facebook displayed user images next to brands that users had “liked” as a form of endorsement on their friend’s profile pages. Specifically, plaintiffs alleged that Facebook created, rather than merely edited user content by “mistranslating” a member’s actions, such as clicking on a “Like” button on a company’s Facebook page, into the words “Plaintiff likes [Brand]” and combining that text with plaintiff’s photograph, the company’s logo and the label “Sponsored Story.” In denying Facebook’s motion to dismiss, Judge Koh ruled that Facebook’s alleged actions in creating Sponsored Stories that went beyond a publisher’s traditional editorial functions “such as deciding whether to publish, withdraw, postpone or alter content.”<sup>44</sup> Judge Koh emphasized that plaintiffs did not allege merely that Facebook edited user content—“such as by correcting spelling, removing obscenity or trimming for length.”<sup>45</sup> She explained:

Plaintiffs allege not only that Facebook rearranged text and images provided by members, but moreover that by grouping such content in a particular way with third-party logos, Facebook transformed the character of Plaintiffs’ words, photographs, and actions into a commercial endorsement to which they did not consent. Defendant’s alleged actions go far beyond simply adding HTML meta tags to make user-provided text more visible, *see Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10–01360–SVW (PJMx), 2011 WL 2469822, at \*6–7 (C.D. Cal. May 4, 2011), or simply placing its own watermark on photographs and printing its website address on advertisements created by others and published on its website,

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<sup>42</sup>*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at \*9 (N.D. Cal. Oct. 26, 2011), *aff’d on other grounds*, 765 F.3d 1123 (9th Cir. 2014).

<sup>43</sup>*Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

<sup>44</sup>*Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), quoting *Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003).

<sup>45</sup>*Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), quoting *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (*en banc*).

see *Ramey v. Darkside Prods., Inc.*, No. 02–730(GK), 2004 WL 5550485, at \*6–7 (D.D.C. May 17, 2004).<sup>46</sup>

Even under *Roommate.com*, payment and solicitation alone, or payment and light editing, are not be enough to expose an interactive computer service provider or user to liability as an information content provider.<sup>47</sup>

With respect to payment, *Blumenthal v. Drudge*,<sup>48</sup> which was discussed earlier in this section, underscores that paying for material, like editing it, is a traditional publication function. Payment may be consistent with an agency or employment relationship,<sup>49</sup> which in turn could have bearing on whether particular material was developed by a defendant, or merely reflects the acquisition of content from another information content provider.

Paying someone to write about celebrities, for example, should not expose an interactive computer service provider to liability for developing content, even if the content created turns out to be actionable.<sup>50</sup> By contrast, paying someone specifically to write false things about a particular celebrity—such as that an actor beats his wife—could amount to development in a suit for defamation, at least in the Tenth

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<sup>46</sup>*Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802–03 (N.D. Cal. 2011).

<sup>47</sup>See *supra* § 37.05[3][D][ii]; see also, e.g., *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (holding preempted by the CDA plaintiff's claim that the defendant was liable as an information content provider for encouraging negative comments, inviting consumers to post public complaints on its website, displaying those negative posts as prominently as possible, and increasing the prominence of its webpages by various means, including using plaintiff's trademarks); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) (“[T]he fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider ‘creates’ or ‘develops’ the content . . .”; quoting *Goddard v. Google*, No. C 08-2738 JF (PVT), 2008 WL 5245490, \*3 (N.D. Cal. Dec. 17, 2008)); *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558–63 (N.C. App. 2012) (summarizing case law for the proposition that notice of an unlawful posting, solicitation, earning revenue from allegedly illegal content and reasonable foreseeability or willful blindness are not sufficient to amount to development).

<sup>48</sup>*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

<sup>49</sup>This issue is explored further in connection with blog moderators in section 37.05[3][D][iv].

<sup>50</sup>See *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding AOL exempt from liability for defamation for comments in the Drudge Report despite the fact that AOL had editorial discretion and paid Drudge in connection with his political writings).

Circuit. Sites that actively develop actionable content at issue in a given case, such as some commercial gripe sites, may not be able to hide behind the CDA to avoid liability *for their own* conduct and content, at least in the Ninth and Tenth Circuits.

Outside the Ninth and Tenth Circuits, courts may find parsing for *responsibility for development* a slippery slope that, as the Fourth Circuit noted in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,<sup>51</sup> may undermine the benefit of the exemption by requiring interactive computer services to litigate—and perhaps even go to trial—to prove their entitlement to the exemption. Moreover, as the dissent in *Roommate.com* underscored, evaluating development cannot take place without consideration of the underlying merits of a case to determine if the development is material to CDA analysis.

Given the policy objectives of section 230—to insulate interactive computer service providers and users from liability for screening or deleting third-party content (and thereby avoid results such as in *Stratton Oakmont*)—courts in close cases should err in favor of finding that aggregating, compiling or making even substantial editorial changes to third party material constitutes exempted activity. As Chief Judge Kozinski wrote in *Roommate.com*, courts “must keep firmly in mind that this is an immunity statute we are expounding . . . and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230.”<sup>52</sup>

### 37.05[3][D][iv] Blog Moderators

Many blog forums use moderators who may be employees, but often are merely unpaid volunteers, who help keep blog discussions focused on a given topic and try to deter aggressive or anti-social behavior. It is the very fact of CDA protection that allows websites and blogs to use moderators to deter harassing or objectionable content. Indeed, the CDA was specifically enacted to overrule *Stratton Oakmont v. Prodigy*

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<sup>51</sup>*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

<sup>52</sup>*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*) (emphasis in original).

*Services, Inc.*,<sup>1</sup> a case which had held an interactive computer service provider subject to the liability standards imposed on a publisher for, among other things, the conduct of its board operators in seeking to deter harassing or otherwise objectionable content. Accordingly, although few courts have had occasion to rule on the issue to date, blog owners generally should not be denied CDA immunity for moderator edits or comments.

There have not been a lot of cases<sup>2</sup> to date that address the issue of CDA preemption for claims based on moderator content. In *Cornelius v. Deluca*,<sup>3</sup> however, the court denied Bodybuilding.com's motion to dismiss where the plaintiff alleged that it appointed moderators to act as representatives of the company to control and edit content on the forum message board and that the person who posted the messages at issue was a moderator acting within the scope of her representation.<sup>4</sup>

The court ultimately granted summary judgment for the defendant,<sup>5</sup> holding that it was undisputed that the forum moderator lacked authority to speak on the defendant's

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[Section 37.05[3][D][iv]]

<sup>1</sup>*Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995); see generally *supra* § 37.04[3] (analyzing the case).

<sup>2</sup>See *Cornelius v. Bodybuilding.com, LLC*, No. 1:10-cv-027-BLW, 2011 WL 2160358, at \*5–6 (D. Idaho June 1, 2011) (granting summary judgment in favor of a defendant operator of an online forum sued for unfair competition under the Lanham Act based on a post by a forum moderator who lacked authority to speak on the defendant's behalf); see also *Higher Balance, LLC v. Quantum Future Group, Inc.*, No. 08-233-HA, 2008 WL 5281487, at \*7 (D. Or. Dec. 18, 2008) (granting defendants' motion under Oregon's anti-SLAPP statute to strike claims for libel, false light, intentional interference with business relationships/prospective economic advantage that stemmed from postings by Internet forum moderators, concluding that moderators were not employees or agents of the defendant website operators, and defendants were therefore "immunized by the CDA from postings made by forum moderators because they are 'another information content provider'").

<sup>3</sup>*Cornelius v. DeLuca*, 709 F. Supp. 2d 1003 (D. Idaho 2010).

<sup>4</sup>The court and parties litigated the CDA issue on the incorrect assumption that plaintiff's Lanham Act claim could be preempted by the CDA. See *infra* § 37.05[5].

<sup>5</sup>See *Cornelius v. Bodybuilding.com, LLC*, No. 1:10-cv-027-BLW, 2011 WL 2160358, at \*5–6 (D. Idaho June 1, 2011) (granting summary judgment in favor of a defendant operator of an online forum sued for

behalf.

Whether a site or service could be held accountable for a moderator's actionable comments ultimately may turn on agency law principles.

Similarly, while employees may engage in the traditional editorial functions of newspapers, new posts or content potentially could be actionable if attributable to the site owner or service provider.

### **37.05[4] Subpart 230(c)(2): Filtering and Voluntary Actions Undertaken In Good Faith to Restrict Objectionable Material**

#### **37.05[4][A] In General**

Subpart (C)(2) of the Good Samaritan exemption was intended by Congress to encourage providers and users of

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unfair competition under the Lanham Act based on a post by a forum moderator who lacked authority to speak on the defendant's behalf).

In *Bodybuilding.com*, forum moderators were enlisted by the defendant to "aid in directing conversations on the forum." *Id.* at \*1. Its moderators were allowed to "edit and delete posts, move threads, and ban forum users for violations of the forum's terms and conditions." *Id.* *Bodybuilding.com's* moderators "self-select by nominating themselves on a designated topic board in the online forum," "[o]ther forum members then vote on the nomination," and "[i]f confirmed, the nominated forum member is given the moderator title after *Bodybuilding.com* approves the application." *Id.* "*Bodybuilding.com* does not pay the moderators a salary, and they are not considered employees," although moderators receive a discount on purchases from the website and a free trip to an industry expo. *Id.*

In asserting a Lanham Act claim for a post made by the defendant's moderator, the plaintiff argued that the defendant "gives its moderators actual and express authority to delete posts of forum users and to ban forum users for violations of the terms and conditions of forum us, and thus moderators are agents of *Bodybuilding.com*." *Id.* at \*5. However, the court concluded that plaintiff's argument "misse[d] the mark"—"[m]oderators are agents for the limited purposes of moderating discussions, but this does not make them all-purpose agents." *Id.* Moderators therefore lacked authority to bind the forum operator when expressing their own views on a forum:

At most, *Bodybuilding.com* represented to the public that moderators had the authority to oversee and edit forum discussions. This does not translate into a representation that forum moderators represent *Bodybuilding.com* when stating personal opinions on a forum. Rather, a close link between an agent's tortious conduct and the agent's apparent authority must exist in order for the principal to be liable. Restatement (Third) of Agency § 7.08, cmt. a (2006). Here, this close link does not exist.

