

CYBER CRIME CONTROL: WILL WEBSITES EVER BE HELD ACCOUNTABLE FOR THE LEGAL ACTIVITIES THEY PROFIT FROM?

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INTRODUCTION

In 2009, Craigslist was bombarded with negative media attention after Phillip Markoff, later dubbed the “Craigslist Killer” by the national media, was put in contact with a masseuse, Julissa Brisman, through an advertisement posted in the site’s “Erotic Services” section.² Markoff arranged to meet Brisman in an expensive hotel in Boston where he allegedly robbed and murdered her.³ When Markoff’s case gained nationwide attention, similar stories that had gone largely unreported began to surface.⁴ Kamari Williams, convicted of sexual assault, kidnapping and robbery, was sentenced to 169 years in prison after he used the site to arrange meetings at his apartment with multiple women whom he robbed and sexually assaulted.⁵ Margery Tannenbaum used Craigslist’s “Casual Encounters” section to “orchestrate a scheme to harass” a nine-year-old neighbor with whom her daughter did not get along.⁶ Tannenbaum posted a sexually suggestive advertisement on the website with the home phone number of the neighbor, who received more than twenty-two phone calls in response to the advertisement.⁷

These widely publicized abuses of interactive websites have led to the creation of state and local laws that criminalize conduct such as cyber-bullying, as well as public demands for judicial and legislative action to prevent use of these websites for the furtherance of illegal and unethical conduct.⁸ Reacting to negative

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² See John E. D. Larkin, *Criminal and Civil Liability For User Generated Content: Craigslist, A Case Study*, 15 J. TECH. L. & POL’Y 86 (2010).

³ See Abby Goodnough, *Details Released About ‘Craigslist’ Suspect*, N.Y. TIMES (Apr. 21, 2009), http://www.nytimes.com/2009/04/22/us/22boston.html?ref=philip_markoff (last visited Nov. 6, 2010).

⁴ Bill Hewitt, *The Craigslist Killing ‘There is More Coming Out,’* PEOPLE (May 11, 2009), at 152.

⁵ See Lisa Fernandez, *169-Year Sentence in Sex Assaults*, SAN JOSE MERCURY NEWS, May 20, 2009.

⁶ Zachary R. Dowdy & Sophia Chang, *Web Ad Spurs Mom’s Arrest*, NEWSDAY, May 9, 2009.

⁷ *Id.*

⁸ See William H. Freivogel, *Hulshof Cyberbullying Bill Raises 1st Amendment ?s*, ST. LOUIS BEACON (May 23, 2008), available at <http://www.stlbeacon.org/content/view/783/186/>.

publicity, Craigslist made a number of changes to its site in 2009. It changed the name of its Erotic Services section to “Adult Services,” and began charging fees for posts placed in that section. It also hired a staff to manually screen each submitted post before allowing it to be published, rather than relying on computerized word searches to filter out inappropriate posts.⁹ Still, many governmental officials were not satisfied and wanted the website to do more to deter criminal activity stemming from postings published on its boards, especially in its Adult Services section.¹⁰

In *Dart v. Craigslist, Inc.*, Thomas Dart, a sheriff in Cook County, Illinois, filed a complaint against Craigslist, alleging that the site facilitates prostitution and constitutes a public nuisance under state law.¹¹ In his complaint, Dart accused Craigslist of committing illegal acts by knowingly organizing prostitution.¹² Dart sought money damages in the amount that his department had devoted to policing prostitution on Craigslist, as well as compensatory and punitive damages.¹³ He also sought an injunction requiring Craigslist to stop engaging in conduct that amounts to “streamlin[ing] the prostitution process.”¹⁴ The court held that Section 230 of the Communications Decency Act (“CDA”) protects websites such as Craigslist from civil liability for cases in which the website does not create the advertisements at issue and “did not induce users to post illegal content.”¹⁵

In September 2010, after years of pressure from government and law enforcement officials, including pleas, threats of lawsuits, and an open letter signed by seventeen Attorney Generals “contending that it helped facilitate prostitution and the trafficking of women and children,” Craigslist completely disabled the Adult Services link on its United States website.¹⁶ The link was initially replaced with a black “censored” box—now deleted—once again drawing a great deal of public attention and leading to numerous disputes about whether Craigslist should be legally required to remove the link, once and for all.¹⁷

Due to these recent changes made by Craigslist, some commentators argue that discussions regarding criminal liability within Section 230 are now moot.¹⁸ This is a naïve position. Even if Craigslist does not reactivate its Adult Services

⁹ See Larkin, *supra* note 2, at 87.

¹⁰ See Press Release, Connecticut Attorney General’s Office, Attorney General, Joined by 17 Other States, Calls on Craigslist to Eliminate Adult Services Section (Aug. 23, 2010), *available at* <http://www.ct.gov/ag/cwp/view.asp?Q=464990&A=3869>, (last visited Jan. 16, 2011).

¹¹ See *Dart v. Craigslist, Inc.*, 665 F.Supp. 2d 961 (N.D. Ill., 2009).

¹² See *id.*

¹³ See *id.*

¹⁴ *Id.*

¹⁵ *Id.* at 961.

¹⁶ Clare Cain Miller, *Craigslist Blocks Sex Ads Raising Free Speech Qs*, N.Y. TIMES (Sept. 6, 2010), <http://www.ndtv.com/article/world/craigslist-blocks-access-to-adult-services-pages-49713>.

¹⁷ See *id.*

¹⁸ See, e.g., Peter Adamo, *Craigslist, The CDA, and Inconsistent International Standards Regarding Liability for Third-Party Postings on the Internet*, 2 NO. 7 PACE INT’L L. REV. ONLINE COMPANION 1 (2011).

link, it is inevitable that advertisements for illegal activities such as prostitution, which once flooded the Adult Services section of the website, will simply shift to another area of the site, such as its Casual Encounters section, or to other websites offering similar interactive features.

Those who believe that these websites should be able to operate free from government interference and threats of lawsuits typically rely on one of two arguments. First, many in favor of allowing websites to operate freely argue that limiting their operations would result in an unconstitutional deprivation of free speech.¹⁹ Second, some argue that Congress intended for the CDA to preempt websites' civil liability for posts generated solely by their users.²⁰ In response, those who believe that these websites should be held accountable for illegal activities that stem from posts published on their sites argue that the courts have continuously interpreted the CDA as providing website operators with broader protections than the legislatures intended.²¹

Online forums such as Craigslist continually escape legal liability as a result of the protections provided by Section 230 of the CDA.²² Those opposed to holding websites civilly or criminally liable for the criminal activities that result from postings on their sites are well supported by case law and federal legislation.²³ However, changes in the courts' holdings suggest that while judges initially interpreted the act as granting total immunity to all such websites, they are beginning to construe the Act's text more narrowly.²⁴ Recent case law shows that courts increasingly find instances in which they will not apply Section 230 protections to websites that post user generated information.²⁵

¹⁹ See, e.g., Matt Zimmerman, *Beyond "Censored": What Craigslist's "Adult Services" Decision Means for Free Speech*, ELECTRONIC FRONTIER FOUNDATION (Sept. 8, 2010), available at <http://www.cff.org/dceplinks/2010/09/craigslist-beyond-censored> (last visited Nov. 6, 2010).

²⁰ See *id.*

²¹ See, e.g., Larkin, *supra* note 2, at 87-88.

