

**DOES THE COMMUNICATIONS DECENCY ACT PROTECT YOU?**  
**10/26/07**

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# DOES THE COMMUNICATIONS DECENCY ACT PROTECT YOU?

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## I. INTRODUCTION

Web pages are frequently collaborative ventures. Many website operators allow users to post content on their website, and many companies give their employees access to the Web through company computers. The enthusiasm of these providers about such collaborative activities decreases if a third party sues the provider for content on the website or sent through the company's computers. As discussed in this article, the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230, can protect from liability companies that qualify as interactive computer services or users of interactive computer services (this article refers collectively to such services and users as "Intermediaries"), but such protection is subject to many qualifications. For instance, if a court concludes the Intermediary is in fact an "information content provider" of the subject over which the plaintiff is suing, then the CDA does not protect the Intermediary.

It is therefore important for companies operating websites or providing employees with access to the Web to understand the protections afforded by the CDA and the risks remaining in spite of the CDA. This article presents a framework for such analysis, but does not advise companies on how to maximize protection under the CDA, or how to balance business needs against the protections afforded by the CDA. Companies should consult with their counsel for such advice.

Part II of this article discusses who the CDA protects. Part III discusses what protection the CDA provides to Intermediaries. Part IV discusses when an Intermediary becomes the information content provider not protected by the CDA. Part V discusses court decisions indicating that in certain situations the CDA may not protect Intermediaries from liability even though they do not on first glance appear to be information content providers. Part VI provides some concluding observations. This article does not address issues regarding foreign jurisdiction over defamation cases<sup>1</sup> or the satisfaction of foreign judgments in U.S. courts.<sup>2</sup>

## II. WHO THE CDA PROTECTS

### A. The Text

#### 1. prohibitions

There are three different protections provided by the CDA for interactive computer services and users of such services:

§ 230(c)(1)--"**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.**"

§ 230(c)(2)(A)--"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."

§ 230(c)(2)(B)--"No provider or user of an interactive computer service shall be held liable on account of .... (B) any action taken to enable or make available to information content providers or others the technical means to restrict access" to such material. <sup>3</sup>

In applying the CDA, the courts have frequently cited two policies behind the CDA: (1) encouraging wide use of the Internet and (2) encouraging website owners/operators to edit improper content posted on websites without fear of liability.<sup>4</sup> Both policies support giving broad scope to the protections afforded by the CDA.

## 2. definitions

The CDA defines "interactive computer service" to mean "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."<sup>5</sup> The CDA defines "access software provider" to mean "a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content."<sup>6</sup> The CDA does not define "user of an interactive computer service" mentioned in §230(c)(1) and (2). The CDA defines "information content provider" 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."<sup>7</sup>

## 3. pre-emption of state laws

The CDA pre-empts state laws, but only if the state laws are inconsistent with the CDA:

"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 inconsistent with this section."<sup>8</sup>

To take two presumably clear examples, the CDA (a) would not pre-empt a state law imposing taxes on the income of a website owner or operator, but (b) does pre-empt a

state law imposing liability on a website owner or operator as a publisher for merely acting as a conduit for content posted by others.<sup>9</sup>

## **B. Interactive Computer Services And Other Users**

The courts have broadly interpreted “interactive computer services” protected by the CDA to include not just companies that provide access to the Web – internet service providers – but also to include internet auction sites, on-line stores, newsgroups, other web sites,<sup>10</sup> companies allowing employees to access the Web through company computers,<sup>11</sup> and providers of “block lists” identifying servers allegedly promoting spam.<sup>12</sup> Courts have recognized, moreover, that the protections of the CDA also apply to users of interactive computer services, including individuals posting messages on the internet.<sup>13</sup>

In *Donato v. Moldow*<sup>14</sup>, the New Jersey court held that an interactive computer service did not have to provide access to the Internet. It explained that “web site operators do not provide access to the Internet, but that is irrelevant.... According to Schneider’s complaint, Amazon’s web site enables ‘visitors to the site to comment about authors and their work, thus providing an information service that necessarily enables access by multiple users to a server. This brings Amazon squarely within the definition’ of an interactive computer service.”

At least one federal district court, however, has suggested that in order to be an “interactive computer service,” the company must provide access to the Internet. In *800-JR Cigar, Inc. v. GOTO.com, Inc.*<sup>15</sup>, the court rejected the CDA defense of GoTo.com, described as a pay-for-priority search engine, as follows: “GoTo does provide access to the Internet like service providers such as AOL. The only authority cited in support of GoTo qualifying for this designation is an unpublished Superior Court of California case where it was undisputed that eBay qualified as an ‘interactive computer service.’.... The Court does not find that argument persuasive.”<sup>16</sup>

This part of the decision in *J.R. Cigar* does not seem consistent with the text of the CDA that defines “interactive computer service” to mean “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 ....” This definition includes any service that enables computer access to a server. Even though they do not actually provide the user with access to the Internet, company web pages enable users who have gained access to the Internet to access computer servers, in particular the servers of the web host, bringing web sites within the definition of interactive computer service.<sup>17</sup> Moreover, as other courts have pointed out, the CDA protects not only interactive computer services, but users of interactive computer services, and companies with web pages and web hosts by definition would use interactive computer services even if they were not interactive computer services.<sup>18</sup>

### C. Summary

Most frequently the key issue in a CDA case is not whether the defendant is an “interactive computer service,” because the courts generally have interpreted that term broadly. Moreover, even if a court might not consider a company to be an interactive computer service, the company probably is a user of an interactive computer service covered by the CDA. Therefore, the key CDA issue is more often what protection the CDA provides to the interactive computer service or user, so this article places more attention on what, rather than who, the CDA protects.

## III. WHAT THE CDA PROTECTS

### A. Majority Rule: CDA Provides Immunity

#### 1. general test

The majority of courts interpreting the CDA have followed the first appellate case interpreting the CDA, *Zeran v. America Online, Inc.*, a defamation case.<sup>19</sup> In *Zeran*, the Fourth Circuit stated, “By its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”<sup>20</sup> The Fourth Circuit in *Zeran* continued that “§230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions - such as deciding whether to publish, withdraw, postpone or alter content - are barred.”<sup>21</sup>

Recent cases adopting *Zeran* have recognized the above sentence in *Zeran* about a publisher’s role and set forth the following three elements for immunity under §230(c) of the CDA:

- “the defendant is a provider or user of an interactive computer service”;
- “the asserted claims treat the defendant as the publisher or speaker of the information”; and
- “the information is provided by another information content provider.”<sup>22</sup>

This test, however, still leaves a number of questions unanswered, such as whether the immunity as a publisher also extends to immunity as a distributor, discussed next.

#### 2. publisher vs. distributor

In *Zeran* the Fourth Circuit concluded that for purposes of the CDA, there is no difference between a publisher and a distributor. The court noted that Congress had enacted §230 to overrule the state court decision of *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>23</sup> holding an interactive computer service strictly liable as a

publisher of a defamatory statement posted by a third party on an online bulletin board.<sup>24</sup> The Fourth Circuit acknowledged that under common law, publishers could be held liable for a defamatory statement they published without actual knowledge of the statement, whereas distributors could only be held liable if they had notice of the defamatory statements they were distributing.<sup>25</sup> However, the Fourth Circuit concluded that “distributors are considered to be publishers for purposes of defamation law” and are “protected by §230’s immunity.”<sup>26</sup>

Similarly, in *Optinrealbig.com, LLC v. Ironport Systems, Inc.*,<sup>27</sup> the District Court for the Northern District of California said that “the focus on distributor liability is and should be coterminous with the focus on publisher liability: content. Just like a publisher, if a distributor alters the content, then the distributor may be liable.” The court also said, “Under §230, interactive service providers and users cannot be held liable for the republication or distribution of statements provided by any other content provider.”<sup>28</sup> Also, in *Barrett v. Rosenthal*, the California Supreme Court held that the CDA “does not permit Internet service providers or users to be sued as ‘distributors’, nor does it expose ‘active users’ to liability.”<sup>29</sup>

### 3. immunity from what types of claims

The CDA expressly provides it does not apply to any federal criminal statute,<sup>30</sup> intellectual property law violations,<sup>31</sup> state laws consistent with the CDA<sup>32</sup> or the federal Electronic Communications Privacy Act.<sup>33</sup> In *Universal Communication Systems, Inc. v. Lycos, Inc.*, the court said that it was “Expressing no view on the appropriateness of applying §230 immunity to a putative civil claim under 47 USC §223 .... Nor do we express a view on whether the specific exception in §230(e)(1) for federal criminal statutes might apply to analogous state statutes.”<sup>34</sup>

In *Zeran*, the Fourth Circuit said that “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”<sup>35</sup> Courts following *Zeran* have held that the CDA protects interactive computer services and users who are not the information content providers from liability in tort-based claims such as defamation, invasion of privacy, gross negligence and negligence.<sup>36</sup> Courts have also held, however, that the CDA provides immunity from claims under state anti-spam laws,<sup>37</sup> civil actions for violations of federal criminal laws,<sup>38</sup> and state law unfair competition, false advertising and right of publicity claims.<sup>39</sup> In *Noah v. AOL Time Warner*, the District Court for the Eastern District of Virginia held that “this expansive language [in the CDA] grants a broad immunity limited only by specific statutory exclusions...” and concluded that the CDA barred the plaintiff’s federal title II claims.<sup>40</sup>