*Id.* at \*6.



interactive computer services<sup>1</sup> to take actions that they were not otherwise required to, to monitor and eliminate *objectionable material* from their sites and services (or to make available to third parties the technical means to do so), among other things. Subpart 230(c)(2) provides optional protection for providers or users of interactive computer services (including potentially employers)<sup>2</sup> that *voluntarily* take any action not otherwise required of them or mandated by law, and shields them from liability “on account of” having acted like a Good Samaritan. In the words of Judge Easterbrook of the Seventh Circuit, “[s]ection 230(c)(2) tackles this problem [of web hosts or other intermediaries providing service to people who use the service for illegal purposes] not with a sword, but with a safety net. Removing the risk of civil liability may induce web hosts and other informational intermediaries to take more care to protect the privacy and sensibilities of third parties.”<sup>3</sup> As explained by the Third Circuit, “Section 230(c)(2) does not *require* [a party] to restrict speech; rather it allows [it] to establish standards of decency without risking liability for doing so.”<sup>4</sup> In short, its “principal purpose . . . is to encourage ISPs [and other interactive computer service providers] to engage in effective self-regulation of certain content.”<sup>5</sup>

Subpart 230(c)(2)(A) provides that no liability may be imposed on account of “any action voluntarily taken in good faith to restrict access to or [the] 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 . . . .” Subpart 230(c)(2)(B) in turn exempts liability for any action taken to enable or make available to information content providers or others the technical means to restrict access to the material described in section 230(c)(2)(A). Subpart (c)(2)(B) is more limited in scope—applying only where action is taken to enable or make available technical means to restrict access—whereas subpart

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**[Section 37.05[4][A]]**

<sup>1</sup>See *supra* § 37.05[2] (defining *interactive computer service*).

<sup>2</sup>See *supra* § 39.05[2].

<sup>3</sup>*Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003).

<sup>4</sup>*Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003).

<sup>5</sup>*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

(c)(2)(A) potentially immunizes a broad range of Internet activities. Both subparts, by their terms, require *action*, although *any action* will suffice. To benefit from the broad exemption created by subpart (c)(2)(A), the action must be “voluntarily taken in good faith,” whereas subpart (c)(2)(B) merely requires that the action be taken (whether or not it was undertaken voluntarily or in good faith).

Although the purpose of section 230(c)(2)(A) was primarily to encourage interactive computer service providers (and users) to monitor their services and restrict access to or the availability of “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”<sup>6</sup> *content*, the exemption by its terms applies to causes of action based on a provider (or user)’s *conduct* in monitoring online content, not the content itself. Indeed, the nature of networked computers is such that *conduct* that occurs online frequently is manifested in the form of *content*. Thus, an interactive computer service or user who screens, edits or otherwise monitors its site or service for the purpose of restricting objectionable material should not be held liable for *any* claim (subject to the exceptions for federal criminal law, intellectual property and the Electronic Communications Privacy Act or equivalent state laws)<sup>7</sup> based on a duty that otherwise could be inferred by its conduct.

While section 230(c)(1) provides an exemption based on the nature of the claim asserted and the conduct of a provider or user of an interactive computer service in publishing or speaking content originating with a third party (and is self-executing), section 230(c)(2)(A) provides the same exemption for publishing or speaking, failing to block publication or speech or intentionally blocking publication or speech, all of which could otherwise result in liability in the physical world based on monitoring or screening content<sup>8</sup>—but only where action is taken, in good faith, to restrict ac-

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<sup>6</sup>To maximize the protection available under this statute, providers and users should track the language of the statute in Terms of Use or other online documents so that the purpose can clearly be shown in the event of litigation. *See supra* § 27.05[2][B].

<sup>7</sup>*See supra* § 37.05[1][A].

<sup>8</sup>Stated differently,

subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection (c)(2), for its part, provides an additional shield from liability, but only for “any action voluntarily taken in good faith to restrict

cess to or the availability of certain objectionable content, as discussed below. As explained by the Ninth Circuit:

[T]he persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider [or user] of an interactive computer service. *See* § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, *see Roommates*, 521 F.3d at 1162–63, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers [sic]<sup>9</sup> from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.<sup>10</sup>

**37.05[4][B] Threshold Entitlement to Section  
230(c)(2)(A) Exemption—Voluntary  
Action Undertaken in Good Faith**

Section 230(c)(2) provides that:

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 . . . .

As noted earlier in the text, subpart (c)(2)(A) inverts the common law rules on distributor and publisher liability by immunizing conduct undertaken to monitor or screen content. Traditionally, the more editorial control exerted, the more likely it was that a company would be subject to the greater potential liability of a publisher, rather than the lower exposure to defamation claims faced by distributors, such as newspaper vendors and bookstores.<sup>1</sup>

By its terms, the threshold for entitlement for Good

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access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable.”

*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009).

<sup>9</sup>The Good Samaritan exemption applies to interactive computer service providers and users, not Internet service providers, which is the term that the *Barnes* court mistakenly uses.

<sup>10</sup>570 F.3d at 1105.

**[Section 37.05[4][B]]**

<sup>1</sup>*See, e.g.*, Restatement (Second) of Torts § 581, at 231 (1977); *supra* §§ 37.03[2], 37.04.

Samaritan protection is low—*any action* (by a provider or user of an interactive computer service)<sup>2</sup> is sufficient, so long as it is undertaken voluntarily (and therefore will benefit the public as a deed not otherwise required) and in good faith, to restrict access to or the availability of enumerated material.<sup>3</sup>

Mere inaction would be insufficient. The statute expressly is phrased in terms of “any action taken . . .” or “any action voluntarily taken . . .”<sup>4</sup> A provider or user who makes no effort to restrict or to enable restriction of access to objectionable material, therefore should be unable to benefit from subpart (c)(2) of the Good Samaritan exemption (and potentially could be exposed to greater liability than a provider or user who takes at least some *action*), depending upon whether immunity under subpart (c)(1) otherwise was available for the same content.<sup>5</sup> Although an interactive computer service provider or user who takes *no action* would be unable to benefit from the exemption provided by section 230(c)(2), taking *no action* would not limit the potential reach of section 230(c)(1) since it is self-executing and, by its plain terms, no action is required.

To be effective under section 230(c)(2)(A), “any action” undertaken by an interactive computer service or user must have been undertaken *voluntarily* and *in good faith*. Presumably, actions required by law or otherwise compelled would not apply.

Similarly, good faith, not merely voluntary action, is

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<sup>2</sup>An *interactive computer service* is defined under the Act as “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 . . .” 47 U.S.C.A. § 230(f)(2). An *access software provider* is defined as “a provider of software . . . or enabling tools that do any 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, or translate content.” 47 U.S.C.A. § 230(f)(4); see *generally supra* § 37.05[2] (defining *interactive computer service*).

<sup>3</sup>The specific categories of covered material are discussed below in section 37.05[4][C].

<sup>4</sup>47 U.S.C.A. § 230(c)(2)(A), 230(c)(2)(B).

<sup>5</sup>Service provider liability is addressed more extensively in chapters 49 and 50.

required. In *Sabbato v. Hardy*<sup>6</sup>—an unreported intermediate appellate court decision from Ohio—Judge Sheila G. Farmer of Stark County correctly concluded, consistent with the analysis of this treatise, that the availability of the exemption created by section 230(c)(2)(A) is not automatic and depends on “some evidence” of good faith. She therefore ruled under the facts of that case that a website designer and operator could not prevail on his motion to dismiss plaintiff’s defamation complaint simply by interposing the exemption, but rather would have to convert his motion into one for summary judgment by introducing evidence of his good faith.<sup>7</sup>

The requirement of good faith in section 230(c)(2)(A)<sup>8</sup> ensures that “any action” that qualifies under the statute will not merely be a cosmetic gesture intended solely to insulate an interactive computer service from liability. It also means that a service provider (or user) cannot benefit from the exemption if it acts willfully or maliciously.

A good example of a case where section 230(c)(2)(A) might have applied had it been raised by the parties is *Barnes v. Yahoo!, Inc.*<sup>9</sup> In that case, a woman whose former boyfriend created phony profiles of her containing naked pictures that had been taken of her without her knowledge, invitations to engage in sexual intercourse and her real work address, phone number and email account, sued Yahoo! for failing to take down the phony profiles. In response to the profiles, men who the plaintiff did not know were “peppering her office with emails, phone calls, and personal visits, all in the expectation of sex.”<sup>10</sup> Barnes sent multiple take down requests to Yahoo!, but also spoke to Yahoo!’s Director of Communications, who called her and promised to “personally walk” her statement over to the division responsible for

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<sup>6</sup>*Sabbato v. Hardy*, 29 Media L. Rep. (BNA) 1860, 2000 WL 33594542 (Ohio Ct. App. Dec. 18, 2000).

<sup>7</sup>In that case, the defendant presumably alternatively could have asserted the exemption created by section 230(c)(1).

<sup>8</sup>The broad exemption provided by section 230(c)(2)(A) requires “any action voluntarily taken in good faith” to restrict access to or the availability of particular content. The more limited exemption created by section 230(c)(2)(B) for action to enable or make available the technical means to restrict access to objectionable material merely requires “any action,” rather than “any action voluntarily taken in good faith.” See *infra* § 37.05[4][D].

<sup>9</sup>*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

<sup>10</sup>*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009).

removing unauthorized profiles and that Yahoo! would take care of it. The Ninth Circuit concluded that plaintiff's negligent undertaking claim was preempted by section 230(c)(1), but ruled that her quasi-contractual promissory estoppel claim, based on the representations of the Director of Communications which plaintiff alleged she relied on to her detriment, was not similarly preempted because it was not premised on publication or speaking. As the court explained, "Barnes does not seek to hold Yahoo! liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached."<sup>11</sup> In so ruling, the Ninth Circuit was careful to explain that it was not opining on whether the claim might be preempted by section 230(c)(2)(A), which Yahoo! had not

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<sup>11</sup>*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009). A district court in New York had reached the opposite conclusion, finding a quasi contract claim preempted by section 230(c)(1). Relying on *Zeran*, the court held that Ask.com, a search engine, could not be held liable for failing to keep an alleged promise to remove a site allegedly including false information from its directory because "[d]eciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity." *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (holding preempted by the CDA a claim by the Independent party candidate for governor to compel Ask.com to block from its search engine a page that listed him in close proximity to others identified with the Communist Party, such that when a search result snippet was viewed it appeared to falsely identify him as a Communist Party member). Although the court in *Pataki* also cited the lower court's decision in *Barnes v. Yahoo!*, which was reversed on appeal, it is not clear that the Pataki court would have ruled differently had it had the benefit of the Ninth Circuit's subsequent opinion. See *Murawski v. Pataki*, 514 F. Supp. 2d 577 (S.D.N.Y. 2007), citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding that the CDA immunized AOL from liability for failing to remove a defamatory post), *cert. denied*, 524 U.S. 937 (1998).

