

## Web Sites' CDA §230 Immunity: An Ever-Expanding Universe?

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The federal Communications Decency Act of 1996 ("CDA") immunizes Web site operators and other interactive computer service providers from liability for third parties' tortious acts. Pub Law No. 104-104 (Feb. 8, 1996) 110 Statutes at Large 56 §509, codified at 47 U.S.C. §230. 47 U.S.C. §230 shields providers and users of interactive computer services from responsibility for third-party content.

In the 10 years since the CDA's enactment, courts have cut a broad swath of immunity, refusing to impose a duty to monitor content created by others. While most decisions have centered on defamation, the contexts have ranged from tortious interference, to fraud, to CAN-SPAM, to the Fair Housing Act.

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However, dicta in some recent decisions indicates that some issues remain unresolved, including: 1) whether there should be a distinction between "primary publishers" and "distributors," despite the unanimous case law to the contrary; and 2) whether state law invasion-of-privacy claims should fall within the "intellectual property" category and thus beyond the reach of §230.

### HISTORY OF THE CDA AND ITS

#### CASE LAW

##### Overview

Recognizing that Web services "offer a forum for a true diversity of political discourse" and other forms of "intellectual activity," Congress enacted several pieces of legislation in the late 1990s to foster the then-fledgling Internet. Along with other state and federal laws, two specific Acts created a patchwork of immunities for Web sites and other online service providers. The Digital Millennium Copyright Act of 1998 aimed to limit online service providers' liability for copyright infringement claims based on third-party content. The CDA (passed as part of the colossal 1996 Telecommunications Act) had two primary goals.

First, Congress designed the CDA to protect children from online pornography. Subsequently, however, the CDA provisions regulating pornographic content were struck down as unconstitutional. Second, both the House and Senate emphasized that the CDA was to overrule *Stratton-Oakmont v. Prodigy*, an unreported 1995 New York case. *Stratton* had imposed liability on Prodigy for libelous statements, in part because Prodigy had screened and edited the online bulletin board to which the postings had been made.

Hence, §509 — codified at 47 U.S.C. §230 — was born. Statutory carve-outs were made for "criminal law," "intellectual property law," and "communications privacy law." 47 U.S.C. §230(e)(1)-(2), (4).

Unlike the anti-pornography sections, §230 has remained intact and in force. Section 230 certainly could have been clearer about its reach, the laws it modifies, and its protected parties. In any event, its scope has grown through judicial interpretation, such that it has become a powerful shield for providers and users of interactive computer services.

Although §230 was probably not intended to provide the current breadth of immunity, perhaps it is a happy accident that the statute was drafted in such imprecise terms. This serendipity has allowed courts to mold §230 to their evolving understanding of the appropriate balance between protecting offended individuals and protecting online activity.

#### CDA Immunity

Section 230(e)(3), provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." However, most of the CDA immunity case law has focused on the two parts of §230(c), titled "Protection for 'Good Samaritan' blocking and screening of offensive material."

*Section 230(c)(1): An Online Information Provider Is Not a Publisher or Speaker*

Subsection (c)(1) of CDA §230 — titled "Treatment of publisher or speaker" — states that "no provider

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or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Section 230(c)(1) thus has two essential elements:

1) “Interactive computer service”

An “interactive computer service” is “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 and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. §230(f)(3).

Although providing Internet access alone is sufficient, the CDA litigation defense often implicates — and then typically protects — at least one extra user community feature, such as a bulletin board, chat room, or listserv. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (bulletin board); *Lunney v. Prodigy Servs.*, 94 N.Y.2d 242, 723 N.E.2d. 539 (1999), *cert. denied*, 529 U.S. 1098 (2000) (bulletin board, e-mail); *Barnes v. Yahoo!, Inc.*, 2005 WL 3005602, (D. Or. 2005) (chat rooms and forum for posting of personal profiles).

2) “Information content provider”

An “information content provider” is “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. §230(f)(2).

In a defamation case, the true “content provider” is the author of the pertinent speech. Analogously, in some privacy/information-security cases, the underlying “content providers” have been, respectively:

- the seller of highly private material, *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (affirming lower court’s grant of immunity to Web-hosting services provider as to claim brought by plaintiffs/college-athletes complaining of “unconsented” nude videos compiled into tapes sold on Web);

- the poster of an intrusive computer application. *See Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.) (immunity from state law claim for failure to police its systems so as to block a “punter” signal, namely a computer program created by a hacker to halt and disrupt another computer), *cert. denied*, 540 U.S. 877 (2003); and
- the authors of spam complaints communicated to a blocklist service, *Optinrealbig.com, LLC v. Ironport Systems, Inc.*, 2004 WL 1459337 (N.D. Cal. 2004) (distributor immune because not complicit in shaping content; operator of interactive, spam-blocklist service did not alter content of spam complaints prior to distributing them to spammers’ ISPs or posting them on its Web site).