²² See Communications Decency Act of 1996, 47 U.S.C. § 230

(c) Protection for "good samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker: No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability: 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) [subparagraph A]

²³ See discussion *infra* Part II(C)(i). See also *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Doe v. SexSearch.com*, 502 F.Supp.2d 719 (N.D. Ohio 2007).

²⁴ See discussion *infra* Part II(C)(ii).

²⁵ See, e.g., *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc). See also *NPS, LLC et al. v. StubHub, Inc. et al.*, No. 06-4874-BLS1, 2009 Mass. Supr. LEXIS 97 (Mass. Super. Ct. Jan. 26, 2009).

This Note argues that, while courts are unlikely to ever hold an online forum like Craigslist civilly liable for illegal activity that arises out of posts generated solely by its users, courts should find that Section 230 protections apply only to civil cases, and that the Act does not protect these websites from criminal liability. This Note illustrates that criminal suits brought against these websites are likely to be more successful than the civil claims previously filed, but that legislative reform is needed for any significant change in the judiciary's reading of Section 230.

Part I of this Note offers a history of the CDA, and it will provide an explanation of two material terms used in the Act—Internet Service Providers and Information Content Providers. An Internet Service Provider (“ISP”) is a website, such as Craigslist, that posts content generated by the website's users.²⁶ In other words, ISPs have no participation in creating the content posted on their sites, and in no way influence users to create and post any content. The CDA's protections apply to ISPs, but are not intended to protect Information Content Providers (“ICPs”) because ICPs are responsible for hosting information as well as creating it.²⁷ Finally, Part I will explore case law interpreting the Act in relation to defamation claims, the Fair Housing Act, and criminal activity. All of the referenced cases arose from postings placed on online forums, such as Craigslist.

Part II analyzes the strengths and weaknesses of the various arguments for and against applying legislative protections to websites providing interactive forums, and suggests new charges that government officials might allege in future lawsuits brought against these website operators in order to circumvent current Section 230 protections. Finally, Part II analyzes the likelihood of legislative reform to Section 230 to expressly provide for criminal liability.

I. BACKGROUND

A. *The Communications Decency Act*

In February 1996, Congress signed a Telecommunications Bill into law, which included the “Communications Decency Amendment.”²⁸ The Communications Decency Act (“CDA”) imposed regulations on Internet website operators similar to those imposed on United States broadcasts by the Federal Communications Commission.²⁹ The Act included anti-indecency and anti-obscenity provisions, which criminalized the transmitting of “obscene or indecent”

²⁶ See Broder Kleinschmidt, *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*, 18 INT'L J.L. & INFO. TECH. 332 (2010).

²⁷ See *id.*

²⁸ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

²⁹ Thomas W. Hazlett & David W. Sosa, “Chillin’ the Internet? Lessons from FCC Regulation of Radio Broadcasting,” 4 MICH. TELECOMM. & TECH. L. REV. 35 (1997), available at <http://www.mttl.org/volfour/hazlettfr.html>.

materials to anyone known to be under 18,³⁰ and imposed criminal sanctions on anyone

[who] knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses an interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.³¹

In 1997, the United States Supreme Court struck down these two provisions of the CDA in *Reno v. the American Civil Liberties Union (ACLU)* finding that they violated the First Amendment's freedom of speech provision.³² In his decision, Justice Stevens distinguished Internet communication from other types of communication that had previously been regulated.³³ He wrote, "[I]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults."³⁴

In addition to these anti-indecency and anti-obscenity provisions, the CDA included Section 230, a safe harbor provision that protected ISPs from being held liable for the words created by others.³⁵ Section 230, which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"³⁶ was intended by Congress to overrule a judicial decision from a 1995 case, *Stratton-Oakmont v. Prodigy*.³⁷ In *Stratton-Oakmont*, the Supreme Court of Nassau County, New York, found that defendant Prodigy, an ISP, could be held liable for libelous statements posted by users of the online bulletin boards that the website provided.³⁸ The amended CDA was signed into law on October 21, 1998, with this safe harbor provision intact, which served to overturn the *Stratton-Oakmont* decision.³⁹

³⁰ See Telecommunications Act of 1996, *supra* note 28.

³¹ *Id.*

³² See *Reno v. A.C.L.U.*, 521 U.S. 844 (1997).

³³ See *id.*

³⁴ *Id.*

³⁵ See Communications Decency Act of 1996, 47 U.S.C. § 230.

³⁶ *Id.*

³⁷ See H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.).

³⁸ See *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

³⁹ See Communications Decency Act of 1996, 47 U.S.C. § 230.

B. Interactive Service Providers vs. Information Content Providers

The CDA's safe harbor provision is designed to protect interactive computer services from being treated as publishers or speakers of any information that is provided by a separate ICP. The legal definition of 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."⁴⁰ The language used by Congress in drafting Section 230 has led to a great deal of litigation about who Congress intended to protect. Courts continually struggle with determining when websites should and should not be afforded Section 230 protections because the Act fails to specify whether it is aimed at ICPs in addition to ISPs. Further, the Act does not provide courts with much assistance in distinguishing ISPs from ICPs.⁴¹

As discussed in the previous subsection, reports from the House Conference indicate that one purpose for Congress's implementing Section 230 was to overrule the decision that came down in *Stratton-Oakmont v. Prodigy*.⁴² In that case, the defendant-Prodigy was an ISP, yet the court found that the website could be held liable for content posted by third parties.⁴³ The language of Section 230, in addition to House Reports indicating Congress's discontent with the *Stratton-Oakmont* decision, makes it apparent that Congress intended for Section 230 to protect ISPs. Less clear is whether Congress also intended the provision to provide protections to websites that operate as ICPs.

An ICP is defined as "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."⁴⁴ A literal reading of Section 230 suggests that it was not intended to provide ICPs with immunity because it precludes website operators from being treated as the publisher or speaker of information provided by another—ICPs are the actual speaker or publisher of the posted information. The courts seem to interpret the CDA and Section 230 in this

⁴⁰ 47 U.S.C. § 230(f)(2).

⁴¹ *See, e.g., Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *but see Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (the latter holding that the website acted as an ICP because it contributed to the content placed on the website by requiring users to answer specific questions).

⁴² *See Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

⁴³ *See id.*

⁴⁴ 47 U.S.C. § 230(f)(3).

way, by typically first determining that a defendant-website is an ISP and then holding it immune from civil liability under the Act.⁴⁵

Today, when faced with a case that requires a court to determine whether a defendant-website operator should be provided immunity under Section 230, courts generally apply a three-prong test, known as the *Gibson Test*.⁴⁶ For immunity to be deemed appropriate, the defendant must satisfy all three prongs of the test: 1) The defendant must be a “provider or user” of an “interactive computer service;”⁴⁷ 2) The cause of action asserted by the plaintiff must treat the defendant as a publisher or speaker of the harmful information that is at issue;⁴⁸ 3) The defendant must not be responsible for providing the harmful information at issue.⁴⁹ The courts have consistently read Section 230 to provide immunity to ISPs, but not to shield an ICP from liability for harm caused by the content it generates. More troubling for courts, then, is determining which website operators should be classified as ISPs and which should be deemed ICPs not immune from civil liability.