In *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009), the court declined to extend Barnes to plaintiff's claim that she was a third party beneficiary of Google's contracts with its advertisers, writing that "[r]ead as broadly as possible, Barnes stands for the proposition that when a party engages in conduct giving rise to an independent and enforceable contractual obligation, that party may be 'h[eld] . . . liable [not] as a publisher or speaker of third-party content, but rather as a counter-party to a contract, as a promisor who has breached.'" *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1200 (N.D. Cal. 2009), quoting *Barnes*, 570 F.3d at 1107. In *Goddard*, by contrast, there was "no allegation that Google ever promised Plaintiff or anyone else, in any form or manner, that it would enforce its Content Policy." 640 F. Supp. 2d at 1200.

raised in its appeal.<sup>12</sup>

In *Barnes*, if the conduct of the Director of Communications were deemed to constitute “any action voluntarily taken in good faith” to restrict access to or the availability of objectionable content then plaintiff’s promissory estoppel claim certainly would be preempted by section 230(c)(2)(A). *Barnes* was decided on a Rule 12(b)(6) motion, so plaintiff’s allegations were assumed to be true for purposes of deciding the motion. Ultimately, it was unclear whether the defendant undertook *any action*, even if it was not successful, or whether it took no action, in which case section 230(c)(2)(A) would not apply. If *any action* indeed had been undertaken, plaintiff’s claim would be preempted. The Good Samaritan exemption was created expressly to encourage interactive computer service providers and users to act as Good Samaritans, free from the liability that in the physical world otherwise might attach when a Good Samaritan attempts to help but fails to do so or even makes matters worse.

Where section 230(c)(2)(A) immunity may be available, it may be difficult to raise in a motion to dismiss or for judgment on the pleadings. For example, in *Smith v. Trusted Universal Standards in Electronic Transactions, Inc.*,<sup>13</sup> an unreported decision, the court denied defendants’ motion to dismiss various claims brought by a *pro se* plaintiff arising out of his Comcast email account having been blocked when his IP address was included on a list of notorious spammers by Spamhaus, where the plaintiff alleged that defendants acted in bad faith in blacklisting his IP address. The plaintiff had alleged that after his account was first blocked, he called Comcast and was told that he would not need to worry about being blocked again if he upgraded to a higher level of service. Assuming as true plaintiff’s allegations, the court noted that this explanation “seems to suggest that Comcast was not concerned that people were receiving large quantities of emails, or concerned about the content of the emails, but rather was concerned that Plaintiff had not purchased a sufficient level of service. This is not a good faith belief that the emails were objectionable, but rather a belief that they

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<sup>12</sup>570 F.3d at 1109.

<sup>13</sup>*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

violated a service agreement.”<sup>14</sup>

*Smith* reflects the potential difficulty associated with obtaining dismissal of a claim potentially subject to section 230(c)(2)(A), which requires a showing of good faith, voluntary action, which usually requires evidence from the defendant, either in support of a motion for summary judgment or, if controverted by evidence presented by the plaintiff, at trial.<sup>15</sup>

On the other hand, in *Holomaxx Technologies Corp. v. Microsoft Corp.*,<sup>16</sup> Judge Jeremy Fogel of the Northern District of California dismissed with leave to amend claims brought by an email marketing service against an interactive computer service for allegedly filtering and blocking its communications to Microsoft users. In dismissing claims under the Computer Fraud and Abuse Act<sup>17</sup> and for intentional interference with contract, intentional interference with prospective business advantage and alleged violations of California’s wiretapping/eavesdropping statute,<sup>18</sup> the court concluded that it was clear from the face of plaintiff’s complaint that Microsoft reasonably could have concluded that “Holomaxx’s emails were ‘harassing’ and thus ‘otherwise objectionable.’” In that case, Holomaxx admitted sending approximately three million emails per day through Microsoft’s servers and that at least 0.5% of these were sent to an invalid address or resulted in an opt-out request. As the court noted, on an annual basis this amounted to more than five million invalid or unwanted email messages.

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<sup>14</sup>*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

<sup>15</sup>See *infra* § 37.05[7] (procedural issues about when to raise the CDA defense). In a later ruling in the case, Judge Kugler denied summary judgment to Comcast on its CDA defense because the issue of its good or bad faith was disputed based on its failure to respond to plaintiff’s requests for information about why its IP address was being blocked, but Judge Kugler granted summary judgment for Cisco and Microsoft, which merely provided spam filtering services. See *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2011 WL 900096, at \*8-9 (D.N.J. Mar. 15, 2011). Despite the lack of CDA protection, the court granted summary judgment for Comcast on other grounds.

<sup>16</sup>*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

<sup>17</sup>18 U.S.C.A. § 1030; see generally *infra* § 44.08.

<sup>18</sup>Cal. Penal Code §§ 630 *et seq.*



Judge Fogel rejected Holomaxx's conclusory allegation that Microsoft acted in bad faith, holding that the appropriate question was whether Holomaxx had pled facts to show an absence of good faith.<sup>19</sup> Although the court conceded that other aspects of Microsoft's affirmative defense might be contested, Judge Fogel ruled that before that became relevant Holomaxx would have to plead facts to show an absence of good faith. Accordingly, the court dismissed Holomaxx's claims with leave to amend if it was able to do so.

Judge Fogel also entered equivalent relief in Holomaxx's virtually identical suit against Yahoo!.<sup>20</sup>

**37.05[4][C] Harassing and Otherwise  
Objectionable Content Under Section  
230(c)(2)(A)**

Subpart 230(c)(2)(A) provides that no liability may be imposed on account of "any action voluntarily taken in good faith to restrict access to or [the] 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 . . .*"

While most of the terms referenced in subpart (c)(2)(A) refer to adult content, companies seeking to benefit from the exemption should, at a minimum, take "any action . . . to restrict access to or [the] availability of material that the provider or user considers to be . . . harassing, or otherwise objectionable . . ." The terms *harassing* and *otherwise objectionable* are not defined in the statute. In the policy objectives enumerated in the statute, the term *harassment* is used in the context of criminal laws,<sup>2</sup> while *objectionable* is used in terms of a form of content that parents might want

<sup>19</sup>*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011), quoting *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008).

<sup>20</sup>See *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011); see also *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 2011 WL 3740827 (N.D. Cal. Aug. 23, 2011) (dismissing plaintiff's amended complaint with prejudice).

**[Section 37.05[4][C]]**

<sup>1</sup>47 U.S.C.A. § 230(c)(2).

<sup>2</sup>See 47 U.S.C.A. § 230(b)(5).

to restrict.<sup>3</sup> The legislative history, however, speaks broadly in terms of “objectionable online material” and also states that the provision is intended to further “the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”<sup>4</sup>

A cardinal principle of statutory construction is that every word in a statute is to be given independent meaning.<sup>5</sup> In *National Numismatic Certification, LLC v. eBay, Inc.*,<sup>6</sup> however, Judge Patricia Fawsett of the Middle District of Florida, in an unreported decision, construed the term *objectionable* narrowly. She wrote that “[w]hen a general term follows specific terms, courts presume that the general term is limited by the preceding terms.”<sup>7</sup> Applying the canon of *ejusdem generis*, Judge Fawsett wrote:

One may find an array of items objectionable . . . However, Congress provided guidance on the term “objectionable” by providing a list of seven examples and a statement of the policy behind section 230. Accordingly, the Court concludes that “objectionable” content must, at a minimum, involve or be similar to pornography, graphic violence, obscenity, or harassment.<sup>8</sup>

Accordingly, the court concluded that eBay’s removal of listings for allegedly counterfeit coins was *not* preempted by section 230. In evaluating the level of involvement of an interactive computer service provider or user, however, the court conflated the standards under section 230(c)(1) and (c)(2)(A), interpreting the availability of the exemption created by section (c)(1) as dependent on a defendant’s entitlement to qualify for section (c)(2)(A), which was plainly a

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<sup>3</sup>See 47 U.S.C.A. § 230(b)(4).

<sup>4</sup>Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996).

<sup>5</sup>See *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 197 (1985).

<sup>6</sup>*National Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008).

<sup>7</sup>*National Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008), citing *Begay v. U.S.*, 553 U.S. 137, 140–41 (2008); and *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (“Under [the canon of *ejusdem generis*], when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.”).

<sup>8</sup>*National Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404, at \*25 (M.D. Fla. July 8, 2008), citing 47 U.S.C.A. § 230(c)(1).

legal error.

Agreeing with *National Numismatic Certification*, the court in *Goddard v. Google, Inc.*,<sup>9</sup> also in an unreported decision, wrote in *dicta* that Google's content policy requiring mobile advertisers to provide pricing and cancellation information in connection with advertisements, would not be subject to the Good Samaritan exemption because it could not be characterized as addressing objectionable content. According to the court, the policy requirements related "to business norms of fair play and transparency and are beyond the scope of § 230(c)(2)."<sup>10</sup>

Judge Fogel of the Northern District of California, who authored the opinion in *Goddard v. Google*, adopted the same interpretation of the statute in a later reported decision, *Holomaxx Technologies Corp. v. Microsoft Corp.*,<sup>11</sup> although in that case, as discussed below, he dismissed various federal and state claims pursuant to section 230(c)(2), with leave to amend, based on his finding that the conduct at issue in *Holomaxx* on its face seemed objectionable.<sup>12</sup>

By contrast, in *Langdon v. Google, Inc.*,<sup>13</sup> which is also a reported decision, the court held that defendant-search engines could not be held liable for not carrying plaintiff's advertisements—advertisements that Google described as "advocat[ing] against an individual, group [or] organization"<sup>14</sup>—based on a finding that the advertisements were "otherwise objectionable" within the meaning of section 230(c)(2)(A).