In the face of broad CDA immunity, liability has rarely extended beyond the *content* provider to the *computer service* provider; it has only done so when the latter has materially contributed to the content.

*Section 230(c)(2): Online Information Provider Is Not a Publisher or Speaker*

According to the majority case law view, whereas “Section 230(c)(1) is concerned with liability arising from information *provided* online, [s]ection 230(c)(2) is directed at actions taken by Internet service providers or users to *restrict* access to online information.” *Barrett v. Rosenthal*, \_\_ Cal. \_\_, \_\_ Cal. Rptr. 3d \_\_, 2006 WL 3346218 (Nov. 20, 2006). Under that view, “[s]ection 230(c)(1) provides immunity from claims by those offended by an online publication, while section 230(c)(2) protects against claims by those who might object to the restriction of access to an online publication.” *Id.*

As discussed below, the juxtaposition, divergent captions, and differing language of subsections (c)(1) and (c)(2) may warrant a narrower scope than reflected in the case law to date.

## OPEN ISSUES UNDER CURRENT CASE LAW

Is §230’s universe forever expanding? The outcomes of the cases to date suggest so. Yet, some courts’ dicta has reflected discontent with the current status. First, two recent decisions’

statutory construction of “publisher” harkens back to a common law distinction between “primary publishers” and “distributors.” Perhaps this minority view may be the first rumblings ultimately leading to Congressional action or a U.S. Supreme Court decision. Second, the statutory carve-out for intellectual property may or may not result in immunity from a right-to-publicity claim and/or from other state law invasion-of-privacy tort claims.

## CDA’s ‘Big Bang’

Starting with a “big bang” in the Sixth Circuit in 1997, federal judges have unanimously interpreted the CDA to grant immunity to interactive computer services providers and users not involved in content creation.

One of the earliest cases was *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), in which plaintiff sued AOL based on defamatory user’s postings. The *Zeran* plaintiff unsuccessfully argued that §230 immunity should not attach where the service provider had knowledge of the defamatory nature of the statements. However, the court reasoned that distributor liability is merely a subset of publisher liability and that §230, therefore, shielded AOL.

Dozens of federal decisions mirror *Zeran*, including *Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006), where the operator of an online discussion board was held immune from liability for libel despite the operator’s having selected which messages to publish.

## Common Law Defamation’s ‘Publisher’/‘Distributor’ Distinction

If a visitor posts libelous statements to a Web site, and the site operator knows the statements are libelous, should the site operator be liable? That is the question the California Supreme Court just answered in the appeal from *Barrett v. Rosenthal*, 114 Cal. App. 4th 1379 (2004).

Under California common law, one who transmits or publicizes another’s libel may be treated in one of three ways: as the primary publisher (*eg*, newspaper publisher); as a distributor (*eg*, a news stand); or as a conduit (*eg*, the telephone company). In this three-part spectrum:

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- On one extreme, primary publishers are typically held liable for defamatory speech, even where they had no hand in authorship. The reason: Primary publishers are expected to know the content of the speech;
- In the middle are distributors, who are only held liable where they knew, or should have known, the statements were defamatory; and
- At the other extreme, electronic conduits are typically immune from liability for defamation because they do not screen or control the speech that travels through their systems.

In *Barrett*, two medical doctors — notorious for debunking practitioners of alternative medical practices — filed suit against Rosenthal and other defendants for libel. Rosenthal had re-posted to online discussion forums numerous e-mails written by her co-defendant, Timothy Bolen. Those e-mails had referred to the doctors as “quacks” and accused one doctor of stalking women. As a “user” of an interactive computer service publishing information provided by another “content provider,” Rosenthal argued that she had §230 immunity.

The intermediate appellate court in *Barrett* held that §230 did not shield Rosenthal from liability because she was more akin to a distributor than to a primary publisher. The court held that the CDA pre-empts common law primary publisher liability, but not distributor liability. It reasoned that where a statute has two reasonable interpretations, it should be read as being consistent with the common law.