The majority rule is that if the CDA prevents a particular claim for damages, the CDA also prohibits a request for injunctive relief based on the same claim. In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, the district court did hold that the CDA did not bar all claims for injunctive relief, saying, “§230 was not enacted to insulate government regulation of internet speech from judicial review.... defendants cite no authority to suggest that the ‘tort based’ immunity

to 'civil liability' described by §230 would bar the instant action which is for declaratory and injunctive relief."<sup>41</sup> However, since in order for a court to grant permanent injunctive relief it is necessary for a court to find defendant liable, it is difficult to understand the court's decision in *Loudoun* outside of its special context of a challenge to the constitutionality of the government's regulation of the Internet.<sup>42</sup> Moreover, subsequent to the decision in *Loudoun*, the district court in *Noah* held that when §230 provides immunity, that immunity covers claims for injunctive relief as well as claims for damages.<sup>43</sup> Other decisions subsequent to *Loudoun* have also concluded that CDA immunity precludes injunctive relief as well as damages.<sup>44</sup>

The effect of the CDA on some other claims is not yet clear. For instance, some courts have held that the CDA protects Intermediaries from contract actions.<sup>45</sup> On the other hand, in *Langdon v. Google, Inc.*, the District Court for the District of Delaware held that the CDA provided defendants with "immunity for their editorial decisions regarding screening and deletion from their network," but refused to dismiss the breach of contract claim against Google.<sup>46</sup> In *800-JR Cigar, Inc. v. GOTO.com, Inc.*, the District Court for the District of New Jersey rejected a defense of CDA immunity to a fraud claim, saying, "It is not the purpose of the Act to shield entities from claims of fraud and abuse arising from their own pay-for-priority advertising business, rather than from the actions of third parties."<sup>47</sup>

Except for causes of action specifically exempted from CDA protection, in determining whether CDA immunity might apply, the August 2007 decision of the District Court for the Northern District of Ohio in *Doe v. Sexsearch.com* seems to be the most sensible standard: "the Court should not ask what particular form the plaintiff's claim takes – whether it sounds in tort or specifically alleges defamation..."<sup>48</sup> Instead, the court should determine "whether the claim is directed toward the defendant in its publishing, editorial, and/or screening capacities, and seeking to hold it 'liable for its publication of third-party content or harms flowing from the dissemination of that content.'"<sup>49</sup> If the suit seeks to hold the defendant liable for publishing or distributing content provided by a third party, then the CDA applies, unless the claims fall within one of the express exemptions in the CDA.

This position is consistent with the September 2007 decision of the District Court for the District of Wyoming in *Federal Trade Commission v. Accusearch, Inc.*<sup>50</sup> The FTC accused Accusearch of unfair business practices in violation of 15 U.S.C. §45(a) by obtaining and selling confidential customer phone records without that customer's authorization. Accusearch claimed CDA immunity, arguing that it simply "allowed independent researchers to advertise phone record searches for which Abika.com [the d/b/a of Accusearch] 'merely charges an administrative search fee for the use of its website and search engine.'" The court agreed Accusearch was an interactive computer service and the CDA extended immunity beyond defamation and similar tort-based claims. However, the court concluded that "the present lawsuit does not seek to 'treat' Defendants as a publisher within the meaning of the CDA," so the CDA did not protect Accusearch.<sup>51</sup>

This article next looks at two cases originating in the Seventh Circuit (one a decision of the Seventh Circuit) that suggest the CDA provides narrower protection than the majority of courts have stated. The practical difference between these cases from within the Seventh Circuit and cases from the other circuits appears to be the possibility that under the Seventh Circuit cases state statutes might impose duties on Intermediaries to take down content after the Intermediaries received complaints about the content.

## **B. The Seventh Circuit's Limiting Interpretation**

In *Doe v. GTE Corp.*,<sup>52</sup> college athletes sued a number of defendants in connection with display on the Web of videos of nude athletes in locker rooms taken without the permission or knowledge of the athletes. After a number of procedural maneuvers, the only remaining defendants were the companies providing internet access to, and web hosting services for, the web sites that offered the videos for sale. The athletes sued defendants for violating 18 U.S.C. § 2511, which prohibits persons from intentionally intercepting or willfully disseminating the contents of oral or electronic communications. The district court dismissed the complaint on the grounds that Section 230(c) of the CDA provided immunity to the web host. Plaintiffs appealed, and the Seventh Circuit affirmed, but in doing so questioned the scope of *Zeran* and its progeny.<sup>53</sup>

The Seventh Circuit in *dicta* suggested two alternatives to the holding of immunity in the *Zeran* line of cases:

“Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption? .... On this reading, an entity would remain a ‘provider or user’-and thus be eligible for the immunity under § 230(c)(2)-as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.”<sup>54</sup>

Under this alternative reading (so far adopted by no court), the only protection from liability provided by the CDA might be if an interactive computer service had edited the challenged content (230(c)(2)(A)). It would be a strange policy choice to provide immunity for an Intermediary that took no action to edit offensive content but not to provide equivalent protection for an Intermediary that tried to edit out offensive content

In *GTE*, The Seventh Circuit described the second alternative to the majority interpretation of §230(c)(1)as follows:

“There is yet another possibility: perhaps § 230(c)(1) forecloses any liability that depends on deeming the ISP a ‘publisher’-defamation law would be a good example of such liability...”<sup>55</sup>

Under either of these alternatives, as discussed next, states might be able to impose duties on Intermediaries after publication of the content, and liability if the Intermediaries did not comply with those duties, without being pre-empted by §230(e)(3).<sup>56</sup>

In *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*,<sup>57</sup> the district court adopted the second alternative suggested by the Seventh Circuit in *Doe*. In *Chicago Lawyers' Committee*, a consortium of law firms sued a website operator under the federal Fair Housing Act for publishing on a website advertisements that indicated discriminatory preferences in housing. The court in *Chicago Lawyers' Committee* concluded, "While this language [in §230(c)(1) of the CDA] does not grant immunity *per se* ... it does prohibit treatment as a publisher, which, quite plainly, would bar any cause of action that requires, to establish liability, a finding that an ICS [interactive computer service] published third-party content."<sup>58</sup> The court added that it was "not attempting to define the full contours of the word 'publisher' or what constitutes 'treat[ment] as a publisher.'"<sup>59</sup>

The only difference between the holding in *Chicago Lawyers' Committee* and the three part test derived from *Zeran* and its progeny would appear to be the possibility of state imposed liability on Intermediaries not as publishers but as distributors of the content that already had been published. The court in *Chicago Lawyers' Committee* suggested that "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 required 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))."<sup>60</sup> The court granted Craigslist's motion for judgment on the pleadings, however, because under the facts as pled, "to hold Craigslist liable ... would be to treat Craigslist as if it were the publisher of third party content, and the plain language of Section 230(c)(1) forecloses" such action.<sup>61</sup>

Most court analyses of the CDA has focused on §230(c)(1), and not the express provision in §230(c)(2)(A) regarding good-faith editing of content subsequently displayed on the Web and challenged. The next section examines §230(c)(2)(A).

### **C. Good Faith Editing Qualification To Immunity**

Section 230(c)(2)(A) provides protection to interactive computer services and users for good faith edits of content from third parties. Does this mean there could be more of a risk for interactive computer services/users that edit and then post content from third parties than for services/users that simply post the content unedited? Such increased risk would be contrary to one stated policy of the CDA, which is to encourage the editing of obscene and otherwise objectionable material without the editor incurring liability as a result.<sup>62</sup>

One case in which a New Jersey state court analyzed this good faith provision is *Donato v. Moldow*.<sup>63</sup> Donato, a member of a local government entity, sued a website operator – Moldow – for messages on the website that Donato claimed

constituted defamation, harassment and intentional infliction of emotional distress. The site included a discussion forum in which any user could post messages anonymously. The trial court granted Moldow's motion to dismiss on the ground of immunity under § 230 of the CDA, and the Appellate Division affirmed.

Donato and the other plaintiffs alleged that Moldow was more than a passive publisher. They alleged that he actively participated in editing, deleting and rewriting certain messages on the web site. Moreover, they alleged the anonymity of the discussion forum encouraged the use of harassing, defamatory and obscene messages. The court concluded that whether defendant's conduct facilitated the posting of defamatory messages had no bearing on immunity.<sup>64</sup> The court explained that Moldow's activities were "nothing more than the exercise of the publisher's traditional editorial functions, and did not limit its immunity."<sup>65</sup> The court also held that notice from the authentic party that the material was false or improper did not defeat the immunity.<sup>66</sup> The test was whether Moldow was responsible, in part, for the development of the defamatory content, and the court concluded, "Development requires material substantive contribution to the information that is ultimately published."<sup>67</sup>

The court did agree that Moldow was a content provider with respect to his messages. The court explained, however, that it was not inconsistent for a provider to be an immune interactive computer service for content created by other and posted on a web site by Moldow and a liable information content provider for content it created and posted on that web site.<sup>68</sup>

The court then addressed what it referred to as "the 'good faith' requirement of the good Samaritan provision" [§ 230(c)(2)(A)] and noted the complaint alleged that Moldow had a "long-standing resentment against Donato" and had posted the defamatory messages with actual malice."<sup>69</sup> The court concluded that the good Samaritan provision:

"was inserted not to diminish the broad general immunity provided by § 230(c)(1), but to assure that it *not* be diminished by the exercise of the traditional publisher functions. .... To raise an issue of an absence of good faith, an allegation of conduct outside the scope of the traditional publisher's function would be required."<sup>70</sup>

The reasoning of the court in *Donato* seems sound from a policy perspective. It does not make sense that a website operator would be immune for taking no action to edit a defamatory message posted by someone else on a website, but could be held liable for making a mistake in editing.<sup>71</sup>