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<sup>9</sup>*Goddard v. Google, Inc.*, No. C 08-2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008).

<sup>10</sup>*Goddard v. Google, Inc.*, No. C 08-2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008). The court ultimately dismissed plaintiff's amended complaint with prejudice pursuant to section 230(c)(1). See *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).

<sup>11</sup>*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

<sup>12</sup>See *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating Holomaxx's virtually identical complaint against Yahoo!).

<sup>13</sup>*Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

<sup>14</sup>*Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 626, (D. Del. 2007). The court in *National Numismatic Certification, LLC v. eBay, Inc.* sought to harmonize its ruling with that case by noting that advocating "against a group" was similar to "harassment." 2008 WL 2704404, at \*25 n.35.

Likewise, in *e360Insight, LLC v. Comcast Corp.*,<sup>15</sup> the court ruled that commercial email sent by a bulk emailer could be deemed objectionable under section 230(c)(2)(A). In that case, e360 had sued Comcast for using filters to block email sent to Comcast customers by e360, which e360 argued fully complied with the CAN-SPAM Act<sup>16</sup> and therefore was lawful commercial email, not spam. The court rejected this argument, writing that “compliance with CAN-SPAM . . . does not evict the right of the provider to make its own good faith judgment to block mailings.”<sup>17</sup> To force a provider like Comcast to litigate the question of whether what it blocked was or was not spam would render § 230(c)(2) nearly meaningless.”<sup>18</sup> Section 230(c)(2), the court wrote, insulates a provider from “blocking too much, or even too little . . .”<sup>19</sup> The court also emphasized that section 230(c)(2)(A) insulates an interactive computer service provider from liability for blocking content that it subjectively views as objectionable. The court held that “a mistaken choice to block, if made in good faith, cannot be the basis of liability under federal or state law.”<sup>20</sup>

Following *e360*, Judge Jeremy Fogel of the Northern District of California, in *Holomaxx Technologies Corp. v. Microsoft Corp.*,<sup>21</sup> dismissed with leave to amend claims brought by an email marketing service against an interactive computer service for allegedly filtering and blocking its communications to Microsoft users. In dismissing claims under the Computer Fraud and Abuse Act<sup>22</sup> and for intentional interference with contract, intentional interference

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<sup>15</sup>*e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008).

<sup>16</sup>15 U.S.C.A. §§ 7701 to 7713; *see supra* § 29.03 (the CAN-SPAM Act), 29.08[2] (the use of blocking and screening software).

<sup>17</sup>546 F. Supp. 2d at 609.

<sup>18</sup>546 F. Supp. 2d at 609.

<sup>19</sup>546 F. Supp. 2d at 607.

<sup>20</sup>546 F. Supp. 2d at 609. In *e360*, the court granted judgment on the pleadings in favor of Comcast on e360’s claims for violations of the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030, infringement of free speech, tortious interference with prospective economic advantage and deceptive or unfair practices barred by the Illinois Consumer Fraud Act. *See generally supra* § 29.08[2].

<sup>21</sup>*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

<sup>22</sup>18 U.S.C.A. § 1030; *see generally infra* § 44.08.

with prospective business advantage and alleged violations of California's wiretapping/eavesdropping statute,<sup>23</sup> the court concluded that it was clear from the face of plaintiff's complaint that Microsoft reasonably could have concluded that "Holomaxx's emails were 'harassing' and thus 'otherwise objectionable'" where Holomaxx admitted sending approximately three million emails per day through Microsoft's servers and that at least 0.5% of these were sent to an invalid address or resulted in an opt-out request. As the court noted, on an annual basis this amounted to more than five million invalid or unwanted email messages.<sup>24</sup>

Judge Fogel also granted equivalent relief to Yahoo! in Holomaxx's virtually identical suit against that company.<sup>25</sup>

A different court applied similar reasoning in *Smith v. Trusted Universal Standards in Electronic Transactions, Inc.*,<sup>26</sup> which also was brought by an accused spammer over a blocked email account. In *Smith*, the court rejected the argument that blocked material must be "obscene, lewd, filthy, excessively violent, or harassing" to come within the scope of section 230(c)(2)(A), holding that "nothing about the context before or after" the term *otherwise objectionable* "limits it to just patently offensive items."<sup>27</sup> In a subsequent ruling in that case, the court clarified that because section 230(c)(2)(A) "protects material that the user or provider *considers* to be objectionable" it "[i]mportantly . . . does not require the user or provider of an interactive computer service to demonstrate that the otherwise 'objectionable' mate-

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<sup>23</sup>Cal. Penal Code §§ 630 *et seq.*

<sup>24</sup>*See supra* § 37.05[4][B] (discussing the case further).

<sup>25</sup>*See Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011).

<sup>26</sup>*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

<sup>27</sup>*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010). As discussed in the preceding sub-section, because the issue of immunity was raised in a motion to dismiss and the question of good faith was disputed, the court in *Smith* denied defendants' motion to dismiss. *See generally infra* § 37.05[7] (procedural issues associated with when to raise the defense).

rial is actually objectionable.”<sup>28</sup> In granting partial summary judgment for Microsoft and Cisco in that case, the court concluded that “[u]sers or providers of an interactive computer service may determine that spam is material that is harassing or otherwise objectionable under Section 230(c)(2)(A).”<sup>29</sup>

Similarly, in *Blumenthal v. Drudge*,<sup>30</sup> Judge Paul Friedman of the District of Columbia wrote in *dicta* in a footnote that material referenced in subpart (c)(2) as *otherwise objectionable* encompassed “a broad . . . category . . .” (construed in that case to extend to a claim based on defamation).<sup>31</sup>

### **37.05[4][D] Enabling or Making Available the Technical Means to Restrict Access Under Section 230(c)(2)(B)**

Section 230(c)(2)(B) provides that no provider or user of an interactive computer service<sup>1</sup> shall be held liable on account of “any action taken to enable or make available to information content providers<sup>2</sup> or others<sup>3</sup> the technical means to re-

<sup>28</sup>*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2011 WL 900096, at \*5 (D.N.J. Mar. 15, 2011) (emphasis added) (granting summary judgment to Cisco and Microsoft but denying summary judgment to Comcast pursuant to subpart 230(c)(2)).

<sup>29</sup>*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2011 WL 900096, at \*5 (D.N.J. Mar. 15, 2011), citing *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456, at \*6 (D.N.J. May 4, 2010).

<sup>30</sup>*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

<sup>31</sup>*Blumenthal v. Drudge*, 992 F. Supp. 44, 52 n.13 (D.D.C. 1998).

#### **[Section 37.05[4][D]]**

<sup>1</sup>An *interactive computer service* is defined under the Act as “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 . . . .” 47 U.S.C.A. § 230(f)(2). An *access software provider* is defined as “a provider of software . . . or enabling tools that do any 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, or translate content.” 47 U.S.C.A. § 230(f)(4); see generally *supra* § 37.05[2] (defining *interactive computer service*).

<sup>2</sup>An *information content provider* is defined as “any person or entity that is responsible, in whole or part, for the creation or development of in-

strict access to the material described in section 230(c)(2)(A)<sup>4</sup> which, as noted above in section 37.05[4][C], is 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 . . . .”<sup>5</sup> Cases construing those specific terms are separately considered in section 37.05[4][C].

Very few courts have construed section 230(c)(2)(B), which on its face provides broad immunity for any action taken to enable or make available to others, filtering or other technologies. In *Zango, Inc. v. Kaspersky Lab, Inc.*,<sup>6</sup> the Ninth Circuit ruled that section 230(c)(2)(B) extended protection to *Kaspersky Lab*, a distributor of Internet security software that filtered adware and malware. In that case, *Zango*, an Internet company that provides access to a catalog of online videos, games, music, tools and utilities to consumers who agree to view advertisements while they browse the Internet, sued Kaspersky, alleging that its software improperly blocked Zango’s software.

Judge Pamela Ann Rymer, writing for herself and Judge Betty B. Fletcher, held that a provider of software or enabling tools that filter, screen, allow, or disallow content that the provider or user considers obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable may not be held liable for any action taken to make available the technical means to restrict access by multiple

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formation provided through the Internet or any other interactive computer service.” 47 U.S.C.A. 230(f)(3).

<sup>3</sup>The scope of protection under subpart 230(c)(2)(B) is not restricted to tools provided to information content providers. By using the term “information content providers or others” the statute plainly reaches broadly to third parties.

<sup>4</sup>The statute literally refers to subpart (1) but there is no subpart (1) and it is clear from the statute that Congress intended to refer to subpart 230(c)(2)(A). See *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 n.5 (9th Cir. 2009) (“We take it that the reference to the ‘material described in paragraph (1)’ is a typographical error, and that instead the reference should be to paragraph (A), i.e., § 230(c)(2)(A) . . . . Paragraph (1) pertains to the treatment of a publisher or speaker and has nothing to do with ‘material,’ whereas subparagraph (A) pertains to and describes material.”).

<sup>5</sup>47 U.S.C.A. § 230(c)(2)(A).

<sup>6</sup>*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

users to a computer server.<sup>7</sup>

In so ruling the court rejected plaintiff's argument that the court's holding in *Zango* would open the door to provide immunity to all software providers.

Judge Rymer explained that the immunity afforded by section 230(c)(2)(B), by its terms, only applies to technical means to restrict access to objectionable material. "Thus, non-filtering programs such as word processors or video games would not be subject to the good [S]amaritan immunity."<sup>8</sup> In addition, the court wrote that "[t]he universe is further limited by the definition of 'interactive computer service,' which includes only 'information, service[s], system[s], or access software providers.'<sup>9</sup> The court reiterated that the reason Kaspersky comes within the definition of an *access software provider* is "that it is a provider of software that permits users to 'filter, screen, allow, or disallow content."<sup>10</sup>

In his concurring opinion, Judge Fisher suggested that Zango's software might not qualify as "otherwise objectionable" under section 230(c)(2), but noted that Zango had waived that argument before the appellate court.