The court of appeal took issue with two critical determinations in *Zeran*. First, it disagreed that “publisher” refers to both primary publishers and distributors of third-party defamation. It also disagreed that confining immunity to primary publishers would frustrate the free-speech policies behind §230. Instead, the court emphasized the importance of an “individual’s right to the protection of his [sic] own good name” and attempted to strike more of a balance between online speech and individual reputation.

Rosenthal successfully petitioned for review by the Supreme Court of California, which reversed. On Nov. 20, the California high court followed *Zeran*, holding that §230 provides immunity for distributor liability as well as publisher liability. *Barrett v. Rosenthal*, \_\_ Cal.Rptr.3d \_\_, 2006 WL 3346218 (Cal. 2006). The court also held that pursuant to the express language of the statute, both the service provider and its users benefit from §230 immunity for content created by another, so long as they are not the original “content provider.”

The California case law rule now tracks the federal courts’ view that immunity obtains regardless of whether users are engaged in “active” or “passive” use of the computer service. The *Barrett* high court did express some trepidation in reaching its holding, noting that the “prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications.” Yet the court felt that it had followed the only logical interpretation, given §230’s language and legislative history. The court held that if this interpretation is at odds with Congress’ intent, it will be up to Congress to clarify its intent.

*Barrett* arguably made for an unfortunate test case. In most CDA cases, the defendant was a Web site operator. Yet, in *Barrett*, the defendant was an individual who, with knowledge of the underlying content, was re-posting information online. Thus, the *Barrett* defendant was less squarely within the class of persons the CDA was enacted to protect. Moreover, the content-knowledge makes it easier to distinguish the original publisher and subsequent distributor in *Barrett*. By contrast, if the service provider hosting the discussion forum were the defendant, there may have been a more clear-cut case for immunity.

### **Statutory Construction of ‘Publisher’ — a Chink in Zeran’s Armor?**

Less than a week before the *Barrett* reversal, another type of interactive computer service provider (dubbed “ICS”) was assessed in *Chicago Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, \_\_ F. Supp. 2d \_\_, 2006 WL 3307439 (N.D.

Ill. Nov. 14, 2006) (“*CLC*”). There, in a district court within the Seventh Circuit, a public interest consortium brought a suit under the Fair Housing Act, 42 U.S.C. §3604, et seq., against Craigslist, the renowned “operat[or of] a website that allows third-party users to post and read notices for, among other things, housing sale or rental opportunities.” The offending postings were multiple housing notices expressing various preferences and limitations regarding race, gender, and sexual orientation of prospective tenants.

As framed by the *CLC* court, both parties’ views of the CDA were too extreme. Defendant Craigslist essentially argued for “limitless immunity,” whereas plaintiff *CLC* argued that there should be “no immunity at all.” *Id.* at \*12. The court reached the typical outcome of dismissal based on immunity, given that the FHA claim “require[d] publishing as a critical element.” *Id.* (quoting 42 U.S.C. §3604(c) (rendering it illegal “[t]o make, print, or publish, or cause to be made, printed, or published any [discriminatory] notice, statement, or advertisement ...”).

However, *CLC* ruled for the Defendant only after a lengthy discourse vehemently disagreeing with the Sixth Circuit’s approach in *Zeran*. First, *CLC* noted that “Congress did not intend to grant a vast, limitless immunity, but rather enacted Section 230(c) specifically to overrule the court decision in *Stratton-Oakmont* ... Congress enacted Section 230(c) ... to address the problem of holding liable for defamation ICSs that reviewed third-party content (as in *Stratton-Oakmont*), while leaving free from liability ICSs that did not review content.” *Id.* Second, *CLC* reasoned that “[l]imiting the immunity afforded under Section 230 to those claims that require ‘publishing’ as an essential element — as opposed to any cause of action — gives effect to the different language in Sections 230(c)(1) and (c)(2).”

Third, the *CLC* court found that a more restrictive reading of §230 was warranted by the content of the section’s various captions. In particular — relying extensively on the binding Seventh Circuit decision in *Doe v. GTE*

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*Corp.*, *supra* — *CLC* court held that:

[I]t seems rather unlikely that, in enacting the CDA and in trying to protect Good Samaritans from filtering offensive conduct, Congress would have intended a broad grant of immunity for ICSs that do not screen any third-party content whatsoever. *GTE*, 347 F.3d at 660. And because it is something less than an absolute grant of immunity, state legislatures may be able to enact, consistent with Section 230, initiatives that induce or require online service providers to protect the interests of third parties (under *Zeran's* holding, states cannot enact such initiatives because they would be inconsistent with the statute and thus preempted under Section 230(e)(3)). *Id.* (because “[Section] 230(c)(2) never requires ISPs to filter offensive content ... [Section] 230(e)(3) would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interests of third parties, such as the spied-on [*GTE*] plaintiffs, for such laws would not be ‘inconsistent with’ this understanding of §230(c)(1)”).