A subsequent federal district court decision, *Doe v. MySpace Inc.*,<sup>72</sup> is consistent with *Donato*. Doe sued MySpace for the operation of its social networking website, claimed that she had been sexually assaulted by a person she had met through MySpace.com and alleged negligence, gross negligence, fraud and negligent misrepresentation. Doe claimed CDA immunity was inapplicable "because Plaintiffs have not sued MySpace for the publication of third-party content but rather for failing to

implement basic safety measures to prevent sexual predators from communicating with minors on MySpace.”<sup>73</sup> In addition to concluding MySpace.com was immune under §230(c)(1),<sup>74</sup> the court said, “To the extent Plaintiffs seek to hold MySpace liable for ineffective security measures and/or policies relating to age verification, the Court alternatively finds such claims are barred under §230(c)(2)(A).”<sup>75</sup> The court granted defendant’s motion to dismiss.<sup>76</sup>

The good faith proviso would appear to have a practical effect in one type of situation: when the website operator deletes some content provided by a third party and that deletion makes the remaining content defamatory. For instance, suppose a third party had submitted a statement that “Mr. Jones was not a crook,” and the website operator intentionally deleted “not” from the sentence. If Mr. Jones sued, presumably he could successfully argue that (1) the website operator deleted “not” in bad faith so was not protected under §230(c)(2)(A), or alternatively (2) the website operator materially changed the meaning of the sentence by deleting “not,” thus becoming the information content provider of the remaining sentence and not protected under §230(c)(1). With respect to most editing, however, the issue is more likely to be, did the editing by a website operator cause the operator to become an information content provider, rather than was the operator editing in bad faith.

#### **D. Summary**

The majority of cases hold that §230(c) provides immunity to Intermediaries for suits against them as publishers or distributors for content provided by third parties, but the Supreme Court has not ruled on any CDA issue so far. If a website edits content submitted for publication on the web and then publishes the content, that should not adversely affect the immunity, unless the actual editing changed the content from not defamatory to defamatory. In the Seventh Circuit and the circuits which have not ruled on the CDA,<sup>77</sup> there is an unanswered question of the authority of the states to modify the protections otherwise afforded by the CDA by imposing on Intermediaries duties after defamatory content has been posted and someone tells the Intermediary the content is defamatory.

The issue for which there is much confusion now is when does an Intermediary become an information content provider of the challenged content and thus liable for the content. This article discusses that issue next.

### **IV. WHEN THE CDA DOES NOT PROTECT AN INTERMEDIARY**

#### **A. Introduction**

Determining whether an Intermediary is an information content provider of the challenged content is especially difficult to determine under existing case law. There are two different “tests” for determining when an Intermediary is an unprotected information content provider, including in two Ninth Circuit decisions. Parts B and C below discuss these two different tests.

## **B. If Intermediary Actually Inserts The Content**

In *Carafano v. Metrosplash.com, Inc.*, a commercial internet dating service had posted a series of questions for users to fill out and then posted the answers on the Web.<sup>78</sup> One user falsely entered information, pretending to be a well known actress, and that information was defamatory. The actress sued, but the Ninth Circuit held that Matchmaker (the operator of Metrosplash.com) was immune, even though Matchmaker had created the questionnaire completed by the user and reviewed photos, but not text, for impropriety before posting the profiles. The plaintiff argued that Matchmaker's detailed series of questions influenced the user to provide certain answers and that Matchmaker was therefore the information content provider.

The Ninth Circuit rejected that argument for liability: "Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. . . . Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph"<sup>79</sup> The court added that Matchmaker "did not play a significant role in creating, developing or 'transforming' the particular information at issue"<sup>80</sup> .

In *Prickett v. InfoUSA, Inc.*, plaintiffs sued InfoUSA in federal court in Texas for the listing of their names, addresses and telephone numbers on three different websites without their consent.<sup>81</sup> Plaintiffs argued InfoUSA was liable for defamation, invasion of privacy and intentional infliction of emotional distress. The court concluded InfoUSA was immune from suit under the provisions of the CDA. The court described InfoUSA as a compiler of proprietary databases that captured information about businesses and consumer households in the United States and Canada. InfoUSA used many sources to compile the information, including information received over the Web from anonymous third parties. InfoUSA regularly disseminated its database information to customers and the general public.

Plaintiffs argued that InfoUSA's database gathering system prompted third parties to select subcategories for entry onto the database, and that such prompting made InfoUSA an information content provider. The court in *Prickett* rejected that argument, stating that although the content was formulated in response to InfoUSA's prompts, the actual "selection of the content was left exclusively to the user."<sup>82</sup>

The plaintiffs in *Prickett* also argued that InfoUSA operated as an information content provider when it assured the accuracy of its listings through its verification process. However, the court rejected that argument, saying verification was a typical function of a publisher, and the CDA provided publishers with immunity. Plaintiffs further argued that InfoUSA held itself out as an information content provider, but the court said that was irrelevant. The issue was not whether in certain situations InfoUSA was an information content provider, but whether InfoUSA was the information content provider for the particular information over which the plaintiffs sued. In *Prickett*, the complaint concerned information provided by third parties, and InfoUSA "did not

play a significant role in creating or developing the information at issue.”<sup>83</sup> The court granted InfoUSA’s motion for summary judgment.

Other courts have similarly concluded that the exercise of typical editing functions did not cause an immune interactive computer service or user from becoming a liable information content provider even though the actions encouraged or highlighted the challenged content.<sup>84</sup> In *Blumenthal v. Drudge*, moreover, the District Court for the District of Columbia concluded that AOL was immune under the CDA for columns posted on AOL that were written by Matt Drudge, even though AOL paid Drudge \$36,000 a year and AOL “affirmatively promoted Drudge as a new source of unverified instant gossip on AOL.”<sup>85</sup>

The above cases suggest a two part test to determine an information content provider. First, if the Intermediary has not in fact added any content to what was provided by the third party, the provider/user is immune under the CDA. Second, even if the Intermediary added some challenged content, the courts in *Carafano* and *Prickett* appeared to suggest that if the additions were not a significant part of the challenged content, the Intermediary may still have immunity under the CDA. However, there are some cases, discussed next, in which courts have concluded that influencing the challenged content was sufficient to make the Intermediary the information content provider.

### **C. If Intermediary Influences The Content**

#### **1. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC,**

##### **a. The facts in Fair Housing Council**

The recent Ninth Circuit decision in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC.*, in which the three judges on the panel reached three different decisions, reflects the difficulty that can arise in determining whether an interactive computer service is an information content provider of the challenged information.<sup>86</sup> Indeed, *Fair Housing Council* distinguished the Ninth Circuit’s earlier holding in *Carafano*, discussed above.

Plaintiff Fair Housing Council sued Roommate.com, LLC (“Roommate”) for operating an online roommate matching service that the Fair Housing Council claimed violated the federal Fair Housing Act’s prohibition against discrimination in housing.<sup>87</sup> The district court granted summary judgment for Roommate.com based on immunity under the CDA,<sup>88</sup> but the Ninth Circuit reversed, concluding that Roommate.com was only immune under the CDA for one of the three challenged actions.

The majority opinion of the Ninth Circuit, written by Judge Kozinski, identified three separate ways in which plaintiff claimed Roommate.com was the information content provider of the challenged material. The first was:

“(1) it posts the **questionnaires** on its website and requires individuals who want to take advantage of its services to complete them.”<sup>89</sup>

For the questionnaires, Roommate not only provided the specific questions, but a multiple choice list of answers.<sup>90</sup> The second challenged action of Roommate was:

“(2) it posts and distributes by email its **members’ profiles**.”<sup>91</sup>

Roommate generated the profiles from the users’ answers to the questionnaires, with only minor changes, and Roommate then channeled various parts of the information provided only to certain other users, depending on the preferences of the other users.<sup>92</sup> The third challenged action of Roommate was:

“(3) it posts the information its members provide on the **‘Additional Comments’ form**.”<sup>93</sup>

The Additional Comments form was a blank text box that “suggests no particular information that is to be provided by members; Roommate certainly does not prompt, encourage or solicit any of the inflammatory information provided by some of its members. Nor does Roommate use the information in the ‘Additional Comments’ section to limit or channel access to listings.”<sup>94</sup>

b. The three competing opinions

Each judge on the panel wrote a separate opinion, with each opinion drawing different conclusions. This article therefore examines the opinions by the three different types of content analyzed by the opinions: questionnaires, member profiles and additional comments form.

Questionnaires – not immune (by 3-0 vote)  
Kozinski, Ikuta and Reinhardt

Judges Kozinski, Reinhardt and Ikuta agreed that Roommate was the information content provider of the completed questionnaires, “because it ‘creat[ed] or develop[ed]’ the forms **and** answer choices. As a result, Roommate is a content provider of these questionnaires and does not qualify for CDA immunity for their publication.”<sup>95</sup> It appears the fact that Roommate prepared not simply the forms but also the answers were crucial.

Profiles – not immune (by 2-1 vote)  
Kozinski and Reinhardt v. Ikuta

On the issue of the profiles posted by Roommate.com, Judge Kozinski suggested two reasons Roommate.com was not immune. First, Roommate solicited the specific information provided by the user.<sup>96</sup> Second, Roommate selectively inserted

information from the questionnaires into profiles and sent these profiles to certain users based on preferences of the users, so the information was not available to all.<sup>97</sup> Judge Reinhardt agreed.