In *Smith v. Trusted Universal Standards in Electronic Transactions, Inc.*,<sup>11</sup> an unreported decision, the court denied motions to dismiss filed by Cisco and Microsoft because they alleged but did not support allegations that they qualified as access software providers within the meaning of section 230(c)(2)(B). Specifically, the court found lacking any assertion that they provided access by multiple users to a computer server. *Smith* was brought by a *pro se* plaintiff. The court's analysis on this point may simply reflect the court's discomfort with disposing of a claim on a motion to dismiss, rather than at a later stage in the proceedings in a motion supported by evidence.

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<sup>7</sup>*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 (9th Cir. 2009).

<sup>8</sup>*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 (9th Cir. 2009).

<sup>9</sup>*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 (9th Cir. 2009), *citing* 47 U.S.C.A. § 230(f)(2).

<sup>10</sup>568 F.3d at 1176, *citing* 47 U.S.C.A. § 230(f)(4)(A).

<sup>11</sup>*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).



### 37.05[5] The Scope of Exclusions for Intellectual Property and Other Claims

Section 230(e)(2) provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.”<sup>1</sup> Federal intellectual property law claims (for infringement of copyrights, trademarks and patents) plainly are excluded from the scope of section 230 preemption.<sup>2</sup> The applicability of the exemption to state intellectual property laws (such as right of publicity, trade secret and trademark claims arising under state law), however, is the subject of conflicting judicial interpretations.

Section 230(e) sets forth four separate provisions that address the Good Samaritan exemption’s effect on other laws. The exemption does not apply to “[f]ederal criminal statute[s,]”<sup>3</sup> “any law[s] pertaining to intellectual property,”<sup>4</sup> or the federal Electronic Communications Privacy Act<sup>5</sup> “or any similar State law.”<sup>6</sup> On the other hand, the exemption expressly preempts inconsistent state laws<sup>7</sup> (although it does not preempt those state laws that are consistent with its

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#### [Section 37.05[5]]

<sup>1</sup>Intellectual property laws are separately addressed in the following chapters: 4 (Copyright Protection in Cyberspace), 5 (Database Protection), 6 (Trademark, Service Mark, Trade Name and Trade Dress Protection in Cyberspace), 7 (Rights in Internet Domain Names), 8 (Internet Patents), 9 (Intellectual Property Aspects of Information Distribution Systems on the World Wide Web: Caching, Linking and Framing Websites, Content Aggregation, Search Engine Indexing Practices, Key Words and Metatags), 10 (Misappropriation of Trade Secrets in Cyberspace), 11 (Employer Rights in the Creation and Protection of Internet-Related Intellectual Property), 12 (Privacy and Publicity Rights of Celebrities and Others in Cyberspace) and 13 (Idea Misappropriation).

<sup>2</sup>See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006) (*dicta*); *Ford Motor Co. v. GreatDomains.com, Inc.*, 60 U.S.P.Q.2d 1446, 2001 WL 1176319 (E.D. Mich. Sept. 25, 2001); *Gucci America, Inc. v. Hall & Associates*, 135 F. Supp. 2d 409, 412–13 (S.D.N.Y. 2001) (domain names).

<sup>3</sup>47 U.S.C.A. § 230(e)(1).

<sup>4</sup>47 U.S.C.A. § 230(e)(2).

<sup>5</sup>47 U.S.C.A. § 230(e)(4); see generally *supra* § 37.05[1][A].

<sup>6</sup>47 U.S.C.A. § 230(e)(4).

<sup>7</sup>47 U.S.C.A. § 230(e)(3) (“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.”).

provisions).<sup>8</sup> Courts have come to different conclusions in evaluating whether section 230 preempts all inconsistent state laws—including state intellectual property claims—or literally excludes “any law pertaining to intellectual property” even if it arises under state law.<sup>9</sup>

The CDA excludes “*any law* pertaining to intellectual property,”<sup>10</sup> which suggests that the Good Samaritan exemption does not apply to either federal or state IP laws. The word *any* suggests a broad interpretation, as does the term *pertaining to* intellectual property, rather than simply intellectual property laws or more narrowly *federal* intellectual property laws (or even the Copyright Act, Lanham Act and Patent Act). This view is bolstered by Congress’s use of the term “federal” in discussing other exclusions under the statute. Subpart 230(e)(1) makes clear that the exemption has no effect on any “Federal criminal statute.” Had Congress intended to exclude only federal intellectual property claims presumably it would have used the same language in subpart (e)(2) that it did in subpart (e)(1), rather than more expansively excluding “*any law* pertaining to intellectual property.”

The structure and language of section 230(e) likewise sug-

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<sup>8</sup>The statute does not “prevent any State from enforcing any State law that is consistent with this section.” 47 U.S.C.A. § 230(e)(3). As expressed in terms of stated policy, the purpose of the section is to promote the development of the Internet and other interactive computer services and media, preserve the free market for the Internet and online services without state or federal government regulation, encourage the development of technologies that maximize user control over what information is received by users, remove disincentives for the development and use of blocking and filtering technologies that parents may use to restrict children’s access to objectionable or inappropriate online material and ensure the enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer. 47 U.S.C.A. § 230(b).

<sup>9</sup>*Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (holding that the CDA preempted a state right of publicity claim) *with Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008) (declining to dismiss plaintiff’s right of publicity claim under New Hampshire law, holding that the plain text of the statute excludes any claim pertaining to intellectual property and severely criticizing the Ninth Circuit’s ruling in *Perfect 10*) and *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009) (construing the literal language of the statute the same way as the court in *Doe* and allowing a common law copyright claim under New York law to proceed); *see generally infra* § 37.05[5].

<sup>10</sup>47 U.S.C.A. § 230(e)(2) (emphasis added).

gests that Congress intended to exclude *any* law pertaining to intellectual property, and not merely *federal* intellectual property laws. Section 230(e) contains four sub-parts. Subpart (e)(1) excludes federal criminal laws, while subpart (e)(3) provides that inconsistent state laws are preempted but consistent state laws are not. Subpart (e)(4) refers to both federal and state laws in providing that “[n]othing in this section shall be construed to limit the application of the Electronic Communications Privacy Act . . . or any similar State law.” Viewed in this context—where each of the other three subparts expressly refer to state or federal law—or both—the use in section 230(e)(2) of “*any law* pertaining to intellectual property” without reference to either state or federal law strongly suggests that Congress intended to exclude all intellectual property laws, and not merely federal ones.

The question of whether the Good Samaritan exemption preempts or has no effect on state claims pertaining to intellectual property ultimately depends upon whether the four subparts of section 230(e), captioned “[e]ffect on other laws,” constitute independent provisions or modify one another. If they are independent, the Good Samaritan exemption has no effect on federal criminal laws (subpart (1)), no effect on intellectual property laws (subpart (2)), no effect on claims under the Electronic Communications Privacy Act or similar state laws (subpart (4)) and no effect on state laws that are consistent with the exemption (subpart (3)), but otherwise preempts all other state law civil and criminal provisions (i.e., state law claims other than IP claims, provisions consistent with the Good Samaritan exemption and state laws similar to the ECPA) and provides an exemption in federal civil cases other than those arising under the ECPA. On the other hand, to find that the Good Samaritan exemption preempts state laws pertaining to intellectual property a court would have to conclude that section 230(e)(3), which broadly preempts all inconsistent state and local laws, modifies section 230(e)(2), which provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.” However, there is nothing in the text or structure of the statute to suggest that subpart (e)(3) modifies subpart (e)(2).

In *Perfect 10, Inc. v. CCBill, Inc.*,<sup>11</sup> the Ninth Circuit construed the term “intellectual property” to mean “federal intellectual property” and ruled that the plaintiff’s right of publicity claim against an Internet payment processor was preempted.<sup>12</sup> Consequently, in the Ninth Circuit the CDA will be construed to preempt state law intellectual property claims, including right of publicity, common law trademark infringement and dilution and trade secret misappropriation claims, among others,<sup>13</sup> provided the content originated with a third party information content provider and was not cre-

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<sup>11</sup>*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

<sup>12</sup>*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

<sup>13</sup>*See, e.g., Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice state law claims for trademark infringement and dilution and unfair competition as preempted by the CDA); *Evans v. Hewlett-Packard Co.*, C 13-02477 WHA, 2013 WL 4426359, at \*2-3 (N.D. Cal. Aug. 15, 2013) (dismissing Pennsylvania unfair competition and trademark infringement and Pennsylvania and California right of publicity claims brought against the operators of the HP App Catalogue, an app store for Palm devices, as preempted by the CDA, because, although “cleverly-worded,” the complaint did “not allege that defendants created the app at issue here. Rather, it appears that the app was created entirely by third parties.”); *Evans v. Hewlett-Packard Co.*, No. C 13-02477, 2013 WL 5594717 (N.D. Cal. Oct. 10, 2013) (denying plaintiffs’ motion to amend the complaint to “plead around the CDA” by alleging that the defendants did not merely operate an App store for apps used on Palm devices but actually developed the allegedly infringing “Chubby Checker” App, holding that plaintiffs’ proposed, amended California and Pennsylvania state law trademark, unfair competition, right of publicity, and emotional distress claims were preempted by section 230); *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (holding that a sports betting website operator was immune from state law claims for misappropriation of trade secrets, misappropriation of licensable commercial property, civil theft, and tortious interference with contractual relations, because it was not a “developer” of user-generated content under the CDA, even though it awarded loyalty points for user posts); *Perfect 10, Inc. v. Giganews, Inc.*, CV11-07098 AHM SHX, 2013 WL 2109963, at \*15–16 (C.D. Cal. Mar. 8, 2013) (applying CCBill in dismissing with leave to amend plaintiff’s California right of publicity and unfair competition claims as barred by the CDA because the pornographic images found on defendant’s website originated with third parties). *But see Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086–87 (C.D. Cal. 2012) (narrowly applying the CDA without much analysis in denying in part the defendant’s motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not

ated or developed by the defendant itself.<sup>14</sup>

In *CCBill*, the Ninth Circuit spent most of its attention in the opinion on issues of first impression under the Digital Millennium Copyright Act,<sup>15</sup> giving short shrift to its holding that the plaintiff's California right of publicity claim was preempted by the Good Samaritan exemption. Judge Milan Smith, Jr., writing for the panel, explained that:

While the scope of federal intellectual property law is relatively well-established, state laws protecting 'intellectual property,' however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes.<sup>16</sup>

This analysis, however, ignores the structure of the statute and was severely criticized in *Doe v. Friendfinder*

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claims arising out of the alleged sale of plaintiff's "Cybersitter" mark as a key word to trigger sponsored link advertisements).