C. The Courts' Interpretations of Section 230

Despite the continuous and widespread misuse of websites like Craigslist, these websites are rarely held responsible for the harm that occurs through their use. The following cases illustrate that courts have consistently held, in a variety of contexts, that Section 230 provides a broad and sweeping immunity to ISPs faced with civil liability claims. However, as the cases progress, it becomes evident that the view of courts is gradually shifting. Courts were initially very liberal in anointing a website operator the title of ISP. The first few cases below show the courts' interpretations of Section 230, which extended its immunity so far that it became a total protection from all suits brought against website operators.⁵⁰ However, more recently, courts have begun shifting to a less liberal approach. Recently, courts have been more willing to deem website operators ICPs or partial ICPs, rather than ISPs, and thus not immune from liability.

i. Initial Court Holdings Interpreting Section 230 as a Total Protection for ISPs

The cases below illustrate that, while just after the CDA was created, courts perceived it as granting total immunity for ISPs, they have since begun carving narrow exceptions out of this immunity.

⁴⁵ See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). See also *Doc v. SexSearch.com*, 502 F.Supp.2d 719 (N.D. Ohio 2007).

⁴⁶ See *Gibson v. Craigslist, Inc.*, No. 08-7735, 2009 U.S. Dist. LEXIS 53246, at *9 (S.D.N.Y. June 15, 2009).

⁴⁷ *Id.* at 9.

⁴⁸ See *id.* at 9-10.

⁴⁹ See *id.* at 9.

⁵⁰ See discussion *infra* Part II(C)(i)(a)-(d).

a. Defamation: Zeran v. American Online, Inc.

1997 marks the first year that a court was asked to interpret Section 230 of the CDA and to determine the extent of the immunity it provides.⁵¹ In *Zeran v. America Online, Inc.*, plaintiff Kenneth Zeran filed a negligence claim against America Online, Inc. (“AOL”) after an unknown third party posted advertisements featuring his name and telephone number on the website’s electronic bulletin board.⁵² The advertisements were for items featuring slogans glorifying and making light of the 1995 Oklahoma City bombing.⁵³ Not surprisingly, as a result of these posts, Zeran received numerous threatening phone calls.⁵⁴ Zeran sued AOL, claiming that the company acted negligently by allowing the posts to “remain and reappear on [its] ‘bulletin board’ despite having received notices and complaints from Zeran following the appearance of the first advertisement.”⁵⁵

Zeran sued AOL under the theory that AOL distributed information that it knew, or should have known, was defamatory in nature.⁵⁶ The Court held that Section 230 preempted Zeran’s claim because imposing distributor liability on AOL would amount to treating AOL as the publisher or the speaker of the defamatory information posted on its site.⁵⁷

On appeal, the Fourth Circuit affirmed the lower court’s decision, distinguishing ISPs from print publishers, and focusing on the vast number of posts the former receive.⁵⁸ Here, the court reasoned that the policy behind Section 230 was to prevent the chilling of free speech over the Internet and that holding website operators liable based on notice would have this exact negative impact.⁵⁹

b. Failure to Monitor: Doe v. SexSearch.com

In 2007, plaintiff John Doe filed a complaint naming the owners of SexSearch.com as the defendant.⁶⁰ SexSearch.com is a website that offers an online dating forum for members who are primarily interested in meeting with others to engage in sexual acts.⁶¹ In 2005, while searching the website, Doe came across the profile of another user indicating that she was an eighteen-year-old

⁵¹ See *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124 (4th Cir. 1997).

⁵² *Id.* at 1127.

⁵³ *Id.* at 1126.

⁵⁴ *Id.* at 1127.

⁵⁵ *Id.* at 1126.

⁵⁶ See *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1128-29 (4th Cir. 1997).

⁵⁷ See *id.* at 1133.

⁵⁸ See *Zeran v. American Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

⁵⁹ *Id.*

⁶⁰ See *Doe v. SexSearch.com*, 502 F.Supp.2d 719 (N.D. Ohio 2007).

⁶¹ See SEXSEARCH.COM, <http://www.sexsearch.com> (last visited Jan. 16, 2011).

female.⁶² The two scheduled to meet and engaged in consensual sexual relations.⁶³ One month later, as a result of this encounter, the plaintiff was arrested and charged with three counts of engaging in unlawful sexual conduct with a minor.⁶⁴ Unbeknownst to the plaintiff, the female he met through SexSearch.com was only fourteen years old and, as a result, he faced up to fifteen years in prison.⁶⁵ He filed a lawsuit against the website operator, SexSearch.com, accusing the site of failing to screen and discover underage users.⁶⁶

SexSearch.com argued that it was immune from liability under Section 230.⁶⁷ In response, the plaintiff argued that the website reserved the right to modify accounts and should thus be deemed an ICP—not protected under Section 230—rather than an ISP. The court found that, because SexSearch.com did not actually modify the account of the minor, it fit the definition of an ISP and was therefore protected by Section 230.⁶⁸ Next, the plaintiff argued that Section 230 was only intended to apply to defamation cases.⁶⁹ However, the court reasoned that Congress intended Section 230 to prevent free speech online from becoming inhibited, and that free speech would undoubtedly be chilled if ISPs were held liable for failing to screen all of their users.⁷⁰ Before *Doe v. SexSearch.com* was decided, Section 230 immunity had only been applied in tort claims.⁷¹ The court's decision in *SexSearch* created a new standard under which the type of claim brought against an ISP would not matter: Section 230 would apply whenever a claim was directed towards a website operator acting as a publisher, editor, or monitor.

c. Fair Housing Act: Chicago Lawyers Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc.

In March 2008, the Seventh Circuit Court of Appeals decided a case brought by the Chicago Lawyers' Committee For Civil Rights Under Law, Inc.⁷² The Chicago Lawyers Committee, a public interest consortium, claimed that Craigslist had violated the Fair Housing Act ("FHA") which prohibits discrimination in the

⁶² *Doe*, 502 F.Supp2d at 722.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Doc v. SexSearch.com*, 502 F.Supp.2d 719, 724 (N.D. Ohio 2007).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 727.

⁷¹ See Shahrzad T. Radbod, *Craigslist-A Case for Criminal Liability for Online Service Providers?*, 25 BERKLEY TECH. L.J. 597 (2010).

⁷² See *Chi. Lawyers' Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (2008).

selling or renting of housing based on race, religion, gender or familial status.⁷³ This section includes a ban making it illegal

[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates an preference, limitation, or discrimination based on race, color, religious, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.⁷⁴

The Chicago Lawyers' Committee claimed that some postings on Craigslist included phrases such as "No Minorities" and "No Children," and that FHA Section 3604(c) applied to all postings that did not satisfy the FHA Section 3603(b)(1) exemption for "any single-family house sold or rented by an owner . . . [who] does not own more than three such single-family houses."⁷⁵ The plaintiff argued that Craigslist was not immune from liability under Section 230(c)'s, "Protection for 'good samaritan' blocking and screening of offensive material,"⁷⁶ because the website operator did not filter content submitted by users for posting.⁷⁷ In response, Craigslist argued that Section 230 provided a general immunity from civil liability for all ISPs.⁷⁸

The court determined that neither argument was correct, stating that unfiltered websites were not excluded from Section 230 immunity, but that the Act does not provide complete immunity from all civil liability claims either.⁷⁹ Ultimately, the court held that Craigslist was a provider of the posted advertisements, not a publisher or speaker, and as such, the website did not cause the advertisements to be posted.⁸⁰ The court in *Chicago Lawyers Committee* analogized ISPs to telephone services and other common carriers that are not affected by Section 3604(c) of the FHA.⁸¹ In doing so, they found that ISPs are exempt from liability under Section 230(c) because "they neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks."⁸²

As was typical in these early cases, the court in *Chicago Lawyers Committee* was extremely concerned about the great expense that requiring ISPs to manually screen all postings would impose on websites operators. The court also considered

⁷³ *Id.*

⁷⁴ 42 U.S.C. § 3604(c).