Judge Ikuta adopted the more limited *Carafano* view of when someone became an information content provider: “The fact that some of the content was formulated in response to Matchmaker’s questionnaire does not alter this conclusion.... However, the selection of the content was left exclusively to the user.... Unless a website operator directly provides ‘the essential published content’ ... it is not an ‘information content provider.’”<sup>98</sup> Judge Ikuta concluded that even though it influenced the content, Roommate.com was not an information content provider, because ultimately “the selection of the content was left exclusively to the user.”<sup>99</sup>

Additional Comments – immune (by different 2-1 vote)  
Kozinski and Ikuta vs. Reinhardt

The difference in opinion over the Additional Comments form revolved around whether a court should look at the Additional Comments (1) separately from the profiles and questionnaires or (2) together with the profiles and questionnaires. Judges Kozinski and Ikuta looked at the Additional Comments separately from the other content and concluded Roommate.com was not the information content provider for the Additional Comments sections.<sup>100</sup>

In contrast, Judge Reinhardt wrote that looking at the entire content on the website was appropriate in order to determine if Roommate was an information content provider of the Additional Comments.<sup>101</sup> Looking at the entire content resulted in his conclusion that the suggestions and channeling of information in the other comments caused Roommate to be an information content provider of the Additional Comments section as well.

**2. Hy Cite and Accusearch**

The possibility of liability for soliciting objectionable content finds support in *Hy Cite Corp. v. badbusinessbureau.com*.<sup>102</sup> In federal district court in Arizona, Plaintiff Hy Cite sued website operators for posting consumer complaints that Hy Cite claimed were false and defamatory. The website described itself as “a worldwide consumer reporting Website & Publication, by consumers, for consumers, to file & document complaints about Companies or Individuals who rip off consumers.”<sup>103</sup> The court rejected defendants’ claim of CDA immunity and denied defendants’ motion to dismiss (to the extent the motion was based on the CDA) on two grounds:

- (1) [Defendant’s] “argument ignores Plaintiff’s allegations that wrongful content appears on the Rip-Off report website in editorial comments created by Defendants and titles to Rip-Off Reports which Defendants allegedly provide.”

- (2) “Plaintiff further allege that Defendants ‘solicit individuals to submit reports with the promise that individuals may ultimately be compensated for their reports.’”<sup>104</sup>

The court held that these allegations could support a finding that defendants were responsible for the creation or development of the challenged content, so denied defendants’ motion to dismiss.<sup>105</sup>

The possibility of liability for soliciting objectionable content also finds support in *Federal Trade Commission v. Accusearch*, discussed above in III.A.3. In *Accusearch*, the district court found that “by soliciting requests for such phone records and purchasing them for resale, Defendants ‘participat[ed] in the creation or development of [the] information, and thus [do] not qualify for §230 immunity,” quoting in part note 4 in *Ben Ezra, Weinstein & Co. v. America Online*.<sup>106</sup> However, the court took the quote out of context, because in *Ben Ezra* the Tenth Circuit held the that defendant was immune under the CDA. Also, note 4 in *Ben Ezra* stated the position of defendant and was not a holding of the court: “Defendant conceded that in an appropriate situation, an interactive computer service could also act as an information content provider by participation in the creation or development of information, and thus not qualify for immunity.”<sup>107</sup>

The court in *Accusearch* held that the challenged information was not provided by another information content provider, because, “Where a defendant contributes to and shapes the content of the information at issue, there is no immunity under the CDA.”<sup>108</sup> While declaring that an Intermediary who contributes to defamatory content is an information content provider is consistent with *Carafano*, it does not seem consistent with *Carafano* to state that an Intermediary who “shapes” defamatory content of a third party is an information content provider.<sup>109</sup>

The decision in *Accusearch* on this issue, moreover, seems inconsistent with the decision in *Blumenthal v. Drudge*, discussed above at IV.B. In *Blumenthal*, the district court held AOL was not an information content provider and was immune under the CDA, even though AOL had paid Drudge for preparing the challenged reports and had promoted the Drudge reports. The arguable distinction between the two decisions on what constitutes an information content provider is that in *Accusearch* the defendant knew it was paying for information obtained improperly, whereas perhaps in *Blumenthal* AOL was not paying Drudge for any specific reports and did not know the reports it paid for were defamatory.

#### **D. Summary**

The fact that an Intermediary is an information content provider for some content on the Web does not eliminate immunity for that Intermediary if the plaintiff is suing about different content, content provided by a third party. In order to be liable under the CDA, the Intermediary must be the provider of the content challenged in the litigation.<sup>110</sup>

A person is not the provider of the challenged content simply because it is an interactive computer service that allows the posting of, or actually posts, defamatory messages on the web prepared by someone else.<sup>111</sup> Moreover, the person should be immune under the CDA even if he has notice that the message is defamatory, except perhaps in cases filed in courts within the jurisdiction of the Seventh Circuit.

Once a website operator starts adding content, then if that content is challenged as being actionable, the operator will probably have no immunity under the CDA for the content he added.<sup>112</sup> Although the California Supreme Court in *Barrett v. Rosenthal* held the CDA provided broad immunity, it recognized, "At some point, active involvement in the posting would expose a defendant to liability as an original."<sup>113</sup> The more an operator fiddles with text/pictures received from third parties, the more likely some court will conclude the operator has become an information content provider for the challenged content and potentially liable.

The clearly conflicting positions of the three judges on the *Fair Housing Council* panel, and the apparent conflict between the majority in *Fair Housing Council* and the decision in *Carafano*, make it impossible describe a single standard for when an Intermediary becomes an information content provider in the Ninth Circuit when an Intermediary . Moreover, the standard of the majority in *Fair Housing Council* that influencing content can cause an Intermediary to lose immunity under the CDA is an extremely difficult standard to administer. How much influence is enough the cause an Intermediary to become an information content provider and lose immunity?

On October 12, the Ninth Circuit ordered that *Fair Housing Council* be reheard en banc. In its decision, the Ninth Circuit en banc panel should be consistent with the intent of Congress in enacting the CDA and the majority of other federal cases, including *Carafano*. The panel should confirm a standard that courts can manage and that can meaningfully guide Intermediaries in their conduct -- an Intermediary only becomes the information content provider by actually inserting content challenged by the plaintiff.<sup>114</sup>

## **V. ADDITIONAL RISKS TO A CDA DEFENSE**

In spite of the language in *Zeran* and related cases about immunity from liability for information provided by third parties, courts may find exceptions to immunity or may find distinguishing facts warranting liability in the court's view, even though the Intermediary did not create the challenged conduct. This may be the result of actions of the Intermediary before or concurrent with the posting of the content. Perhaps more frequently it may arise when the conduct – or failure to act – occurs after the posting from the third party. In some of these situations it could be argued that the court is simply treating the Intermediary as the information content provider. In some cases the courts may conclude the plaintiff is not treating the Intermediary as a publisher or distributor, so the CDA does not bar the suit. The cases do not fit into an easy category, and Intermediaries and their counsel should be aware of them.

### **A. Knowingly Posting Information Without Authority**

If someone posts on the Web content provided by a third party, but the person posting the information should have known the person creating the information did not intend the information to be posted, the person posting the content may not have immunity even though he did not create the information. In *Batzell v. Smith*, the Ninth Circuit did hold that the operator of a website about stolen art was immune from liability,<sup>115</sup> but discussed a situation in which a website operator could be liable even though he did not create the content. The Ninth Circuit said that “a service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other interactive computer service.”<sup>116</sup>

The Ninth Circuit added, however, “If Cremers should have reasonably concluded, for example, that because Smith’s e-mail arrived via a different e-mail address it was not provided to him for possible posting on the listserv, then Cremers cannot take advantage of the § 230(c) immunities.”<sup>117</sup> In other words, if Cremers should have known the sender had not intended the information to be posted on the Web, the posted information was not “provided” by another “information content provider” within the meaning of § 230.<sup>118</sup> Although the court did not expressly say so, a logical conclusion would be that the Intermediary had been the information content provider.

### **B. Independent Federal Obligation To Act**

In *Avery v. Idleaire Technologies Corp.*, a former employee of Idleaire Technologies Corp. sued Idleaire in federal district court in Tennessee for sexual harassment, hostile work environment and related claims. Among other things, pornographic pop-ups had appeared on computer screens used by plaintiff while an employee.<sup>119</sup> The plaintiff “testified that she had complained about the pop-ups ‘over the months’ but that nothing had ever been done.”<sup>120</sup> The court rejected Idleaire’s argument that the CDA “prohibits any federal or state claim that seeks to hold an employer that provides computer systems to its employees for use on the job from being held liable based upon the content of the information ‘provided by another information content provider.’”<sup>121</sup>

Unfortunately, the court in *Avery* did not explain its reasoning to provide guidance for future cases, or cite any authority, and the decision may not be consistent with the decision in *Noah v. AOL Time Warner* that the defendant was immune from a Title II claim.<sup>122</sup> On the other hand, the decision makes sense, since liability in *Avery*, if any, would ultimately be based not on publication of the material on the computer screen (even assuming display on one computer screen could be deemed a publication under the CDA), but on the reaction of the defendant – or failure to react – after the prospective plaintiff had notified defendant of the objectionable material on the computer screens.

