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### COMMUNICATIONS DECENCY ACT

Section 230 of the Communications Decency Act grants immunity to online service providers against liability arising from content created by third parties. Attorneys from Vorys Sater Seymour and Pease LLP discuss two recent court decisions denying websites' claims of such immunity and the potential impact these cases may have on future Section 230 rulings.

## Favorable Ruling for Critics of Section 230 of the CDA in Washington Case



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**S**ection 230 of the Communications Decency Act of 1996 (CDA) – codified as 47 U.S. Code § 230 – does a great deal for the advancement of free speech on the Internet. In essence, it shields most “interactive”

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websites from being held liable for third-party generated content. Thus – by way of example – Facebook will not be held liable for a defamatory wall post or status update from one of its users. Similarly, Twitter will not be on the hook for unlawful speech contained in a tweet.

Yet the federal statute is controversial in that preventing the chilling of speech in the online world has left a number of parties feeling as though they are not being adequately protected from malicious attacks online.

The general rule of thumb for the victims of online posts is to pursue the attackers (authors/posters) themselves, and not the websites. However, that often proves difficult if, for example, the person behind an attack has gone great lengths to conceal his or her identity or if the defendant is judgment proof.

In some circumstances – including those in which it might not be difficult to pursue the poster – there might be a legitimate argument for potentially holding a content-hosting website at least partially responsible

for bad acts they might have, at least to an extent, facilitated. But those regularly fail in court.

Further, in some instances, Section 230 has stood in the way of parties seeking to hold websites responsible for the *offline* activities that arose out of postings on their forums. For instance, in 2014, a California court dismissed a lawsuit brought by a set of parents against the website Topix, after their son died of an overdose from drugs bought from a seller he met through a Topix forum. In September 2015, the appellate court upheld the lower court's ruling on the basis of Section 230, holding the website was simply not a content creator/publisher of the content at issue.

Typically, it is difficult for plaintiffs to prevail in these cases, given the strong free speech considerations. As such, the Supreme Court of Washington's September 3, 2015, ruling in favor of three plaintiffs, in a matter involving the website [www backpage.com](http://www backpage.com) (Backpage) (20 ECLR 1261, 9/16/15), was all the more surprising. The ruling, *J.S. v. Village Voice Media Holdings*, was positive for those seeking to hold websites accountable for certain harms arising from content published on their websites.

### **J.S. v. Village Voice Media Holdings**

The plaintiffs in this case, three minors, filed a lawsuit against several parties (including the parent companies of Backpage) after allegedly being raped by individuals who had responded to advertisements published on Backpage. According to [endsexualexploitation.org](http://endsexualexploitation.org), Backpage is the top website in the United States for "prostitution advertising," accounting for almost 80 percent of prostitution advertising over the Internet.

Section 230(c)(1) of the CDA states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This federal statute, thus, protects most websites from being held liable for third-party provided content – including, typically, content of the aforementioned nature on Backpage.

However, early last month, the top court in Washington state found that the plaintiffs had pleaded a case sufficient to withstand the defendants' motion to dismiss, which was based on immunity under Section 230. The Washington Supreme Court, in affirming the trial court's denial of the defendants' motion to dismiss, remanded the case for further proceedings.

In a lengthy dissent, one of the judges from the 6-3 decision vigorously attacked the majority's application of the CDA, noting that the defendants should not be considered information content providers "merely by facilitating an individual user's expression of information, if it is the user alone who selects the content." The plaintiffs might be able to prove that the defendants were, in fact, intending to induce sex trafficking; but that would not be sufficient to make Backpage a content provider, he wrote.

At its next stages, the plaintiffs will continue to try to convince the court to hold the defendants liable for helping develop the content published on [Backpage.com](http://Backpage.com) that allegedly led to the sex trafficking of minors – in spite of Section 230.

According to the plaintiffs, they were featured in ads posted to the site that complied with Backpage's con-

tent requirements. Specifically, they alleged the rules were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message." The defendants argued, to the contrary, that that they were not the content providers and, based on the CDA, could not be held liable for the posters' actions.