⁷⁵ 42 U.S.C. § 3603(b)(1); *Chi. Lawyers'*, 519 F.3d at 668.

⁷⁶ 47 U.S.C. § 230(c).

⁷⁷ *Chi. Lawyers'*, 519 F.3d at 668.

⁷⁸ *Chi. Lawyers' Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

⁷⁹ *Id.* at 670.

⁸⁰ *Id.* at 666.

⁸¹ *Id.* at 668.

⁸² *Id.*

the long delay that this requirement would cause, and that such a delay would render many of the services provided by these sites useless.⁸³

While courts are still extremely concerned with the costs that would be imposed on website operators if they were forced to conduct a thorough manual screening of all posts, more recent cases illustrate that they are now seeking to balance these costs with the need to protect their civilian users.⁸⁴ It is highly likely that, in future cases involving criminal activity, courts will be more willing to impose these costs on website operators, especially those like Craigslist that generate large economic gains directly from the posts at issue.

d. Criminal Activity: Doe v. MySpace

In 2005, plaintiff Julie Doe, then thirteen years old, created a MySpace profile in which she lied about her age, claiming to be eighteen years old.⁸⁵ Through MySpace, Julie came into contact with a nineteen-year-old man.⁸⁶ After conversing through MySpace, and by other means of communication, Julie and the older man arranged a meeting during which he sexually assaulted her.⁸⁷

In *Doe v. MySpace, Inc.*, Julie and her mother sued MySpace, along with News Corp., its parent corporation, for negligence, fraud and misrepresentation.⁸⁸ They argued that Section 230 did not provide immunity to any website operators that do not take reasonable steps towards protecting minors.⁸⁹ In addition, they argued that MySpace had a common law duty to protect its users.⁹⁰ The court determined that the plaintiffs' claims were directed at MySpace in its role as a publisher and a monitor and thus that Section 230 barred plaintiffs from suing for negligence or gross negligence.⁹¹ The court also dismissed the plaintiffs' fraud and misrepresentation claims, deciding that they were not pleaded with the "sufficient particularity" required.⁹² The court determined that these claims were attempts to disguise the real issues in the plaintiffs' complaint, which was, in actuality, about content published on MySpace and the websites' failure to filter—blatant CDA issues.⁹³ The plaintiffs' counsel admitted that the real basis for their claim was negligence and that they did not wish to pursue fraud and misrepresentation

⁸³ *Id.* at 668-69.

⁸⁴ *See, e.g.,* NPS, LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 Mass. Super. LEXIS 97 (Mass. Super. Ct. Jan. 26, 2009).

⁸⁵ *Doe v. MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 417.

⁹⁰ *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See id.* at 421.

claims.⁹⁴ The court never determined whether MySpace could have been held liable for fraud or misrepresentation, or whether Section 230 protected websites from liability for these claims, too.

ii. The Narrowing of Section 230 Immunity

The prior cases highlight the courts' initial reactions to Congress's enactment of Section 230. The earlier holdings expanded the protections provided by the Act, creating a total immunity for ISPs. The cases below illustrate that some courts wish to limit these Section 230 protections. In the more recent cases, the courts have found that website operators, even those deemed to be ISPs, are not always immune from liability under Section 230. This shift towards narrowing Section 230 protections indicates that courts may be willing, or even intending, to find that Section 230 does not provide protections to ISPs or ICPs in the realm of criminal suits.

a. Gibson v. Craigslist

In 2008, Calvin Gibson filed a lawsuit against Craigslist, claiming breach of duty of care after a man shot Gibson with a gun he had purchased through a Craigslist posting.⁹⁵ As expected, Craigslist filed a motion to dismiss relying on Section 230 immunity.⁹⁶ The website operator claimed that Section 230 provides a blanket immunity, barring all claims that hold any ISPs liable for harm resulting from posts generated by third party users.⁹⁷ The *Gibson* court developed a new approach in order to determine whether a website operator is immune from liability under Section 230. The court applied a three-pronged test. If the defendant-website operator satisfied all three prongs, immunity was deemed applicable.⁹⁸

Under its newly developed test, the *Gibson* court first had to determine if the defendant-website was an ISP.⁹⁹ This first prong signified a significant advancement in the court's view on Section 230, indicating that the courts would no longer liberally apply the term ISP to any and all website operators. Under the test's second prong, the court determined whether a third party user—a content provider—had provided the postings at issue. Lastly, the court analyzed whether the plaintiff's claims unfairly treated the defendant-website as the speaker, or publisher, of the content generated by another.¹⁰⁰ Taken as a whole, this new test

⁹⁴ *See id.*

⁹⁵ *Gibson v. Craigslist, Inc.*, No. 08-7735, 2009 U.S. Dist. LEXIS 53246, at *1 (S.D.N.Y. June 15, 2009).

⁹⁶ *See id.* at *2.

⁹⁷ *Id.*

⁹⁸ *See id.* at *9.

⁹⁹ *See id.*

¹⁰⁰ *Gibson v. Craigslist, Inc.*, No. 08-7735, 2009 U.S. Dist. LEXIS 53246, at *12 (S.D.N.Y. June 15, 2009).

indicated that being designated an ISP would no longer provide a total protection for all website operators.

In *Gibson*, the classification of the defendant as an ISP was not contested.¹⁰¹ Gibson's complaint suggested that an "unknown individual" had created the postings.¹⁰² That unknown person responsible for generating the post easily qualified as a third party user, thus satisfying the second prong of the test. Finally, the court determined that, by seeking to hold Craigslist liable for failing to monitor the postings on its website, Gibson's claim treated Craigslist as a publisher of the user generated content.¹⁰³ Having satisfied all three prongs of the court's test, Craigslist's motion to dismiss was granted.¹⁰⁴

Gibson was one of the earliest cases to show the courts' new willingness to narrow their readings of Section 230 protections. In a few more recent cases, discussed below, the courts held that certain website operators are not, in all circumstances, protected from civil liability by Section 230. These holdings suggest that the recent willingness of courts to restrain the Section 230 protections may have contributed to Craigslist's decision to deactivate its Adult Services link. They also illustrate that courts are not willing to protect website operators, including ISPs, at all costs, and that it is very possible that they will not provide the same broad protections to ISPs in criminal liability cases as they have done in civil suits.

b. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC

In 2008, shortly after *Chicago Lawyer's Committee* was decided in the Seventh Circuit,¹⁰⁵ a local fair housing council filed a suit against Roommates.com, a website that matches users seeking roommates.¹⁰⁶ In *Roommates*, the plaintiff claimed that the website operator violated the FHA by requiring each subscriber to describe himself, and his preferences in roommates with regard to gender, sexual orientation and whether his household would include children.¹⁰⁷ The website operator would use this information, as well as any additional information provided by the user, to generate a profile page for others to view.¹⁰⁸ As discussed, earlier, the FHA prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin."¹⁰⁹

¹⁰¹ *Id.* at *10.

¹⁰² *Id.* at *11.

¹⁰³ *See id.*

¹⁰⁴ *Id.* at *13.

¹⁰⁵ *See* discussion *supra* Part II(C)(i)(c).

¹⁰⁶ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, No. 03-09386, 2004 WL 3799488, at *1 (C.D. Cal. Sept. 30, 2004).