A related significant distinction between the context in *Avery* and the more typical CDA case is that 42 USC §2000e-2(a)(i)(Title VII) imposes an independent federal obligation on employers to prevent a hostile work environment, so the plaintiff did not have to rely on the CDA for a duty to take down sexually offensive messages. Put another way, an element of the cause of action for sexual harassment is not the publication of any specific content, but the existence of a workplace that “is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>123</sup>

### **C. Ratification or Aiding and Abetting**

In *Delfino v. Agilent Technologies, Inc.*, Delfino received threatening e-mail messages, and other threatening messages had been posted on Internet bulletin boards.<sup>124</sup> Plaintiff traced the e-mails and postings to an employee of Agilent, who Agilent subsequently fired. Delfino sued Agilent. The court granted Agilent’s motion for summary judgment, based on the immunity provided by the CDA.<sup>125</sup> Although granting summary judgment, the court acknowledged that under different facts, Agilent could have been liable under a theory of ratification:

“An employer may be liable for an employee’s willful and malicious actions under principles of ratification.... An employee’s action may be ratified after the fact by the employer’s voluntary election to adopt the employer’s conduct by, in essence, treating the conduct as its own.”<sup>126</sup>

One example the court gave of evidence that could support a claim of ratification – absent in *Delfino* – was “failure to discharge an employee after knowledge of his or her wrongful acts.”<sup>127</sup> There was no evidence that Agilent had ratified the threats of the former employee, so the court rejected Delfino’s claim of ratification.

In *Batzell v. Smith*, however, the Ninth Circuit broadly rejected a claim of ratification.<sup>128</sup> The court concluded, “Although a principal is liable when it ratifies an originally unauthorized tort, the principal – agent relationship is still a requisite, and ratification can have no meaning without it.” Ratification may be more likely to be applicable in an employer/employee situation, such as *Avery*, where for some purposes an employee is an agent of the employer.

Even if a defendant could not be deemed to have ratified an act of a third party, a plaintiff might make a slightly different argument to try to circumvent CDA immunity. A plaintiff might argue he is seeking to hold the defendant liable not for publishing the challenged content, but for aiding and abetting the person who created the challenged content.<sup>129</sup> On the other hand, at least one court has expressed doubt that Intermediaries would lose the protections of the CDA if they only acted with “culpable assistance” without actually being the information content provider.<sup>130</sup>

#### **D. Other Subsequent Actions Of Defendant**

Recently in *Anthony v. Yahoo! Inc.*, the district court rejected a motion to dismiss a plaintiff's claims against Yahoo! for fraud and negligent misrepresentation in connection with two on-line dating services of Yahoo!.<sup>131</sup> Plaintiff alleged that Yahoo! (1) created false profiles of others "to trick people like Anthony into joining the service and renewing their membership"; and (2) circulated legitimate profiles of individuals whose subscriptions had expired, "giving the misleading impression that these individuals are still available for dates."<sup>132</sup> The court rejected the argument that Yahoo! was immune with respect to the allegedly false profiles, because Yahoo! was alleged to have created them and thus would be an information content provider.<sup>133</sup>

The court also rejected the claim of immunity with respect to the claim of the expired profiles: "Because Anthony posits that Yahoo's manner of presenting the profiles – not the underlying profiles themselves – constitutes fraud, the CDA does not apply."<sup>134</sup> In *Anthony*, the defendant had actually circulated the expired profiles to subscribers to try to lure them into renewing subscriptions. Arguably this claim against circulating to subscribers the expired profiles after the initial publication of the profiles was not treating the defendant as a publisher, but as someone intentionally making misrepresentations to third parties.

#### **E. Summary**

The question for an Intermediary is not simply whether plaintiff is suing the Intermediary as a publisher and whether a third party actually prepared the challenged content. If federal law imposes specific obligations on an Intermediary, especially obligations not based on publication by the Intermediary, a court may conclude – as the court did in *Avery* - that the CDA does not provide immunity.

In addition, if a defendant: took affirmative steps subsequent to publication that supported the content, or if defendant improperly obtained the content, such actions could cause a court to find there is no immunity under the CDA. Such actions could cause a court to conclude that: (1) by such actions the defendant ratified the content from the third party, (2) such actions caused the defendant to become the information content provider; or (3) such actions made the defendant liable for aiding and abetting the information content provider. .

#### **VI. CONCLUSION**

The CDA generally provides immunity to an Intermediary from liability for state law claims when a plaintiff sues the Intermediary for its actions that are typical of publishers or distributors, when third parties created the challenged content.

To the extent an Intermediary changes content provided by third parties, and a plaintiff brings a suit challenging that changed content, a court is likely to find the Intermediary to be an information content provider of the challenged content not immune under the CDA.

To be consistent with the majority of other federal courts and the policies behind the CDA and to implement a standard that courts can reasonably apply and that can meaningfully guide Intermediaries, the Ninth Circuit's en banc panel in *Fair Housing Counsel* should hold that only when the Intermediary actually creates the challenged information will the Intermediary be the information content provider.

Of course, even with such a standard for determining an information content provider, the CDA will not protect a company from all content posted by third parties, such as content infringing the federal intellectual property rights of others. Once a third party claims that content (a) posted on a company's web site by someone else or (b) sent through the company's computer system violates the rights of the third party, the company should consult with its counsel or otherwise have a policy of evaluating the complaint to determine if the company should take any remedial action with respect to the content.

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Romero E. Lawrence

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<sup>1</sup> In *Dow Jones and Company Inc v Gutnick*, 2001 VSC 305 (28 August 2001), a claim was brought in an Australian court alleging that Dow Jones had defamed Gutnick by publishing an article on its subscriber-based website. Dow Jones defended asserting that publication occurred when the material was uploaded from the company's server in New Jersey, thus New Jersey had jurisdiction. The Supreme Court of Victoria disagreed, holding that the article was published in Victoria when downloaded by persons in Victoria and that the court had jurisdiction. See <http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.rtf>, accessed 10/23/2007. The High Court of Australia dismissed the appeal, stating at p. 18, "In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily, then, that will be the place where the tort of defamation is committed." 2002 HCA 56 (10 December 2002). See [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2002/56.rtf](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.rtf), accessed 10/23/2007.

<sup>2</sup> See New York's Uniform Foreign Money - Judgment Recognition Act (NY CPLR Article 53)

<sup>3</sup> (Emphasis added). The part of subparagraph not quoted refers to "material described in paragraph (1), but notes to the section in the U.S.C.A. state, "Probably should be 'subparagraph (A).'" Subparagraph 2(B) has rarely been the subject of court discussion and is not analyzed in this article. For one state court case analyzing this section, however, see *Pallorium, Inc. v. Jared*, 2007 WL 80955 (Cal.App. 4 Dist. 2007) and note 12 below..

<sup>4</sup> Among other things, 47 U.S.C. § 230(b) provides that the policy of the United States is "(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulations; .... (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material...." See also *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-331 (4<sup>th</sup> Cir. 1997); *Ben Ezra, Weinstein, and Company, Inc. v. America Online, Inc.*, 206 F.3d 980, 985-986 (10<sup>th</sup> Cir. 2000); *Green v. America Online (AOL)*, 318 F.3d 465, 471-472 (3<sup>rd</sup> Cir. 2003); *Batzell v. Smith*, 333 F.3d 1018, 1027-1028 (9<sup>th</sup> Cir. 2003); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-419 (1<sup>st</sup> Cir. 2007); *Doe v. SexSearch.com*, No. 3:07 CV 604, 2007 WL 2388913, \*6 (N.D. Ohio, Aug. 22, 2007); and *Dimeo v. Max*, 433 F.Supp. 2d 523, 528-529 (E.D. Pa., 2006).

<sup>5</sup> 47 USC §230(f)(2) (Emphasis added).

<sup>6</sup> 47 U.S.C. § 230(f)(4).

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<sup>7</sup> 47 USC §230(f)(3)(Emphasis added).

<sup>8</sup> 47 U.S.C. § 230(e)(3).

<sup>9</sup> For instance, in *Barnes v. Yahoo!, Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, \*3 (D.Ore., 2005), the court held that § 230 pre-empted plaintiff's claims that defendant could be held liable for breach of "a common law or statutory duty to block, screen, remove, or otherwise edit" content that appeared on defendant's website. In *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md., 2006), the district court agreed that the CDA pre-empted any attempt to hold defendant, an interactive computer service provider, liable under the Maryland Commercial Electronic Mail Act.

<sup>10</sup> *Batzel v. Smith*, 333 F.3d 1018, 1030, ns. 15 & 16 (9<sup>th</sup> Cir. 2003); *Ben Ezra*, 206 F.3d at 985; *Zeran*, 129 F.3d at 330; *Blumenthal*, 992 F.Supp. at 49-50; and *Carafano v. Metrosplash.com, Inc.*, 207 F.Supp.2d 1055, 1065-66 (C.D.Cal., 2002), aff'd 339 F.3d 1119 (9<sup>th</sup> Cir. 2003); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500-1 (E.D.Pa., 2006) aff'd 2007 WL 1989660 (3rd Cir. 2007); *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 831 & n. 7 (2002); *Schneider v. Amazon.com*, 31 P.3d 37, 40-41 (Wash. App., 2001); *Barrett v. Clark*, No. 833021-5, 2001 WL 881259, at \*9 (Cal.Super., July 25, 2001).

<sup>11</sup> *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App.4<sup>th</sup> 790 (2006).

<sup>12</sup> *Pallorium, Inc. v. Jared*, No. G036124, 2007 WL 80955 (Cal.App. 4 Dist., Jan. 11, 2007). Not surprisingly, the opposing parties in *Pallorium* characterized the services of Jared differently. Pallorium characterized the service as nothing more than a list, whereas the court accepted Jared's characterization as a list related to software, and thus "a technical means to restrict access." *Id.* at \*8. If the case had only involved a list incorrectly identifying Pallorium as a spammer, it is unclear whether the court would have concluded that Jared had provided the technical means to restrict access, thus qualifying for immunity under 230(c)(2)(B). However, even if Jared had not provided technical means, presumably Jared would still have qualified as an interactive computer service, and may have qualified for immunity under 230(c)(1) or, with a finding of good faith, for immunity under 230(c)(2)(A).