<sup>14</sup>See, e.g., *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090-91 (D. Nev. 2013) (denying the defendant's motion to dismiss plaintiff's amended complaint where plaintiff alleged that the website provider "acted as a 'developer' within the meaning of the CDA by promoting the publication of protected 'service plays' and thereby contributing to the misappropriation of Plaintiffs' trade secrets and commercial property."); *Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086-87 (C.D. Cal. 2012) (denying in part the defendant's motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not claims arising out of the alleged sale of plaintiff's "Cybersitter" mark as a key word to trigger sponsored link advertisements); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801-02 (N.D. Cal. 2011) (denying Facebook's motion to dismiss plaintiff's right of publicity claim arising out of the use of user names and images in connection with advertisements for pages that users "liked" on Facebook because the court concluded that the advertisements, which were comprised of user content, had been developed by Facebook).

<sup>15</sup>17 U.S.C.A. § 512(c); see generally *supra* § 4.12 (analyzing the statute and discussing the case).

<sup>16</sup>488 F.3d at 1118.

*Network, Inc.*,<sup>17</sup> a district court decision from New Hampshire, in which Judge Joseph N. LaPlante denied the defendant's motion to dismiss claims for false advertising and false designation of origin under the Lanham Act and violations of the plaintiff's right of publicity under New Hampshire law, but dismissed plaintiff's other state law claims under the Good Samaritan exemption. He ruled that the language of section 230(e)(2) was clear and did not suggest any limitation to *federal* intellectual property law. In addition, the use of the expansive modifier *any* offered no indication that Congress intended a limiting construction of the statute.<sup>18</sup>

Judge LaPlante wrote that “[t]he Ninth Circuit made no attempt to reckon with the presence of the term ‘any’—or for that matter, the absence of the term ‘federal’—in section 230(e)(2) when limiting it to federal intellectual property laws.”<sup>19</sup> He further criticized the Ninth Circuit for failing to “make any effort to reconcile its reading of section 230(e)(2) with other limiting provisions of section 230 which specifically identify federal or state law as such . . . . The content of these provisions indicates that, where Congress wished to distinguish between state and federal law in section 230, it knew how to do so.”<sup>20</sup> Judge LaPlante explained:

[T]he use of “any” in § 230(e)(2), in contrast to the use of “federal” elsewhere in the CDA, suggests that Congress did not intend the terms to be read interchangeably. “It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Duncan v. Walker*, 533 U.S. 167, 173, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (internal quotation marks and bracketing omitted) (declining to read “federal” into section of statute where it did not appear because Congress had

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<sup>17</sup>*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

<sup>18</sup>See *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008). He wrote that “[s]tatutory interpretation begins with the language of the statute. Where . . . that language is clear and ambiguous, the inquiry is at an end.” *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008), quoting *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007), citing *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

<sup>19</sup>540 F. Supp. 2d at 299.

<sup>20</sup>540 F. Supp. 2d at 299–300.

“denominat[ed] expressly both ‘State’ and ‘Federal’ . . . in other parts of the same statute”) . . . .<sup>21</sup>

Finally, Judge LaPlante criticized the Ninth Circuit’s rationale for construing “intellectual property” to mean “federal intellectual property”—Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes—writing that “[h]owever salutary this ‘goal’ might be on its own merits, it is not among those ‘expressed’ in § 230.”<sup>22</sup>

Other cases had previously discussed<sup>23</sup> the issue or held without specifically analyzing that state intellectual property claims, like federal intellectual property claims, are excluded from section 230 and are not preempted.<sup>24</sup>

In *Atlantic Recording Corp. v. Project Playlist, Inc.*,<sup>25</sup> Judge Denny Chin of the Southern District of New York reached

<sup>21</sup>540 F. Supp. 2d at 300.

<sup>22</sup>540 F. Supp. 2d at 300. He explained that:

While the text of § 230 identifies one of its purposes as freeing the Internet from “government regulation,” 47 U.S.C.A. § 230(a)(4), this plain language restricts regulation by any government, not just those of the states. One of § 230’s announced policies, in fact, is “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.” *Id.* § 230(b)(2) (emphasis added) . . . . As the presence of § 230(e)(2) indicates, however, Congress also believed that laws protecting intellectual property rights should nevertheless remain in effect—that the potential costs to those rights, in essence, outweighed the benefits of the alternative.

540 F. Supp. 2d at 300. The court further wrote that “while Congress often acts to protect interstate commerce from the burden of nonuniform state laws, there is nothing in the language of section 230 effecting that protection here. ‘Courts are not free to disregard the plain language of a statute and, instead, conjure up legislative purposes and intent out of thin air’ under the guise of statutory interpretation.” 540 F. Supp. 2d at 300, quoting *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007) (footnote omitted).

<sup>23</sup>See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320–24 (11th Cir. 2006) (suggesting in *dicta* that section 230(e)(2) would not preempt a right of publicity claim). The court’s discussion in *Almeida*, however, was based in part on the lower court opinion in *Perfect 10* that was subsequently reversed on this very point by the Ninth Circuit and therefore has little value even as *dictum*.

<sup>24</sup>See *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23 (1st Cir. 2007) (holding a claim for trademark infringement under Florida state law, Fla. Stat. § 495.151, “not subject to section 230 immunity.”).

<sup>25</sup>*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

the same conclusion as Judge LaPlante, in denying defendant's motion to dismiss state law claims for common law copyright infringement and unfair competition under New York law. Project Playlist, a site that created links to music files found on the Internet, had been sued by major record labels for copyright infringement and state law claims.

Judge Chin held that the plain text of section 230(e) was clear in excluding *any* law pertaining to intellectual property and characterized the Ninth Circuit's ruling in *Perfect 10* as rooted "not in the text of the statute but the public policy underlying it."<sup>26</sup> He explained:

The problem with Playlist's argument is that it lacks any support in the plain language of the CDA. In four different points in section 230(e), Congress specified whether it intended a subsection to apply to local, state, or federal law. *See* 47 U.S.C. § 230(e)(1) ("any other *Federal* criminal statute"), (3) ("any *State* law" and "any *State* or *local* law"), (4) ("any similar *State* law") (emphasis added in all). It is therefore clear from the statute that if Congress wanted the phrase "any law pertaining to intellectual property" to actually mean "any *federal* law pertaining to intellectual property," it knew how to make that clear, but chose not to.<sup>27</sup>

By contrast, he noted that "[t]he Ninth Circuit did not engage in a textual analysis in *Perfect 10*."<sup>28</sup>

Judge Chin continued, explaining that "the modifier 'any' in section 230(e)(2), employed without any limiting language, 'amounts to' expansive language [that] offers no indication whatsoever that Congress intended [a] limiting construction."<sup>29</sup> Further, he wrote that this conclusion was "bolstered by the fact that . . . the 'surrounding statutory language' [discussed above] supports the conclusion that Congress intended the word 'any' to mean any state or

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<sup>26</sup>*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) (characterizing Project Playlist's argument, which "relie[d] heavily" on *Perfect 10*).

<sup>27</sup>*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) (footnote omitted; emphasis in original).

<sup>28</sup>*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 n.11 (S.D.N.Y. 2009).

<sup>29</sup>*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009), quoting *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008), quoting *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980).



federal law pertaining to intellectual property.”<sup>30</sup> Because “the plain language of the CDA is clear, as ‘any law’ means both state and federal law,” Judge Chin concluded, “the Court need not engage in an analysis of the CDA’s legislative history or purpose.”<sup>31</sup>

Judge Chin’s analysis was subsequently followed by a state court trial judge in New York, in granting the plaintiff’s motion to dismiss the defendant’s CDA affirmative defense in a common law copyright infringement suit.<sup>32</sup>

Given the sharp divergence between the Ninth Circuit’s analysis, on the one hand, and the *Friendfinder* and *Project Playlist* cases on the other, courts in other parts of the country may be disinclined to find right of publicity or other state I.P. claims necessarily preempted, at least at an early stage in the proceedings.<sup>33</sup>

Even in the Ninth Circuit, the scope of preemption for

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<sup>30</sup>603 F. Supp. 2d at 704, quoting *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59, 69 (2d Cir. 2008) (holding that the word any in a statute “deserves an expansive application where the surrounding statutory language and other relevant legislative context support it.”).

<sup>31</sup>603 F. Supp. 2d at 704.

<sup>32</sup>See *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 948 N.Y.S. 881, 888-89 (N.Y. Sup. 2012), *rev’d on other grounds*, 107 A.D.3d 51, 964 N.Y.S.2d 106 (N.Y. App. 2013).