Yet the Washington Supreme Court found that the plaintiffs had alleged facts that – if proven true – would demonstrate that the defendants had acted beyond merely maintaining neutral policies, including that:

- "Backpage.com . . . has intentionally developed its website to require information that allows and encourages . . . illegal trade to occur through its website, including the illegal trafficking of underage girls;"
- "Backpage.com has developed content requirements that it knows will allow pimps and prostitutes to evade law enforcement;"
- "Backpage.com knows that the foregoing content requirements are a fraud and a ruse that is aimed at helping pimps, prostitutes, and Backpage.com evade law enforcement by giving the [false] appearance that Backpage.com does not allow sex trafficking on its website;"
- "the content requirements are nothing more than a method developed by Backpage.com to allow pimps, prostitutes, and Backpage.com to evade law enforcement for illegal sex trafficking, including the trafficking of minors for sex;"
- "Backpage's "content requirements are specifically designed to control the nature and context of those advertisements so that pimps can continue to use Backpage.com to traffic in sex, including the trafficking of children, and so Backpage.com can continue to profit from those advertisements;" and
- "Backpage has a "substantial role in creating the content and context of the advertisements on its website."

In short, the outcome of this case hinges on a finding of whether Backpage simply hosted the ads or actually contributed to their development. In the case of the latter, the defendants would not be protected by Section 230 of the CDA. It would be premature to call this a victory for anyone (other than the plaintiffs, of course). But it is a favorable ruling for those critical of how Section 230 is written and applied.

### **Recent Section 230 Ruling in Utah**

Just days earlier, on August 27, 2015, another potentially significant ruling against Section 230 was handed down by a federal court in Utah. In that case, a business and individual harmed by an allegedly false Ripoff Report posting filed suit against its parent company.

The United States District Court for the District of Utah, Central Division, found that Xcentric Ventures, LLC (d/b/a Ripoff Report) encourages users to submit negative content and, therefore, is not a neutral publisher based on the facts alleged (20 ECLR 1362, 9/30/15).

The district court judge stated that it can be reasonably inferred that the company (website)'s actions – including refusing to remove allegedly defamatory content – were motivated by its own commercial interests (in particular, offering to assist the plaintiffs through a paid program run by the defendants, which the plaintiffs argued amounted to extortion).

In denying Xcentric Ventures' motion, the plaintiffs in the matter can proceed with (and are now likely in the middle of) discovery.

### Section 230 Implications

While it might seem easy to disagree with certain Section 230 rulings (including those that go against the average person's instincts, such as the Topix case), the courts' rulings in favor of the defendants are generally correctly applying Section 230 of the CDA as written. The rationale behind the CDA is obvious and a good one; not chilling free speech is important. Nonetheless, there are still many parties being harmed on the Internet that have little protection and recourse, which is problematic.

However, those critical of the CDA have to be pleased with the recent ruling in *J.S. v. Village Voice Media Holdings*, as well as *Vision Security, LLC v. Xcentric Ventures, LLC*. Both cases could wind up going against

the plaintiffs but, for the time being, there seems to be a glimmer of hope for those wrongfully being harmed online as a result of certain online activity.

The Washington case and Utah federal case both signal a potential step forward for the opponents of certain websites (or, perhaps, instances relating to those websites) that are claiming immunity under the CDA.

In *Village Voice*, it is likely "beneficial" for the plaintiffs that sex trafficking – in particular of minors – is so frowned upon, naturally conflicting with the obvious policy issues from Section 230; although Backpage and similar websites have been able to exercise their rights, to date, thanks to Section 230 immunity.

In terms of the *Vision Security* case in Utah, while defamation certainly pales in comparison to the alleged rapes of underage girls, there is nonetheless no denying that the reputations of both people and organizations are regularly being harmed with no accountability for websites such as Ripoff Report.

Accordingly, the recent rulings can easily be seen as a positive and it will be interesting to track these cases and see how they ultimately turn out. The outcome of one or both of these cases, should either court side with the plaintiffs, could impact future cases – not necessarily limited to those within the same jurisdictions.

Oral arguments will be heard in the *Village Voice* case on Wednesday, October 21.