<sup>13</sup> *Batzel v. Smith*, 333 F.3d 1018, 1030 (9<sup>th</sup> Cir. 2003); and *Barrett v. Rosenthal*, 146 P.3d 510 (Cal., 2006).

<sup>14</sup> 865 A. 2d 711, 719 (N.J.Super.A.D., 2005), quoting from *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40 (Wash. App. Div. 1, 2001).

<sup>15</sup> 437 F.Supp.2d 273 (D.N.J., 2006).

<sup>16</sup> *Id.* at 295. The California case cited was *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637, at \*1 (Cal.Super., 2000).

<sup>17</sup> See *Dimeo v. Max*, 433 F. Supp. 2d 523, 529 (E.D.Pa., 2006) ("Because it is a 'service' that 'enables computer access' by multiple users to a computer server... Max's website is a 'provider'.")

<sup>18</sup> *Id.* at 530 ("for Max's website to exist, it must access the Internet through some form of interactive computer service; otherwise, the public cannot view it. Thus, his website is also the user of an interactive computer service.")

<sup>19</sup> 129 F.3d 327 (4<sup>th</sup> Cir. 1997). See the following federal cases cited for this proposition by the court in *Chicago Lawyers' Committee for Civil Rights Under the Law v. Craigslist*, 461 F.Supp.2d 681, 689, n. 6 (N.D.Ill. 2006); *Green v. America Online (AOL)*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1031 n. 18 (9<sup>th</sup> Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-25 (9<sup>th</sup> Cir. 2003); *Ben Ezra, Weinstein, and Company, Inc. v. America Online, Inc.*, 206 F.3d 980, 984-85 (10<sup>th</sup> Cir. 2000); *Blumenthal v. Drudge*, 992 F.Supp. 44, 51-52 (D.D.C., 1998); *Parker v. Google, Inc.*, 422 F.Supp.2d 492, 500-01 (E.D.Pa., 2006); *Dimeo v. Max*, 433 F.Supp.2d 523, 530-31 (E.D.Pa., 2006); *Whitney Information Network, Inc. v. Verio, Inc.*, No. 2:04CV462FTM29SPC, 2006 WL 66724, \*2-3 (M.D.Fla. Jan. 11, 2006); *Associated Bank-Corp. v. Earthlink, Inc.*, No. 05-C-0233-S, 2005 WL 2240952 (W.D. Wis. Sept. 13, 2005); *Morrison v. American Online, Inc.*, 153 F.Supp.2d 930, 932-934 (N.D.Ind., 2001); *Barnes v. Yahoo!, Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, \*2-3 (D.Or., Nov. 8, 2005); *Landry-Bell v. Various, Inc.*, No. Civ.A. 05-1526, 2005 WL 3640448, \*1-3 (W.D. La., Dec. 27, 2005); *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1117-18 (W.D. Wash., 2004); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, \*7-8 (N.D. Tex., Apr. 19, 2004); *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 537-38 (E.D. Va., 2003); *Smith v. Intercosmos Media Group, Inc.*, No. Civ.A. 02-1964, 2002 WL 31844907, \*3-4 (E.D. La., Dec. 17, 2002); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F.Supp.2d 1069, 1071 (D.S.D., 2001); *Marczeski v. Law*, 122

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F.Supp.2d 315, 327 (D. Conn., 2000); and *Novak v. Overture Services, Inc.*, 309 F.Supp.2d 446, 452-453 (E.D.N.Y., 2004).

<sup>20</sup> 129 F.3d. at 330 (Emphasis added).

<sup>21</sup> *Id.* (Emphasis added).

<sup>22</sup> *Parker v. Google*, No. 04-cv-03918, 2007 WL 1989660, \*4 (3<sup>rd</sup> Cir. July 10, 2007). Accord, *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1<sup>st</sup> Cir. 2007); *Doe v. SexSearch.com*, No. 3:07 CV 604, 2007 WL 2388913, \*4 (N.D. Ohio, Aug. 22, 2007); and *Dimeo v. Max*, 433 F.Supp. 2d 523, 529 (E.D. Pa., 2006).

<sup>23</sup> 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

<sup>24</sup> 129 F.3d. at 331. See also *Dimeo v. Max*, 433 F. Supp. 2d 523, 529 (E.D. Pa., 2006), and 4 U.S. Code Congressional and Administrative News, 104<sup>th</sup> Congress, Second Session 1996, p. 208.

<sup>25</sup> 129 F.3d at 331 and 332.

<sup>26</sup> *Id.* at 332. The court said, "Assuming *arguendo* that Zeran has satisfied the requirements for imposition of distributor liability, this liability is merely a subset, or a species, of publisher liability and is therefore also foreclosed by §230." *Id.*

<sup>27</sup> 323 F.Supp.2d 1037, 1046 (N.D. Cal., 2004).

<sup>28</sup> *Id.* at 1044.

<sup>29</sup> 40 Calif. 4<sup>th</sup> 33, 77 (Cal., 2006). The court clearly included individual users in this immunity, saying: "the congressional purpose of fostering free speech on the Internet supports the extension of section 230 immunity to active individual 'users'... there is no basis for ... any operative distinction between 'active' and 'passive' Internet use.... Congress has comprehensively immunized republication by individual Internet users." *Id.* See also *Patent Wizard, Inc. v. Kinkos, Inc.*, 163 F. Supp. 2d 1069, 1071 ("Congress meant to insulate distributors as well as publishers from liability for defamation"); and *Blumenthal v. Drudge*, 992 F.Supp. 44, 52 (D.D.C., 1998)("Any attempt to distinguish between 'publisher' liability and notice-based 'distributor' liability and to argue that Section 230 was only intended to immunize the former would be unavailing.").

<sup>30</sup> 47 USC §230(e)(1).

<sup>31</sup> 47 USC §230(e)(2). See *Perfect 10, Inc. v. CCBill, LLC*, 340 F.Supp. 2d 1077, 1108 (C.D. Cal., 2004) (unfair competition, false advertising and right of publicity claims pre-empted, but federal trademark infringement claims not pre-empted); and 2007 WL 925727, \*12 (9<sup>th</sup> Cir. March 29, 2007) ("we construe the term 'intellectual property' to mean 'federal intellectual property'"). See also *Gucci America, Inc. v. Hall & Associates.*, 135 F.Supp.2d 409, 413 (S.D.N.Y. 2001) (federal trademark infringement claims not pre-empted) and *Ford Motor Co. v. GreatDomains.com, Inc.*, No. 00-CV-71544, 2001 WL 1176319, \*1 (E.D. Mich., Sept. 25, 2001) (federal trademark infringement claims not pre-empted). In *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11<sup>th</sup> Cir. 2006), the court said the right of publicity was a type of intellectual property right, but did not draw a conclusion on whether the CDA would pre-empt breach of right of publicity claims against Intermediaries.

<sup>32</sup> 47 USC §230(e)(3).

<sup>33</sup> 47 USC §230(e)(4).

<sup>34</sup> 478 F.3d 413, 422 (1<sup>st</sup> Cir. 2007). Although the court expressed no view, if there is a state criminal statute that is identical to a federal statute, it seems the state statute would be consistent with the federal statute and therefore, under §230(e)(3), would not be pre-empted by the CDA. At least one court has concluded that the CDA provides immunity for Intermediaries from civil actions based on violation of federal criminal laws. See *Doe v. Bates* at n. 22 below.

<sup>35</sup> 129 F.3d at 330.

<sup>36</sup> *Zeran v. America Online*, 129 F.3d 327 (4<sup>th</sup> Cir. 1997) (defamation); *Parker v. Google*, No. 06-3074, 2007 WL 1989660 (3<sup>rd</sup> Cir. July 10, 2007) (defamation, invasion of privacy and negligence); and *Doe v. MySpace Inc.*, 474 F.Supp.2d 843 (W.D. Tex., 2007) (negligence and gross negligence).

<sup>37</sup> *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F.Supp.2d 523 (D. Md., 2006).

<sup>38</sup> *Doe v. Bates*, 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex., Dec. 27, 2006).

<sup>39</sup> *Perfect 10, Inc. v. CCBill LLC*, No. 04-57143, 2007 WL 925727 (9<sup>th</sup> Cir. March 29, 2007).

<sup>40</sup> 261 F. Supp. 2d 532, 539 (E.D. Va., 2003) aff'd 2004 WL 602711 (4<sup>th</sup> Cir. 2004).

<sup>41</sup> 2 F.Supp.2d 783, 790 (E.D. Va., 1998). The plaintiffs were an association, and ten individual plaintiffs who were patrons of the public libraries of Loudoun county. The Board of Trustees adopted a policy on

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Internet sexual harassment that required the installation of certain site-blocking software to be installed on library computers, and plaintiffs claimed that the policy illegally blocked their access to protected speech. Defendants in part claimed immunity under §230(c)(2).

<sup>42</sup> See n. 6 in *Noah*, 261 F. Supp. 2d at 539.

<sup>43</sup> 261 F. Supp. 2d at 539-540.

<sup>44</sup> See also *Ben Ezra, Weinstein, and Company, Inc. v. America Online*, 206 F.3d 980, 983-986 (10<sup>th</sup> Cir. 2000); *Smith v. Intercosmos Media Group, Inc.*, No. Civ.A. 02-1964, 2002 WL 31844907, \*\*4 & 5 (E.D. La., Dec. 17, 2002); and *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 692 (2001).