<sup>33</sup>See, e.g., *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261, at \*7 & n.5 (D.N.J. July 31, 2014) (noting the Ninth Circuit’s position but finding that the plaintiff failed to state a claim for a right of publicity violation and therefore it was unnecessary to decide whether the claim was excluded from CDA preemption); *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931, at \*8 (C.D. Ill. Aug. 3, 2012) (writing in *dicta* that plaintiff’s right of publicity claim would not be barred by the CDA, but granting defendant’s motion on other grounds), *aff’d*, 512 F. App’x 635 (7th Cir. 2013); *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788, at \*13 n.10 (E.D. Pa. June 19, 2012) (declining to consider whether plaintiff’s claims arose from laws that pertain to intellectual property and were therefore excluded from CDA preemption because the court found that plaintiff adequately alleged that the claims arose from the defendant’s own conduct to justify denying defendant’s motion to dismiss); *Gauck v. Karamian*, 805 F. Supp. 2d 495 (W.D. Tenn. 2011) (assuming, for purposes of plaintiff’s motion for preliminary injunction, that plaintiff’s publicity rights claim fell within the CDA’s statutory exclusion for claims that arise “from any law pertaining to intellectual property”); *Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (declining “to extend the scope of the CDA immunity as far as the Ninth Circuit . . .,” but nonetheless dismissing plaintiff’s right of publicity claim as barred by the newsworthiness exception analyzed in section

state IP claims is only relevant where third party content is at issue and the other elements of the CDA have been satisfied. Thus, in *Fraleley v. Facebook, Inc.*,<sup>34</sup> Judge Lucy Koh of the Northern District of California, applying Ninth Circuit law, held that Facebook was not entitled to CDA immunity in a right of publicity case where the plaintiffs alleged that Facebook displayed user images next to brands that users had “liked” as a form of endorsement on their friend’s profile pages and that Facebook itself had created this content, rather than merely editing user submissions. In that case, when plaintiffs clicked on a “Like” button on a company’s Facebook page, Facebook allegedly translated this act into the words “Plaintiff likes [Brand]” and combined that text with plaintiff’s photograph, the company’s logo and the label “Sponsored Story” in an advertisement. In denying Facebook’s motion to dismiss, Judge Koh ruled that Facebook’s alleged actions in creating Sponsored Stories went beyond a publisher’s traditional editorial functions “such as deciding whether to publish, withdraw, postpone or alter content.”<sup>35</sup>

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12.05[4][B]); *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873 (E.D. Wis. 2009) (declining to exercise supplementary jurisdiction over state law claims and explaining in *dicta* the split of authority on the issue of whether a right of publicity claim based on third party content is preempted by the CDA), *aff’d on other grounds*, 623 F.3d 436 (7th Cir. 2010).

*Stayart* involved claims brought under Wisconsin law, which recognizes a common law tort for appropriation of a person’s name or likeness and a statutory right based on “use, for advertising purposes or purposes of trade, of the name, portrait, or picture of any living person, without having first obtained the written consent of the person.” 651 F. Supp. 2d at 887, *quoting* Wis. Stat. Ann. § 995.50(2)(b). Chief Judge Rudolph Rada noted that a right of publicity claim “is really an offshoot of the more general ‘appropriation’ tort, which compensates “bruised feelings” or other injuries to the “psyche,” whereas the right of publicity “takes the next logical step” and gives individuals the “right of control over commercial use of one’s identity . . . regardless of the infliction of emotional distress.” 651 F. Supp. 2d at 887, *quoting* J. Thomas McCarthy, *The Rights of Publicity and Privacy* §§ 5.60, 5.67 (2d ed. 2008). Writing in *dicta*, Judge Rada explained that “the distinction between an appropriation theory and a right of publicity theory is . . . relevant to CDA immunity.” 651 F. Supp. 2d at 887.

Even though Judge Rada previously had ruled that Yahoo! was entitled to CDA immunity, he wrote that a right of publicity claim “is generally considered an intellectual property claim, . . . which implicates that exception in § 230(e)(2).” 651 F. Supp. 2d at 887–88.

<sup>34</sup>*Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

<sup>35</sup>*Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), *quoting* *Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003).

She emphasized that plaintiffs did not allege merely that Facebook edited user content—“such as by correcting spelling, removing obscenity or trimming for length.”<sup>36</sup> Judge Koh concluded that “Facebook transformed the character of Plaintiffs’ words, photographs, and actions into a commercial endorsement to which they did not consent.”<sup>37</sup> As explained by Judge Alsup in a later district court opinion that applied *CCBill* to hold common law trademark infringement and right of publicity claims preempted by the CDA, “Facebook created new content with information that it took from plaintiffs without their consent—Facebook was therefore a content provider as well as a service provider, and thus not entitled to immunity under Section 230.”<sup>38</sup> Had the court concluded that sponsored ads merely involved republication of user content, plaintiffs’ right of publicity claims would have been preempted in the Ninth Circuit under *CCBill*.

In *Cybersitter, LLC v. Google, Inc.*,<sup>39</sup> Central District of California Senior Judge Lew narrowly applied the CDA without much analysis in denying in part the defendant’s motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not claims arising out of the alleged sale of plaintiff’s “Cybersitter” mark as a key word to trigger sponsored link advertisements.

In defense of the Ninth Circuit’s rule from *CCBill*, it could be argued that Congress may not have considered state intellectual property claims in articulating two bright line

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<sup>36</sup>*Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), quoting *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (*en banc*).

<sup>37</sup>*Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011).

<sup>38</sup>*Evans v. Hewlett-Packard Co.*, C 13-02477 WHA, 2013 WL 4426359, at \*3 (N.D. Cal. Aug. 15, 2013) (dismissing Pennsylvania unfair competition and trademark infringement and Pennsylvania and California right of publicity claims brought against the operators of the HP App Catalogue, an app store for Palm devices, as preempted by the CDA, because, although “cleverly-worded,” the complaint did “not allege that defendants created the app at issue here. Rather, it appears that the app was created entirely by third parties.”).

<sup>39</sup>*Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086-87 (C.D. Cal. 2012).

rules—a general rule preempting most state law claims (in section 230(e)(3)) and a general exclusion from preemption for intellectual property claims (in section 230(e)(2))—and thus intended that the exclusion for intellectual property claims not impact the general rule of preemption of state law claims.<sup>40</sup>

Intellectual property laws, including even federal copyright and trademark laws, have their origin in state tort law. While rights of publicity,<sup>41</sup> trade secret law,<sup>42</sup> state trademark law<sup>43</sup> and potentially even idea protection<sup>44</sup> usually are considered intellectual property laws, they also often arise under state tort laws or statutory enactments of claims

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<sup>40</sup>Viewed in this context, the structure of section 230(e) arguably could be read to support the Ninth Circuit's analysis. The statute treats preemption of state causes of action in a separate clause from the provision stating that the Act is intended to have no effect on any law pertaining to intellectual property. The other two subsections of section 230(e) both primarily address issues of federal law. Section 230(e)(1), captioned "No Effect on Criminal Law," expressly is limited to federal criminal statutes. Subsection 230(e)(4), captioned "No Effect on Communications Privacy Law," refers to a specific federal statute, although it also states that the Act is not intended to affect any similar state laws. Thus, it could be argued that 47 U.S.C.A. § 230(e)(3), which addresses and is captioned "State Law" and itself does not expressly exclude intellectual property claims, states an absolute rule and that 47 U.S.C.A. § 230(e)(2), which is captioned "No Effect on Intellectual Property Law," in light of the focus of subsection (e)(3) and the other subsections, arguably means federal intellectual property laws.

The weakness of this argument is that, as noted earlier in this section of the treatise and by Judge LaPlante in *Friendfinder Network* and Judge Chin in *Project Playlist*, a plain reading of the text of section 230(e) and in particular 230(e)(2) best supports a construction that would exclude any law pertaining to intellectual property, not merely federal intellectual property claims. To conclude otherwise would be to put greater emphasis on assumed legislative intent than the plain terms of the statute, which is improper. Such a construction would justify the skepticism expressed about legislative history by Justice Scalia (attributing the words to Judge Harold Leventhal), when he wrote that "the use of legislative history [i]s the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

<sup>41</sup>See *supra* chapter 12.

<sup>42</sup>See *supra* chapter 10.

<sup>43</sup>See *supra* § 6.04.

<sup>44</sup>See *supra* chapter 13.

that first arose as common law torts<sup>45</sup> (and, unlike federal copyright, trademark and patent laws, provide no independent basis for federal court jurisdiction). Rights of publicity are an outgrowth of state common law privacy law<sup>46</sup> and trade secret law is often defined (even in U.S. Supreme Court case law) by reference to the Restatement of Torts.<sup>47</sup> Thus, Congress may not have even considered these claims as “pertaining to intellectual property.”

Although not stated in the legislative history, Congress, in excluding intellectual property laws from the scope of the Good Samaritan exemption, undoubtedly had in mind the issues of vicarious and contributory copyright liability raised in *Religious Technology Center v. Netcom Online Communication Service, Inc.*,<sup>48</sup> and the Clinton Administration’s National Information Infrastructure White Paper, which issued in draft form in September 1995 and recommended no change to existing third-party copyright liability doctrines.<sup>49</sup> Along with vicarious liability for defamation, at that time secondary copyright infringement was viewed as the principal threat to the expansion of e-commerce (and in particular to interactive computer services, which were then known as *access providers* or *content providers*, depending on the

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<sup>45</sup>A majority of states have adopted the Uniform Trade Secrets Act and a number of states have enacted right of publicity statutes. *See supra* §§ 10.01 (trade secrets), 12.03[2] (right of publicity statutes). These statutes, like federal intellectual property statutes, have their origins in tort law remedies. State trademark rights likewise may be based on common law or statute, and also have their antecedents in tort law. Idea protection remedies may arise under tort or contract law or other state common law or statutory remedies, such as breach of fiduciary duty or unfair competition. *See supra* chapter 13.

<sup>46</sup>*See supra* § 12.01. The U.S. Supreme Court, while acknowledging that privacy and publicity rights arise from state tort law, has characterized publicity claims at least as “closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors . . . .” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (footnote omitted).

<sup>47</sup>*See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979).

<sup>48</sup>*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

<sup>49</sup>U.S. Department of Commerce, National Information Infrastructure White Paper (Sept. 1995), available at <http://www.uspto.gov/go/com/doc/ipnii/>.

nature of their online offerings).<sup>50</sup> The major Internet law cases in 1995 when Congress considered the Good Samaritan exemption (and as late as January 1996 when the statute was enacted into law) were *Cubby, Inc. v. CompuServe, Inc.*,<sup>51</sup> and *Stratton Oakmont v. Prodigy Services, Inc.*,<sup>52</sup> which addressed defamation,<sup>53</sup> and *Religious Technology Center v. Netcom Online Communication Service, Inc.*,<sup>54</sup> which analyzed direct, contributory and vicarious copyright liability. Congress also potentially could have considered secondary trademark liability in light of *Playboy Enterprises, Inc. v. Frena*.<sup>55</sup> At that time, there were no cases that held out the risk of vicarious liability being imposed on interactive computer service providers or users for third-party content under state intellectual property laws.<sup>56</sup> Indeed, the only online trade secret<sup>57</sup> and right of publicity<sup>58</sup> cases either decided or

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<sup>50</sup>Concern about potential exposure for secondary copyright infringement eventually led to the enactment of the Digital Millennium Copyright Act in 1998. See generally *supra* § 4.12.