In the end, though, based on the type of claim at issue in *CLC*, three factors warranted immunity: 1) the §3604(c) FHA claim undoubtedly entailed “publishing as a critical element;” 2) “Because to hold Craigslist liable under Section 3604(c) would be to treat Craigslist as if it were the publisher of third-party content, the plain language of Section 230(c)(1) forecloses *CLC's* cause of action”; and 3) the enumerated exceptions §230(e)(1)-(4) did not exclude FHA claims.

The same types of concerns raised by *CLC* also arose in the recently reversed intermediate appellate decision in *Barrett*. Not surprisingly, *CLC* and *Barrett* garnered a lot of attention, prompting amicus briefs from Amazon.com, AOL, eBay, the Electronic

Frontier Foundation, Google, Yahoo, and the U.S. Internet Service Provider Association.

Web sites now receive blanket immunity for third-party content. Sites like Amazon.com host customer product reviews without concern about defamation liability. Sites like eBay host pages at which buyers and sellers can evaluate each other. If distributor liability were imposed on such Web sites, the providers would be faced with a new duty to investigate alleged libel. Many sites might decide that the most cost-effective policy would be to automatically take down posts alleged to be defamatory.

Although such a regime would chill online speech, perhaps some clarification of the interplay of subsections (c)(1) and (c)(2) is long overdue. As the *Barrett* high court decision pointed out, that type of normative decision is better left to Congress. It is not clear that Congress has carefully considered the issue. Until it has, though, decisions such as *CLC* may continue to advocate for a narrower reading of §230 immunity than generated by *Zeran's* big bang and its progeny.

### ***Invasion of Privacy Tort: Right of Publicity***

Another unresolved issue is whether the statutory carve-out for “intellectual property” claims also covers invasion-of-privacy torts. Traditionally, there are four types of invasion: “(a) unreasonable intrusion upon the seclusion of another; (b) appropriation of another’s name or likeness; (c) unreasonable public disclosure of private facts; and (d) publicity that unreasonably places the other in a false light before the public.” Robert D. Brownstone, et al., *9 Data Security & Privacy Law*, Privacy Litig. Ch. §9:63 (West 2001 & Supp. 2006). Though these theories are rooted in common law, some states — such as Florida — have incorporated them into statute. *Id.*

This issue was brought to the fore in July in *Almeida v. Amazon.com*, 456 F.3d 1316 (11th Cir. 2006). In that diversity case, an individual whose

photo was on a book cover sued Amazon.com “for displaying her image on its websites in furtherance of its sale of the book.” *Id.* at 1318. Her claims were premised on the Florida right of publicity and civil theft statutes as well as common law invasion-of-privacy (the misappropriation flavor). Relying on *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004), plaintiff argued that its right to publicity claim fit within §230(e)(2)’s “intellectual property” exemption. However, the district court granted summary judgment to defendant under §230(c), without addressing §230(e)(2).

On appeal, the 11th Circuit found that the lower court had erred by failing to address §230(e)(2) before deciding whether to grant immunity. 456 F.3d at 1324. However, the appellate court did not proffer a pertinent rule of law. Instead, it addressed the issue thoroughly in dicta and then abruptly concluded only that the law is unsettled:

[W]hile there appears to be no dispute that the right of publicity is a type of intellectual property right, [Plaintiff] argues that it is not clear from the statute that ‘any law pertaining to intellectual property’ includes claims based upon state intellectual property rights. Moreover, neither party points to any legislative history indicating Congress’ intent as to the effect of §230(e)(2).

Then, *Almeida* side stepped the issue, finding that it could only get to the §230 defense if plaintiff had sufficiently stated a right-to-publicity claim. Plaintiff’s claim did not make out a prima case in that regard. Thus, the appellate court affirmed the dismissal without resolving the §230(e)(2) issue — which consequently remains unsettled. Guidance from other decisions will be needed to determine whether §230(e)(2) precludes causes of action based on the right to publicity and/or other types of state law invasion-of-privacy claims.