<sup>45</sup> See *Schneider v. Amazon.com, Inc.*, 31 P 3d 37, 41-42 (Wash. App. Div., 2001); and *Jane Doe One v. Oliver*, 755 A.2d 1000, 1002 & 1004 (Conn. Super., 2000).

<sup>46</sup> 474 F.Supp.2d 622, 631 & 633 (D.Del., 2007). The court granted the motions to dismiss the breach of contract claims against Yahoo and Microsoft for failure to allege the existence of a contract. In *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3<sup>rd</sup> Cir. 2003), the court did not accept plaintiff's argument that defendant had waived its immunity as the result of a term in a membership contract, but this apparent conclusion of non-waiver is different than concluding that CDA immunity applies to breach of contract actions.

<sup>47</sup> 437 F.Supp.2d 273, 295 (D.N.J., 2006). The court could easily have concluded the defendant was the information content provider in *Cigar*, since GoTO.com affirmatively sold the challenged adwords. In other words, the court did not have to address whether CDA immunity could ever apply to a fraud claim.

<sup>48</sup> *Doe v. Sexsearch.com*, No. 3:07 CV 604, 2007 WL 2388913, \*6 (N.D. Ohio., Aug. 22, 2007),

<sup>49</sup> *Id.*, quoting in part *Doe v. MySpace, Inc.*, 474 F.Supp.2d 843, 849 (W.D.Tex., 2007).

<sup>50</sup> *FTC v. AccuSearch Inc., d/b/a Abika.com*, No. 06-CV-105-D, 2007 U.S. Dist. LEXIS 74905 (D. Wyo. Sept. 28, 2007).

<sup>51</sup> *Id.* at \*\*14-15. The court separately addressed whether Accusearch was the information content provider of the challenged information. That part of the decision is discussed below at IV.C.2.

<sup>52</sup> 347 F.3d 655 (7<sup>th</sup> Cir. 2003).

<sup>53</sup> The Seventh Circuit noted that § 230(c) provided an affirmative defense to interactive computer services but then added, "Affirmative defenses do not justify dismissal under Rule 12(b)(6); litigants need not try to plead around defenses. See *Gomez v. Toledo*, 446 U.S. 635 (U.S. Puerto Rico, 1980). Plaintiffs do not protest the district court's use of Rule 12(b)(6), however, perhaps because the decision could have been recast as a judgment on the pleadings under Rule 12(c). Nor do they seek better notice or a crack at discovery. Their only argument is that § 230(c) does not assist GTE. We turn to that question without fussing over procedural niceties to which the parties are indifferent." *Id.* at 657. However, some courts have granted motions to dismiss based on allegations in the complaint. See e.g., *Donato v. Moldow*, 865 A.2d 711 (N.J. Super.A.D., 2005); *Dimeo v. Max*, 433 F.Supp. 2d 523, 530-531 (E.D. Pa., 2006); and *Doe v. SexSearch.com*, No. 3:07 CV 604, 2007 WL 2388913 (N.D. Ohio, Aug. 22, 2007).

<sup>54</sup> 347 F.3d at 660. (Emphasis added). The court explained, "The difference between this reading and the district court's is that § 230(c)(2) never requires ISPs to filter offensive content, and thus § 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 plaintiffs, for such laws would not be "inconsistent with" this understanding of § 230(c)(1)." *Id.*

<sup>55</sup> *Id.* (Emphasis added). These alternatives were non-binding dicta, since the Seventh Circuit concluded that it did not matter which interpretation of § 230(c) was correct, "because the difference matters only when some rule of state law does require ISPs to protect third parties who may be injured by material posted on their services." *Id.* at 660. However, there was no claim in *GTE* that state law imposed such duty, and the court noted, "Plaintiffs do not contend that GTE "published" the tapes and pictures for purposes of defamation and related theories of liability." *Id.* Therefore, the Seventh Circuit affirmed the district court's dismissal of the suit.

<sup>56</sup> The Seventh Circuit said that under the first alternative (§230(c)(1) as a definition), "§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 plaintiffs, for such laws would not be "inconsistent with" this understanding of § 230(c)(1)." 347 F.3d at 660. The Seventh Circuit said that under the second

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alternative (§230(c)(1) provides immunity as a publisher) would pre-empt the use of state defamation laws, “while permitting the states to regulate ISPs in their capacity as Intermediaries.” *Id.*

<sup>57</sup> 461 F.Supp.2d 681 (N.D. Ill. 2006).

<sup>58</sup> *Id.* at 696. “As the Seventh Circuit already has suggested, ‘defamation law would be a good example of such liability,’ *GTE*, 347 F.3d at 660; so too, as it turns out, are causes of action under Section 3604(c). 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 ...’ (emphasis added)).” *Id.*

<sup>59</sup> *Id.* at 696, n. 14.

<sup>60</sup> *Id.* at 697. The footnote immediately following this quoted sentence stated, “The Court is not definitively reaching—because it need not—the issue of whether states may in fact enact such initiatives.” *Id.* at 698, n. 16. Interestingly, the court added, “Section 230(c)(1) ... could also be a definitional clause, as Judge Easterbrook alternatively suggests [in *Doe v. GTE*] .... Whether it is such a definitional clause is an issue for another day.” *Id.* at 699, n. 17.

<sup>61</sup> *Id.* at 698.

<sup>62</sup> See 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (Senator Coats stating, “[if companies] try to comply with this section by preventing or removing objectionable material, we don’t intend that a court hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for purposes of offenses such as liable.”); See Also 141 Cong. Rec. H8469-H8470 (daily ed. Aug. 4, 1995).

<sup>63</sup> 865 A.2d 711 (N.J.Super.A.D., 2005).

<sup>64</sup> *Id.* at 726.

<sup>65</sup> *Id.* at 725.

<sup>66</sup> *Id.* at 726.

<sup>67</sup> *Id.* at 726 (Emphasis added). The court also said the immunity applied whether the web site was commercially operated or not, and whether it had a limited or large audience. *Id.* at 718.

<sup>68</sup> *Id.* at 720, citing *Batzel v. Smith*, 333 F.3d 1018, 1022 (9<sup>th</sup> Cir. 2003).

<sup>69</sup> *Id.* at 727.

<sup>70</sup> *Id.* at 727.

<sup>71</sup> See *Murawski v. Pataki*, No. 06 Civ. 12965(RJH), 2007 WL 2781054, \*10 (S.D.N.Y., Sept. 26, 2007)(where the court held that an internet search engine does not lose immunity under § 203 where search results omitted formatting that resulted in altered information).

<sup>72</sup> 474 F.Supp.2d 843 (W.D. Tex., 2007).

<sup>73</sup> *Id.* at 848.

<sup>74</sup> The court said that “the court views plaintiffs’ claims as directed toward MySpace and its publishing, editorial and/or screening capacities.” *Id.* at 849.

<sup>75</sup> *Id.* at 850. It did not help Plaintiffs’ case that “Doe lied about her actual age to bypass the age requirement and then violated MySpace’s express rules by giving out her personal information.” *Id.* at 850, n. 6. See also *Langdon v. Google, Inc.*, 474 F.Supp.2d 622, 631 (D. Del., 2007) (§230(c)(2)(A) “provides immunity from suit for restricting material that is ‘otherwise objectionable’.”

<sup>76</sup> The court noted that Plaintiffs admitted it no longer wished to pursue the claims of fraud and negligent misrepresentation, and these claims only were dismissed without prejudice.

<sup>77</sup> The Fifth, Sixth, Eighth and D.C. circuits have not yet ruled on CDA immunity issues.

<sup>78</sup> 339 F.3d 1119 (9<sup>th</sup> Cir. 2003).

<sup>79</sup> *Id.* at 1124 (Emphasis added).

<sup>80</sup> *Id.* at 1125 (Emphasis added). See also *Ramey v. Darkside Productions, Inc.*, 2004 US Dist. LEXIS 10107 \*19 & 20 (D.D.C. 2004) (“Defendant’s minor alterations of that advertisement (printing its website address on every advertisement that it publishes on its website, placing a watermark on the photos used, and categorizing the advertisements by subject matter) do not constitute ‘creation or development’ of the advertisement within the definition of ‘information content provider.’”

<sup>81</sup> No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006).

<sup>82</sup> *Id.* at \*5 (Emphasis added). See also *Doe v. SexSearch.com*, No. 3:07 CV 604, 2007 WL 2388913, \*5 (N.D. Ohio, Aug. 22, 2007) (“the mere fact SexSearch provided the questionnaire Jane Roe answered falsely is not enough to consider SexSearch the developer of the false profile”).

<sup>83</sup> *Id.* at \*6 (Emphasis added).

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<sup>84</sup> See, e.g., *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1118 (W.D. Wash., 2004) (“Although Amazon may have encouraged third parties to use the zShops platform and provided tools to assist them, that does not disqualify it from immunity under §230 because the zShops vendor ultimately decided what information to put on its site”); and *Landry-Bell v. Various, Inc.*, No. Civ.A. 05-1526, 2005 WL 3640448, \*2 (W.D. La., Dec. 27, 2005) (the following allegations, even if true, “would not transform Various into an information content provider.... Plaintiff argues in her brief that Various also acted as an information content provider by ‘blast[ing] out the profile contents to web search engines’; adding ‘descriptors,’ such as ‘horny’ to the content provided by Wilhelm; displaying titles to the listings to attract attention to them; organizing the profiles by geographic area; providing a search engine to categorize and publish profiles; providing a mechanism to input information; asking questions during the input process to create and develop profiles; and perform internal computer ‘testing’ to determine purity and compatibility scores.”)

<sup>85</sup> 992 F.Supp. 44, 51 (D.D.C. 1998).