¹⁰⁷ *Id.* at *2.

¹⁰⁸ *Id.* at *1.

¹⁰⁹ 42 U.S.C. § 3604.

Here, the district court held that the website operator was immune from liability under Section 230, and dismissed the plaintiff's claims without considering whether the website's actions violated the FHA.¹¹⁰ The plaintiff appealed, and the appellate court found differently, reversing the lower court's decision.¹¹¹ The Court of Appeals held that Section 230 immunity did not apply to acts resulting out of the website's questionnaire that users were required to answer.¹¹² The court reasoned that both a website user and a website operator can act contemporaneously as ICPs if the website requires users to answer specific questions.¹¹³ Further, the court found that a website operator can be a partial ICP, regarding the specific questions to which it requires answers, and a partial ISP, regarding an "additional comments" section where users can post whatever information they wish.¹¹⁴ Thus, the court in *Roommates* held that in a case where a website operator forces its subscribers to divulge personal and protected information, and prompts users to post discriminatory preferences and to choose roommates based on those preferences, the website violates FHA, and therefore is not immune under Section 230.¹¹⁵ The court did, however, find that Roommates.com was protected by the CDA from claims arising out of the content provided by users in the "Additional Comments" section.¹¹⁶

One year later, relying on the *Roommates* holding, the Ninth Circuit held that a computer service provider could lose its Section 230 immunity if it made a promise to remove certain material from its website and then failed to do so.¹¹⁷ In *Barnes v. Yahoo!, Inc.*, the Court held that Yahoo!'s failure to follow through on its pledge to take down a fake profile could lead to a successful promissory estoppel

¹¹⁰ *Fair Hous. Council*, at *3-4 ("The FHA is not among the types of laws which are specifically exempted from the CDA. As such, and without evidence of contrary legislative intent, a court may not create an exemption for the fair housing laws without violating the maxim *expression unius est exclusion alterius*.").

¹¹¹ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

¹¹² *Id.* at 1165 ("The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity.").

¹¹³ *Id.* ("[T]he fact that users are information content providers does not preclude Roommate from also being an information content provider by helping 'develop' at least 'in part' the information in the profiles.").

¹¹⁴ *Id.* at 1166 ("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.'").

¹¹⁵ *Id.* at 1175-1176.

¹¹⁶ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1173-74 (9th Cir. 2008) (en banc) ("Roommate is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate . . . This is precisely the kind of situation for which section 230 was designed to provide immunity.").

¹¹⁷ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

lawsuit.¹¹⁸ In *Scott P. v. Craigslist*, an employee was subjected to workplace harassment, including fake posts placed on Craigslist offering homosexual erotic services.¹¹⁹ Craigslist repeatedly promised to remove the posts, and failed to do so.¹²⁰ Relying on the holding in *Barnes v. Yahoo!*, the Superior Court judge denied Craigslist's attempt to exercise its Section 230 immunity, and allowed the case to proceed under a promissory estoppel theory.¹²¹

c. NPS, LLC v. StubHub, Inc.

In 2009, the New England Patriots brought a lawsuit against StubHub, Inc.¹²² StubHub operates a website where users can purchase and sell tickets to a variety of live entertainment events, including football games.¹²³ The lawsuit alleged that StubHub provided a forum where Patriots season ticket holders could illegally sell their tickets. The plaintiff's claims included intentional interference with advantageous relationships, misappropriation of name, and unfair trade practices.¹²⁴ The plaintiff sought an injunction to prevent the website from having any future involvement in the resale of Patriots tickets, as well as additional damages.¹²⁵

StubHub moved for summary judgment, claiming that it is an ISP and therefore protected from liability under Section 230.¹²⁶ The court distinguished StubHub from other website operators that serve as hosts for classified advertisements, such as Craigslist, noting that, unlike other websites that allow users to post content for free, StubHub charges its users fees that are based on the price for which a ticket is sold.¹²⁷ In addition, the court noted that other website operators protected by Section 230 do not require that any particular content be included in postings.¹²⁸ Dissimilarly, StubHub attempted to increase the prices that its users listed in their postings.¹²⁹ Based on this analysis, and citing the holding in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,¹³⁰ the court reasoned that StubHub was partially responsible for generating

¹¹⁸ *Id.*

¹¹⁹ See *Scott P. v. Craigslist, Inc.*, CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/threats/scott-p-v-craigslist-inc> (last visited July 21, 2011).

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² *NPS, LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 Mass. Super. LEXIS 97 (Mass. Super. Ct. Jan. 26, 2009).

¹²³ See *STUBHUB.COM*, <http://www.stubhub.com> (last visited Nov. 8, 2011).

¹²⁴ *NPS*, 2009 Mass. Super. LEXIS, at *1.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See *id.* at *34.

¹²⁸ See *id.* at *35.

¹²⁹ *NPS, LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 Mass. Super. LEXIS 97, at *34 (Mass. Super. Ct. Jan. 26, 2009).

¹³⁰ See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th

the unlawful content on its website, making it an ICP, and thus falling outside of Section 230's reach.¹³¹

II. WILL PROVIDERS PREVAIL?

A. *The First Amendment Argument*

The First Amendment makes it unconstitutional for Congress to pass any law "abridging the freedom of speech, or of the press."¹³² Based on its text, it seems that the First Amendment should serve to prevent Congress and courts from regulating what content websites choose to post, and from imposing any liability on the websites for illegal activity resulting from the posts that they publish. Commentators have argued that Section 230 fits squarely within the First Amendment,¹³³ especially considering Supreme Court decisions that have recognized profanity, hate speech, and anonymous vitriol as protected free speech.¹³⁴ However, commercial speech is considered "low value speech" and thus it is offered far less protection than other forms of expression.¹³⁵ Courts have deemed speech to be "commercial" when it relates "solely to the economic interests of the speaker and its audience."¹³⁶

In *Central Hudson Gas & Electric v. Public Services Commission*, the United States Supreme Court developed a test used to determine when suppressing commercial expression is constitutional.¹³⁷ First, "[f]or commercial speech to [be protected by the First Amendment,] it at least must concern lawful activity and not be misleading."¹³⁸ If the commercial speech is concerning lawful activity, but there is a substantial governmental interest at issue, the court will "determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."¹³⁹

Cir. 2008) (en banc). See also discussion *supra* Part II(C)(ii)(b).

¹³¹ *NPS*, 2009 Mass. Super. LEXIS 97, at *36. It has yet to be seen what the direct repercussions of this holding will be. However, as a result of this, and other recent lawsuits arising out of similar facts, almost all states have made their anti-scalping laws stricter. StubHub, along with other websites including Ticketmaster, are in the process of lobbying state legislatures for modifications or repeal of these new, stricter laws.

¹³² U.S. CONST. amend. I.

¹³³ See William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 20 (2011).

¹³⁴ See *Cohen v. California*, 403 U.S. 15 (1971); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995).

¹³⁵ Megan E. Fresco, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547, 568 (2005).

¹³⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

¹³⁷ See *id.* at 566.

¹³⁸ *Id.* at 567.

¹³⁹ *Id.*

Many of the posts published on interactive websites such as Craigslist are blatant advertisements for prostitution and other illegal activities.¹⁴⁰ These advertisements are in direct conflict with federal and state laws that make soliciting money in exchange for sex illegal.¹⁴¹ Applying the Court's test from *Central Hudson Gas & Electric*,¹⁴² because these posts do not concern lawful activity, and because the government has a substantial interest in preventing illegal conduct, the posts are not an exercise of free speech that must be protected by the First Amendment.