<sup>51</sup>*Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>52</sup>*Stratton Oakmont v. Prodigy Services, Inc.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995).

<sup>53</sup>See *supra* § 37.04 (discussing these cases).

<sup>54</sup>*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

<sup>55</sup>*Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

<sup>56</sup>This assertion is based on numerous Lexis-Nexis database searches conducted by the author between May 1995 and the time the Good Samaritan exemption was signed into law in January 1996. See generally Ian C. Ballon, "The Emerging Law of the Internet" in *The Performing Art of Advocacy: Creating A New Spirit* (A.B.A. Section of Litigation August 1995); Ian C. Ballon, "The Emerging Law of the Internet" in *The Emerging Law of the Internet* (Continuing Education of the Bar Jan. 1996) (chronicling Internet law as of those dates).

<sup>57</sup>The Church of Scientology had filed several trade secret cases in the early 1990s, but by 1995 there was already ample case law standing for the proposition that third parties could not be held accountable for the actions of others. See *Religious Technology Center v. Lerma*, 908 F. Supp. 1362, 1368 (E.D. Va. 1995); *Religious Technology Center v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1526 (D. Colo. 1995); *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995); see generally *supra* § 14.11[2] (discussing the cases).

<sup>58</sup>See *Stern v. Delphi Internet Services Corp.*, 165 Misc. 2d 21, 626 N.Y.S.2d 694 (Sup 1995). *Stern* involved an issue of direct liability (Delphia's use of a picture of Howard Stern to promote its service). See generally *supra* § 12.08[2] (discussing the case).

then-pending raised issues of direct, not vicarious liability. In all likelihood, Congress never considered the risk of exposure for state law intellectual property claims at the time the statute was enacted.

While it is quite possible that Congress simply never contemplated whether right of publicity, trade secret or other state law intellectual property claims would be preempted in crafting the Good Samaritan exemption, this fact does not justify diverging from the plain text of the statute.<sup>59</sup>

If right of publicity, trade secret and other claims are viewed as tort or state statutory claims, they are plainly not excluded and are potentially preempted by section 230. If, however, they are viewed as laws “pertaining to intellectual property” they are plainly excluded and not preempted.

The Communications Decency Act unfortunately sheds no light on whether Congress viewed these hybrid state law claims (or at least some of them) as intellectual property laws or as tort or other state law claims. By expansively excluding *any* law, *pertaining to*, intellectual property, Congress arguably intended to exclude state claims that in some sense are quasi-intellectual property and quasi-tort claims.

Courts taking this view, at a minimum, would likely treat state right of publicity, trade secret and trademark claims as laws pertaining to intellectual property. Whether idea misappropriation and unfair competition claims (or a sub-set of these claims) are viewed the same way perhaps remains more of an open question.

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<sup>59</sup>See *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (holding that even though Congress undoubtedly never considered whether section 230 would preempt a federal Fair Housing Act claim the plain text of the statute would control). As Chief Judge Easterbrook explained in *Craigslist*:

The Lawyers’ Committee responds that “nothing in section 230’s text or history suggests that Congress meant to immunize an ISP from liability under the Fair Housing Act. In fact, Congress did not even remotely contemplate discriminatory housing advertisements when it passed section 230.” That’s true enough, but the reason a legislature writes a general statute is to avoid any need to traipse through the United States Code and consider all potential sources of liability, one at a time. The question is not whether Congress gave any thought to the Fair Housing Act, but whether it excluded section 3604(c) from the reach of section 230(c)(1). Cf. *Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 126–27, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974) (Congress need not think about a subject for a law to affect it; effect of general rules continues unless limited by superseding enactments).

519 F.3d at 671.

Assuming that state intellectual property claims, like federal claims, are excluded from the scope of the Good Samaritan exemption, there is still an open question about how negligence or other tort actions arising from state intellectual property laws should be handled. The CDA, after all, deals with third-party liability. It potentially exempts interactive computer service providers and users from liability for material that originates with an information content provider (so long as the subject matter of the claim is not excluded from the scope of coverage). Secondary (or third party) liability therefore may not be asserted based on all state intellectual property claims. For example, subject to a limited exception,<sup>60</sup> an interactive computer service or user could not be sued for trade secret misappropriation based on the misconduct of another. To make out a claim, a plaintiff would almost certainly have to allege a duty undertaken to the trade secret owner (such as a promise to protect the trade secret or an undertaking in a website's Terms of Use). If such a duty could be inferred, however, it inevitably would arise under state tort or contract law.<sup>61</sup>

In other contexts, courts have construed claims as preempted by the CDA if, regardless of how framed, the cause of action sounds in negligence.<sup>62</sup> Some might argue that preempting a negligence claim based on an interactive computer service provider or user's failure to protect against a state intellectual property right would in effect "limit or expand" a "law pertaining to intellectual property" within the meaning of section 230(e)(2) and therefore could *not* be

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<sup>60</sup>In some jurisdictions a claim for trade secret misappropriation potentially could be brought directly against an interactive computer service that had notice of the secret being posted on its network and failed to take action to remove it. *See supra* § 10.18[1].

<sup>61</sup>A breach of contract claim would not be preempted to the extent that an interactive computer service provider or user was accused of its own breach, unless the claim was premised on acting as a publisher or speaker of material originating with another information content provider or as a result of any action voluntarily taken to restrict access to or the availability of material deemed, among other things, harassing or otherwise objectionable. *See supra* § 37.05[1]. For purposes of clarity, the rest of the discussion in this section focuses on the more typical case where a claim is premised on negligence.

<sup>62</sup>*See, e.g., Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001).



preempted as merely a negligence claim. Ultimately, however, if a state intellectual property law does not permit a claim for secondary liability to be brought against an interactive computer service or user, any theory of recovery based on negligence or similar theories should be viewed for what it is—a tort claim—and preempted to the extent that a party seeks to impose liability under state tort law for an interactive computer service or user acting as a publisher or speaker of another party’s content or undertaking any action voluntarily in good faith to restrict access to or the availability of content enumerated in section 230(c)(2), including material that is harassing or otherwise objectionable. The underlying claim—negligence, for example—is not a law “pertaining to intellectual property” and treating it as such would expand the scope of the state intellectual property law.

Given how limited the potential scope of secondary liability may be for most state law intellectual property claims, this issue may arise only infrequently. To the extent it does and the claim is really a negligence or other tort law claim based on an alleged duty to preserve a state intellectual property law right, it should not be viewed as “any la[w] pertaining to intellectual property” and instead as a preempted state law claim. Right of publicity or state trademark claims, which arguably could be asserted directly against interactive computer service providers or users based on the actions of others, rather than as negligence claims, more directly raise the issue of preemption.

Although it is quite possible that Congress only considered federal intellectual property claims in carving out an exception for “any la[w] pertaining to intellectual property,” implied legislative intent and policy arguments in favor of preemption ultimately must yield to the plain text of a statute. As a different Ninth Circuit panel commented in a later case construing a different provision of the CDA, the “sound and fury on the congressional intent of the immunity under section 230 . . . ultimately signifies nothing. It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language.”<sup>63</sup> As drafted, the Good Samaritan exemption includes an exclusion for “any la[w] pertaining to intellectual property.” As such, any state law that pertains to intellectual

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<sup>63</sup>*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009).

**37.05[5]**

E-COMMERCE AND INTERNET LAW

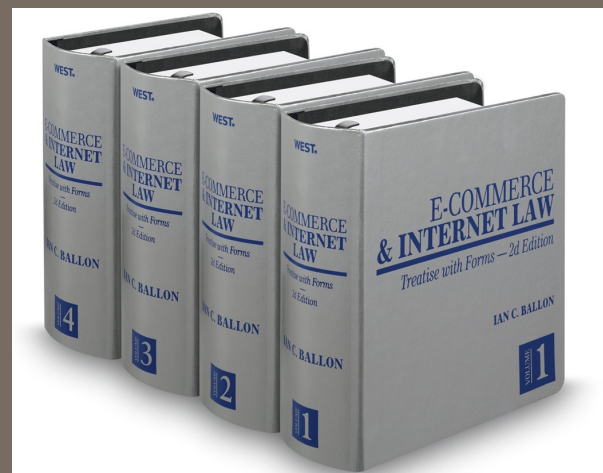
property properly should not be deemed preempted.

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- Obscenity, Pornography, Adult Entertainment and the Protection of Children
- Theft of Digital Information and Related Internet Crimes
- Liability of Internet and Mobile Sites and Services (Including Social Networks and Blogs)
- Civil Jurisdiction and Litigation

## Questions to Answer as Internet law moves to mobile devices, social media and the cloud:

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ABOUT THE AUTHOR

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Mr. Ballon, who is admitted to practice in California, the District of Columbia and Maryland and in the U.S. District Court for the District of Colorado, represents companies in



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Mr. Ballon was the recipient of the 2010 Vanguard Award from the State Bar of California's Intellectual Property Law Section. He also has been recognized by The Daily Journal as one of the Top 75 Intellectual Property litigators and Top 100 lawyers in California.

Mr. Ballon is listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology. He also was recognized by the Los Angeles and San Francisco Daily Journal in 2009 for obtaining the third largest plaintiff's verdict in California in 2008 in *MySpace, Inc. v. Wallace*, which was one of several cases in which he served as lead counsel that created important precedents on the applicability of the CAN-SPAM Act, California's anti-phishing statute and other laws to social networks.

Mr. Ballon received his B.A. magna cum laude from Tufts University, his J.D. with honors from George Washington University Law School and an LLM in international and comparative law from Georgetown University Law Center. He also holds the C.I.P.P. certification from the International Association of Privacy Professionals.

In addition to E-Commerce and Internet Law: Treatise with Forms 2d edition, Mr. Ballon is the author of The Complete CAN-SPAM Act Handbook (West 2008) and The Complete State Security Breach Notification Compliance Handbook (West 2009), published by Thomson West ([www.IanBallon.net](http://www.IanBallon.net)).

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