<sup>86</sup> No. 4:05-cv-00010-RAS, 2004 WL 3799488 (C.D.Cal., Sept. 30, 2004).

<sup>87</sup> Among other things, § 3604 provides, “As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful.... (c) To 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 any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

<sup>88</sup> *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, No. CV 03-09386PA, 2004 WL 3799488, (C.D. Cal., Sept. 30, 2004).

<sup>89</sup> 489 F.3d at 926.

<sup>90</sup> Both the discussion of the questionnaire and preference form (which apparently Judge Kozinski also considered to be a questionnaire) in part 1 of Judge Kozinski’s decision referred to selecting from drop-down menus. Referring to the questionnaires, Judge Kozinski said, “Individuals.... Must use a drop-down menu.... Must use a check-box menu....” Referring to the preferences form, Judge Kozinski noted that individuals “must use a drop-down menu to indicate whether they are willing to live with ‘straight or gay’ males, only ‘straight’ males, only ‘gay’ males, or ‘no males,’ or may choose to select a blank response. Users must make comparable selections for females.” 489 F.3d at 926.

<sup>91</sup> 489 F.3d at 926.

<sup>92</sup> *Id.* at 928-929.

<sup>93</sup> 489 F.3d at 926.

<sup>94</sup> *Id.* at 929.

<sup>95</sup> *Id.* at 926 (Emphasis added).

<sup>96</sup> “*Carafano* differs from our case in at least one significant respect: The prankster in *Carafano* provided information that was not solicited by the operator of the website. The website sought information about the individual posting the information, not about unwitting third parties. Nothing in the questions the dating service asked suggested, encouraged or solicited posting the profile of another person, and the website’s policies prohibited altogether the posting of last names and contact information.” 489 F.3d at 928 (Emphasis added).

<sup>97</sup> “While Roommate provides a useful service, its search mechanism and email notifications mean that it is neither a passive pass-through of information provided by others nor merely a facilitator of expression by individuals. By categorizing, channeling and limiting the distribution of users’ profiles, Roommate provides an additional layer of information that it is “responsible” at least “in part” for creating or developing.” *Id.* at 929 (Emphasis added).

<sup>98</sup> *Id.* at 934 & 935.

<sup>99</sup> *Id.* at 934.

<sup>100</sup> “We conclude that Roommate’s involvement is insufficient to make it a content provider of these comments. Roommate’s open-ended question suggests no particular information that is to be provided by members; Roommate certainly does not prompt, encourage or solicit any of the inflammatory information provided by some of its members. Nor does Roommate use the information in the “Additional Comments” section to limit or channel access to listings. Roommate is therefore not “responsible, in

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whole or in part, for the creation or development of” its users’ answers to the open-ended “Additional Comments” form, and is immune from liability for publishing these responses.” *Id.* at 929.

<sup>101</sup> “Roommate does not display the different portions of a user’s profile in distinct e-mails or web pages, but instead aggregates an entire profile and presents it as a whole.... when viewed in the context of the entire sign-up process that conveys the message to prospective users that they should express their preferences for tenants based on race, gender, sexual orientation, national origin and religion, ordinary users would understand the recommendation to constitute a suggestion to expand upon the discriminatory preferences that they have already listed and to list their additional discriminatory preferences in that portion of the profile.... I conclude that Roommate is not immune under § 230(c), and, at the very least, there is a genuine dispute of material fact as to this question.” *Id.* at 932-933.

<sup>102</sup> 418 F. Supp. 2d 1142 (D. Arizona 2005).

<sup>103</sup> *Id.* at 1145.

<sup>104</sup> *Id.* at 1149.

<sup>105</sup> Plaintiff also alleged in the complaint that defendants “produce original content contained in the Rip-Off Reports.” *Id.*

<sup>106</sup> 2007 U.S. Dist. LEXIS 74905 at \*16.

<sup>107</sup> 206 F.3d 983, n. 4 (10<sup>th</sup> Cir. 2000).

<sup>108</sup> 2007 U.S. Dist. LEXIS 74905 at \*15.

<sup>109</sup> See discussion of *Carafano* at IV.B. above.

<sup>110</sup> *Prickett v. InfoUSA, Inc.*, No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006); *Doe v. SexSearch.com*, No. 3:07 CV 604, 2007 WL 2388913, \*5 (N.D. Ohio, Aug. 22, 2007) (“The critical issue is whether SexSearch acted is information content provider with respect to the information that [Plaintiff] claim[s] is false”).

<sup>111</sup> In *Moldow*, the court said that “with respect to any messages posted by Moldow, using his own name or the appellation ‘Webmaster,’ he was a content provider.” 865 A.2d at 720. Presumably it was the fact that Moldow attached his name or the name “Webmaster” that made Moldow the information content provider, since by attaching the name, Moldow was making the message his own.

<sup>112</sup> *Whitney Information Network, Inc. v. Xcentric Ventures, LLC*, No. 06-11888, 2006 WL 2243041 (11<sup>th</sup> Cir. Aug 1, 2006) (reversing grant of motion to dismiss under CDA, because “Even if this conclusory denial [by defendants of plaintiff’s claims] can be said to challenge Whitney’s allegation that Defendants fabricated some of the consumer complaints posted on the website, it does not controvert Whitney’s allegations that Defendants tailored complaints submitted by other individuals, adding words such as ‘ripoff,’ ‘dishonest,’ or ‘scam.’” *Id.* at 743); *Batzel v. Smith*, 333 F.3d 1018, 1029 (9<sup>th</sup> Cir. 2003); and *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). Cf. *Landry-Bell v. Various, Inc.*, No. Civ.A. 05-1526, 2005 WL 3640448, (W.D. La., Dec. 27, 2005), in which the court upheld immunity in spite of the claimed addition of derogatory titles.

<sup>113</sup> 40 Cal. 4<sup>th</sup> at 60, n. 19.

<sup>114</sup> This is essentially the position Judge Ikuta took in *Fair Housing Council*.

<sup>115</sup> 333 F.3d 1018 (9<sup>th</sup> Cir. 2003). The operator of the website had an electronic newsletter that he mailed out and that included e-mails sent to him from subscribers. The Ninth Circuit noted that the website operator “exercises some editorial discretion in choosing which of the e-mails he receives are included in the listserv mailing, omitting e-mails unrelated to stolen art and eliminating other material that he decides does not merit distribution to his subscribers.” The website operator chose to post one e-mail he had received that falsely accused someone of being one of Adolph Hitler’s right-hand men. The Ninth Circuit concluded there was no need to determine whether the website fit the broad definition of interactive computer service, because the CDA also conferred immunity on users, and there was no dispute that the operator used interactive computer services to distribute its online mailing and to post the listserv on its website. The Ninth Circuit held that because “Cremers did no more than select and make minor alterations to Smith’s email, Cremers cannot be considered the content provider of Smith’s email for purposes of Section 230.” 333 F.3d at 1031. Cremers therefore was immune.

<sup>116</sup> *Id.* at 1034.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1035.

<sup>119</sup> No. 3:04-CV-312, 2007 WL 1574269 (E.D. Tenn. May 29, 2007).

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<sup>120</sup> *Id.* at \*5.

<sup>121</sup> *Id.* at \*20.

<sup>122</sup> See note 40 and the text accompanying note 40.

<sup>123</sup> *Id.* at \*16, quoting *Harris v. Forklift Systems, Inc.*, 510 US 17, 21 (1993).

<sup>124</sup> 145 Cal.App.4<sup>th</sup> 790 (2006).

<sup>125</sup> *Id.* at 795. First, the court said Agilent was an interactive computer service, because “Agilent’s proxy services are the primary means by which thousands of its employees in the United States access the Internet.” *Id.* at 806. Second, the court concluded plaintiffs “sought to treat Agilent ‘as a publisher or speaker’ of those messages.” *Id.* Third, “there was no evidence that Agilent played any role whatsoever in ‘the creation or development’ of the messages,” so the challenged information was provided by another information content provider. *Id.* at 807.

<sup>126</sup> *Id.* at 810. (Emphasis added).

<sup>127</sup> *Id.* at 810-811.

<sup>128</sup> 333 F.3d at 1036.

<sup>129</sup> In *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F.Supp.2d 523, 537 (D. Md., 2006) the court implied there could be a cause of action against an Intermediary for aiding and abetting an information content provider: “apart from BSI’s vague conclusory statements, there is not the least suggestion that Rackspace otherwise acted as an aider, abettor, or assisted a co-conspirator in any illegal conduct of the messages transmitted. In short, it is clear that all the requisites for application of the immunity provisions of the CDA are in place as far as Rackspace is concerned.” However, the court in *Keynetics* also said, “Case law clearly establishes that CDA immunity applies even where an ISP knew of its customers’ potentially illegal activity.” *Id.* at 536.

<sup>130</sup> See *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 421 (1<sup>st</sup> Cir. 2007) (“It is not at all clear that there is a culpable assistance exception to Section 230 immunity.... We need not decide whether a claim premised on active inducement might be consistent with Section 230 in the absence of a specific exemption.”). Cf. *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7<sup>th</sup> Cir. 2003) (“GTE’s activity does not satisfy the ordinary understanding of culpable assistance to a wrongdoer, which requires a desire to promote the wrongful venture’s success”); and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 US 913 (2003) (A defendant can be liable for inducing copyright infringement. *Grokster*, however, was a case not involving the CDA).

<sup>131</sup> 421 F.Supp.2d 1257 (N.D.Calif., 2006).

<sup>132</sup> *Id.* at 1259-1260.

<sup>133</sup> *Id.* at 1263.

<sup>134</sup> *Id.*