Unfortunately, this argument is unlikely to help a private plaintiff win a lawsuit against an ISP. The CDA ensures that these website operators are viewed as publishers only engaged in posting content that is generated by others, not in creating or editing the content.¹⁴³ Even under the narrowest readings of Section 230 that are applied by courts today, the courts will not view websites like Craigslist as the "speaker" of the content, or as a party promoting its own economic situation. Courts will likely hold that a commercial First Amendment argument does not apply in cases where private parties file charges against ISPs for harm caused by criminal activity that results from postings on their websites that were created solely by users. Instead, this argument will be most successful in cases brought directly against the third party users responsible for generating the posts' content.

B. CDA Protections Against Civil Liability

The CDA has two significant effects on online communications. First, it attempts to regulate indecency and obscenity when it is made available to children on the Internet.¹⁴⁴ Second, Section 230 protects the providers of certain Internet services from liability based on content generated by their third party users.¹⁴⁵ Section 230 is typically interpreted as protecting these website operators from being deemed publishers, stating that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹⁴⁶

¹⁴⁰ See Complaint, *Dart v. Craigslist, Inc.*, 665 F.Supp.2d 961 (N.D. Ill. 2009) (No. 09-CV-1385).

¹⁴¹ See, e.g., Model Penal Code § 207.12(1) (stating "A person who engages, or offers, or agrees to engage in sexual activity for hire, or is an inmate of a house of prostitution, or enters this state or any political subdivision thereof to engage in prostitution, commits a petty misdemeanor. Such activity is hereinafter referred to as prostitution, and the actor is referred to as a prostitute").

¹⁴² See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

¹⁴³ See 47 U.S.C. § 230. See also *Dart v. Craigslist, Inc.*, 665 F.Supp.2d 961, 967-70 (N.D. Ill. 2009).

¹⁴⁴ See Solveig Bernstein, *Beyond The Communications Decency Act: Constitutional Lessons of the Internet*, CATO INSTITUTE (Nov. 4 1996), <http://www.cato.org/pubs/pas/pa-262.html>.

¹⁴⁵ See *id.*

¹⁴⁶ 47 U.S.C. § 230.

Courts have consistently held that Section 230 provides a broad immunity for these providers and that any doubts should be “resolved in favor of immunity.”¹⁴⁷ This robust immunity has been extended to all claims that arise out of ISPs posting information that is generated solely by their users.¹⁴⁸ Therefore, private plaintiffs are usually unsuccessful in bringing suits against ISPs after being harmed by content generated by third parties and posted by ISPs; instead, they may only bring suits directly against the third parties responsible for creating the advertisements.¹⁴⁹ Section 230, however, fails to distinguish exactly when a website operator shifts from acting as an ISP to an ICP, and thus when a website operator moves out of the realm of Section 230 protections.¹⁵⁰

Possibly the most common argument made by courts applying Section 230 immunity to ISPs is that it is unfathomable for a website to review all posts for illegal content.¹⁵¹ As discussed previously, after the Markoff murder,¹⁵² Craigslist employed a staff to review each post submitted for any illegal content.¹⁵³ An ISP that employs tactics like these weakens its argument for protection under Section 230 by proving itself that manual screening of each and every post is possible and not disastrously inefficient. In addition, the revenue generated by these fees negates concerns that forcing website operators to manually screen each post thoroughly before publishing would be prohibitively expensive. Craigslist had expected to generate nearly \$44 million in revenue from charges for posts in its Adult Services section in 2010.¹⁵⁴ A small portion of this money could have been used for successfully enacting a more thorough manual review process to screen for posts that advertise illegal activity without any harm to the website. Craigslist also began charging for postings submitted to certain sections on the website.

Craigslist’s Adult Services section asked posters specific questions regarding their gender, age, location and which of numerous pre-defined sexual experiences they were offering.¹⁵⁵ It also provided a blank space for the poster to supply additional, self-generated information.¹⁵⁶ Craigslist would then format the

¹⁴⁷ David L. Hudson, Jr., *Full 9th Circuit: Web Site Can be Sued Under Fair-Housing Laws*, FIRST AMENDMENT CENTER (Apr. 4, 2008), <http://www.firstamendmentcenter.org/analysis.aspx?id=19882>.

¹⁴⁸ See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). See also *Doe v. ScxSearch.com*, 502 F.Supp.2d 719 (N.D. Ohio 2007).

¹⁴⁹ See, e.g., *Zeran*, 129 F.3d 327; *SexSearch.com*, 502 F.Supp.2d 719.

¹⁵⁰ See 47 U.S.C. § 230.

¹⁵¹ See *Chic. Lawyers’ Comm. For Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 668-69 (7th Cir. 2008).

¹⁵² See discussion *supra* Part I.

¹⁵³ See Evan Hansen, *Censored! Craigslist Adult Services Blocked in U.S.*, EPICENTER (Sept. 4, 2010), <http://www.wired.com/cpicenter/2010/09/censored-craigslist-adult-services-blocked-in-u-s/>.

¹⁵⁴ *Craigslist Adult Services Revenue Soared: New Figure for 2010 - \$44.4 mil.*, AIM GROUP (Sept. 5, 2010), <http://aimgroup.com/blog/2010/09/05/craigslist-adult-services-revenue-soared-new-figures-for-2010-44-4-million/>.

¹⁵⁵ See Complaint at 23-24, *Dart v. Craigslist, Inc.*, 665 F.Supp.2d 961 (N.D. Ill. 2009) (No. 09-CV-1385).

¹⁵⁶ See *id.* at 28.

information into one post and publish it on the website.¹⁵⁷ Craigslist also offered a search option in its Adult Services section that enabled users to filter posts for those that specifically interested them. This format, used by websites to gather information by requiring users to contribute specific information and offering them pre-written answers, makes Craigslist more akin to the website involved in the case against Roommates.com.¹⁵⁸ The format also distinguishes their posts from the 100 percent user-generated posts that were at issue in *Zeran* and *Chicago Lawyers*.¹⁵⁹

Congress's intent when establishing Section 230 was to protect ISPs and to ensure free speech via the Internet, which it considered to be "a forum for a true diversity of political disclosure, unique opportunities for cultural development, and myriad avenues for intellectual activity."¹⁶⁰ Websites that engage in the tactics that Craigslist did before disabling its Adult Services link, such as providing users with pre-formatted questions and answers, editing user-generated content, and charging fees for posting certain content, are less likely to find themselves protected by Section 230.

C. Criminal Liability

Section 230 is not without limitations and exceptions.¹⁶¹ While private plaintiffs will continue to struggle in their attempts to bring civil liability suits against ISPs such as Craigslist, a state prosecutor has a much better chance in successfully bringing a criminal liability suit against them. Section 230(e)(1) states that the statute shall have "no effect on criminal law" and should have no impact on enforcing the federal criminal statutes, or the sections of the title pertaining to obscenity and the sexual exploitation of children.¹⁶² While Section 230 preempts state criminal laws, some commentators argue that plaintiffs may find success by filing suits against ISPs asserting breaches of federal criminal liability.¹⁶³

This proposition is supported by the holding in *Doe v. Bates*, in which a court found that Section 230(e)(1) does not allow for *private* plaintiffs—as distinct from

¹⁵⁷ *See id.*

¹⁵⁸ *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

¹⁵⁹ *See Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). *See also* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

¹⁶⁰ *See* Conf. Rep., *supra* note 37.

¹⁶¹ 47 U.S.C. § 230(c)(1) (1998)

Effect on other laws (1) No effect on criminal law: Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is consistent with this section. 47 U.S.C. § 230(c)(3) (1998).

¹⁶² 47 U.S.C. § 230(c)(1) (1998).

¹⁶³ *See, e.g., Larkin, supra* note 2.

the state—to bring civil claims alleging the breach of a federal criminal law.¹⁶⁴ The court in *Doe v. Bates* found support for its holding in Congress’s rationale for enacting Section 230(e)(1): that ISPs be protected from civil liability but that police and other government officials still be able to successfully enforce the law.¹⁶⁵ This reasoning suggests that Congress and courts did not intend for Section 230 to provide an ISP with immunity from liability when it has engaged in breaking a criminal statute. Section 230(e)(3) states that “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”¹⁶⁶ Even if the courts held that ISPs are immune from any and all civil liability under Section 230, Section 230(e) provides a foundation for believing that criminal suits against ISPs that aim to enforce a federal or state criminal statute have the potential to be successful.

i. Corporate Criminal Liability for ISPs

The idea of corporate liability for criminal activities is fairly new, and the laws regarding corporate liability are still developing.¹⁶⁷ In the early 1900s, courts took a new and significant turn towards recognizing corporations as “persons” that could be held liable for criminal acts.¹⁶⁸ Most notably, in *New York Central & Hudson River Railroad v. United States*, the United States Supreme Court reasoned that, because “a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done.”¹⁶⁹

Jurisdictions remain divided on when a corporation should be held liable for criminal acts and when criminal sanctions should be imposed on corporations rather than on individual actors.¹⁷⁰ The rule set out in *New York Central & Hudson River Railroad*—that corporations may be held criminally liable for acts, omissions, and failures of any persons in their employ, regardless of their ranking within the corporation, who are acting within the scope of their employment—¹⁷¹ has been adopted by courts and legislatures in over a dozen jurisdictions.¹⁷² Still, many other jurisdictions deem this rule to be too broad and prefer to only impose criminal sanctions on corporations for the wrongdoings of officers, or for crimes committed at the request or command of managing officers.¹⁷³ The Model Penal

¹⁶⁴ See *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D.Tex. Dec. 27, 2006) (in which a court found Yahoo! Inc. immune from liability for sexually explicit postings of minors).

¹⁶⁵ See *id.*

¹⁶⁶ 47 U.S.C. § 230(e)(3) (1998).

¹⁶⁷ See William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 648-51 (1994).

¹⁶⁸ See *id.*

¹⁶⁹ *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492-93 (1909).

¹⁷⁰ Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 NEB. L. REV. 197, 199 (2008).

¹⁷¹ See *Hudson River R.R. Co.*, 212 U.S. 481.

¹⁷² See Green, *supra* note 170.

¹⁷³ See *id.*

Code only holds corporations criminally liable for offenses “authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.”¹⁷⁴

Whether the strictest or the narrowest of these rules is implicated, a state could be successful in filing a corporate criminal liability suit against an ISP. Just a few years ago, when advertisements for acts of prostitution were posted on Craigslist free of charge, and without any manual screening process, Craigslist would have had a solid defense strategy against any criminal suit. Relying on cases such as *People v. Raphael*,¹⁷⁵ Craigslist could have easily shown that it had no knowledge of prostitution activity arising out of postings on its website, and thus, that it lacked the *mens rea* that was required for the website to be prosecuted for prostitution.¹⁷⁶

In *People v. Raphael*, an apartment superintendent charged a fee, additional to security deposit and rent, as a condition of rental agreements.¹⁷⁷ The apartment company was charged with violating the Sharkey Act, which makes it illegal to demand consideration in excess of fixed rent regulations in exchange for housing.¹⁷⁸ There, the court found that there was no evidence that the apartment company profited from the bonuses collected by its employee, nor any proof that its officers knew about the illegal activity and as a result, refused to impose criminal sanctions on the corporation.¹⁷⁹ Similarly, before Craigslist made the previously discussed procedural changes to its Erotic Services section in 2009, it could likely have escaped any criminal liability by showing that it did not profit from any postings that advertised illegal activity, and that its officers and employees had no knowledge of the contents of the postings found on the website.

However, an ISP that manually screens postings would have a much more difficult time building a defense to criminal liability, especially if it also charges fees for users to post content. In past cases, courts have held corporations liable for the acts of their agents and employees acting within the scope of their employment, even when their actions are against corporate policy.¹⁸⁰ Those who are employed by an ISP to manually screen postings are undoubtedly acting within the scope of their employment when they decide to authorize or reject a posting, regardless of which decision they make. Therefore, even if the website operator’s policy is for those screeners to reject certain postings, the website operator could still be held liable for an employee’s failure to do so.

¹⁷⁴ MODEL PENAL CODE § 2.07(1)(c) (1962).

¹⁷⁵ See *People v. Raphael*, 72 N.Y.S.2d 748, 749 (N.Y. Magis. Ct. 1947).

¹⁷⁶ See Larkin, *supra* note 2.

¹⁷⁷ See *Raphael*, 72 N.Y.S.2d 748.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 752-53.

¹⁸⁰ See, e.g., *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

ii. Suggested Strategies for Successful Criminal Prosecutions Against ISPs

a. Aiding and Abetting Prostitution

Section 2 of the United States Crimes Code states that a defendant is liable as a principal actor if she “aids, abets, counsels, commands, induces or procures its commission,” or if she “willfully causes an act to be done which if directly performed by [her] or another would be an offense against the United States.”¹⁸¹ In the states that have adopted the federal prostitution statute, a successful lawsuit against Craigslist, or any similar ISP, for aiding and abetting prostitution is extremely unlikely. The federal prostitution statute makes it a crime to transport an “individual in interstate or foreign commerce [in order to have said individual] engage in prostitution.”¹⁸² Thus, in states enforcing the federal statute, to succeed in charging these ISPs with aiding and abetting prostitution, the prosecution would have to prove that the defendant willfully caused this transportation—an unlikely feat.¹⁸³

In other states such as South Carolina, however, the requirements for prosecuting aiding and abetting are more forgiving,¹⁸⁴ leading some to believe that in some cases, there is more promise of success for prosecutors bringing suits against ISPs.¹⁸⁵ In these states, a party only must knowingly aid and abet prostitution, which does not require physical transport of an individual for the purpose of prostitution, to be found guilty.¹⁸⁶ In the past, it would have been difficult to prove that Craigslist, and other similar websites, knowingly aided and abetted any criminal activity. But the implementation of manual screening procedures, as discussed above, makes a finding that an ISP or an ICP has knowledge of postings regarding illegal activities much more likely. Further, in the instances when ISPs charge for posting, it is reasonable to expect a website operator to hire a staff that is capable of doing a thorough screening of each and every posting.

b. Promotion

While charging ISPs with aiding and abetting may prove difficult in many, if not most, states, charges for promotion may prove to be more successful. The majority of states have promotion of prostitution laws that make it a crime for any person to knowingly receive money, or other objects of value, “from the earnings

¹⁸¹ 18 U.S.C. § 2 (2009).

¹⁸² 18 U.S.C. § 2421 (1998).

¹⁸³ *See id.*

¹⁸⁴ *See* Matthew Green, *Sex on the Internet: A Legal Click or an Illicit Trick?*, 38 CAL. W. L. REV. 527, 530-31 (2002).

¹⁸⁵ *See, e.g.,* Larkin, *supra* note 2.

¹⁸⁶ *See id.*

of a person engaged in prostitution.”¹⁸⁷ It is evident at this point that before Craigslist began charging fees for posting advertisements in its Adult Services section, any charge of promoting prostitution would have failed. But, in the case that an ISP charges for postings, it is likely that any advertisement for illegal activity that appears on its site in exchange for payment can create a basis for holding the ISP criminally liable for promoting prostitution. It is important to note, however, that these statutes were created before the Internet came into being, so no promotion statute includes text strictly construed to cover website operators such as Craigslist.¹⁸⁸

Some states have even broader promotion laws. For instance, in Maine, “[a] person is guilty of promotion of if he knowingly promotes prostitution.”¹⁸⁹ Arranging a meeting for the purpose of prostitution surely falls within Maine’s broad definition of promoting. And Georgia’s promotion law includes a provision that makes it illegal to “arrange a meeting of persons for the purpose of prostitution.”¹⁹⁰ In these states that employ extremely broad language in their promotion statutes, it is even more likely that crimes of promotion include crimes committed over the Internet.

c. Reform Must Come From Above

Commentators believe that these and other, more creative, criminal charges will lead to successful prosecutions against websites like Craigslist. For example, John E. D. Larkin suggests that Craigslist could be held liable for aiding and abetting wire fraud.¹⁹¹ However, it is unlikely that ISPs such as Craigslist will be forced to bear much responsibility for illegal conduct initiated by their users unless either legislatures reform the language of Section 230 to explicitly allow for criminal liability, or judges start interpreting and enforcing it differently. While some commentators believe that it is unlikely that the language or enforcement of Section 230 will change,¹⁹² there is reason to believe that reform is in our future.

For example, Judge Kozinski—who wrote the Ninth Circuit majority opinion in *Roommates*¹⁹³ spoke at a conference in the spring of 2009, where he made it utterly clear that he believes courts should, and will, further restrict the protections

¹⁸⁷ See KAN. STAT. ANN. § 21-3513 (2009) (repealed 2011); LA. REV. STAT. ANN. § 14:83.2 (2009); NEB. REV. STAT. § 28-802 (2009); N.M. STAT. ANN. § 30-9-4 (West 1978); N.D. CENT. CODE ANN. § 12.1-29-02 (West 1983); OHIO REV. CODE ANN. § 2907.22 (West 2010); UTAH CODE ANN. § 76-10-1304 (West 2011).

¹⁸⁸ See Larkin, *supra* note 2.

¹⁸⁹ ME. REV. STAT. ANN. tit. 17-A, § 853 (2009).

¹⁹⁰ GA. CODE ANN. § 16-6-11 (West 2009) (quoting a Georgia statute seeking to remedy prostitution by punishing “pimping”).

¹⁹¹ Larkin, *supra* note 2, at 97.

¹⁹² See Adamo, *supra* note 18, at 37-38.

¹⁹³ See *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

of Section 230.¹⁹⁴ Judge Kozinski anticipates that a case will arise at some point, with such compelling facts, that it will provoke a strong and significant response among the judiciary.¹⁹⁵ He also voiced his distaste for the behavior of certain ISPs that go out of their way to obtain as little information about their users as possible, in case of a future legal proceeding.¹⁹⁶ Judge Kozinski suggested that ISPs that engage in this type of behavior should automatically lose their Section 230 immunity.¹⁹⁷

A number of others within the political arena agree with Judge Kozinski's line of thought, and commentators have suggested numerous Section 230 reforms. It has been argued that ICPs should always be held to the same rules and standards regarding liability in defamation cases, regardless of the medium in which the defamation appears.¹⁹⁸ It has also been suggested that, instead of modifying Section 230 in the way that it was done in *Roommates*, there should be a "notice and takedown scheme, similar but not identical to that which exists under copyright law, which would allow people who were directly impacted by objectionable content to petition to have the content removed from the site."¹⁹⁹ Others have proposed distinguishing distributors and publishers, with the ultimate effect being to invalidate distributor immunity.²⁰⁰ Still, others believe that the answer is to require the parties responsible for creating posts—the websites' users—to provide their personal information, stripping the anonymity involved and providing victims with the opportunity for recourse against those responsible for generating the content at issue.²⁰¹ This subject is so heavily publicized, and receives such constant attention from those in the public and private spheres alike, that it leaves little doubt that some form of reformation is on the horizon.

CONCLUSION

Prior to Craigslist's voluntary deactivation of its Adult Services link, the site had repeatedly drawn nationwide attention as a result of numerous crimes that

¹⁹⁴ The Hon. Alex Kozinski, Remarks at the 22nd Annual Media and Law Conference, Kansas City, Mo. (Apr. 17, 2009).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Roger G. Magoc & Tae Hee Lee, *Information Conduits or Content Developers? Determining Whether News Portals Should Enjoy Blanket Immunity from Defamation Suits*, 12 COMM. L. & POL'Y 369, 403 (2007).

¹⁹⁹ Eric Weslander, *Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry*, 48 WASHBURN L.J. 267, 297 (2008).

²⁰⁰ Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U.L. REV. 1285, 1326 (Spring 2007). See *Zeran v. Am. Online*, 129 F.3d 327 (4th Cir. 1997).

²⁰¹ Paul Ehrlich, *Regulating Conduct on the Internet: Communications Decency Act Section 230*, 17 BERKELEY TECH. L.J. 401, 417-19 (2002).

stemmed from postings found on the website. The crimes associated with Craigslist have ranged from “victimless” prostitution to statutory rape, sexual assaults, human trafficking, robbery, and murder. Craigslist, as well as other ISPs, have continually been successful in avoiding legal liability, but it remains unclear whether this trend will continue. If ISPs continue to operate as meeting places for criminals engaged in advertising and soliciting illegal activities, it is quite possible that they will find themselves faced with a number of criminal charges in the near future.

When Section 230 of the CDA was first enacted, courts were unwilling to hold website operators that they deemed to be ISPs liable for any harm resulting from content posted on their sites. In addition, courts used the title ISP liberally to define website operators, rationalizing that Congress’s goal in implementing Section 230 was to ensure free speech via the Internet. However, as time has passed, courts have narrowed their interpretation of the protections provided by Section 230, and have been more willing to hold website operators out as ICPs that do not fall under the Section 230 protections. This shift indicates a desire for balance. Courts want to hold website operators responsible for the damages they cause, and to ensure that government officials are able to do their jobs successfully by punishing these criminal acts, while at the same time avoiding a chilling effect on Internet free speech. Now, in addition to being exposed to more civil lawsuits, ISPs may find that creative prosecutors can succeed in bring criminal charges against websites. Section 230 does not offer any website operators, including those labeled ISPs, immunity from charges that arise out of a breach of a federal criminal statute, nor from any state statute that does not conflict with the CDA.

The most significant changes to the treatment of these websites, especially of ISPs like Craigslist, will stem from the legislative or judicial branches. Considering the ongoing interest in this subject by members of the public, legal commentators, government officials, judges, and legislatures, it is unlikely that things will remain the same. We will undoubtedly begin to see some change to Section 230 and the protections provided to these website operators in the near future, whether it be through legislation or enforcement. Thus, the question is not whether these website operators will be held responsible for liability in the future, but how much responsibility they will be forced to bear.