e-Commerce Law REPORT
Buying and Selling on the Internet
November 2007 ■ Volume 9 ■ Issue 11

The Uncertain Future of Section 230 and Liability for Mixed-Content Websites

BY THOMAS R. BURKE & AMBIKA K. DORAN*

** Thomas R. Burke is a partner in the San Francisco office of Davis Wright Tremaine LLP. He can be contacted at thomasburke@dwt.com. Ambika K. Doran is an associate in the firm's Seattle office. She can be contacted at ambikadoran@dwt.com.*

Introduction

More than a decade ago, Congress enacted Section 230 of the Communications Decency Act, a sweeping statute that immunizes the Internet publication of third-party content from defamation and other tort claims. Courts interpreting Section 230 have almost uniformly found that the statute protects Internet content providers from tort liability based on content created by third parties.

However, in the past decade, few Section 230 decisions have meaningfully analyzed whether federal immunity is available where Internet content providers—such as websites—edit, prepare content for users to select, or combine original content with third-party content, now commonplace features. These providers may be vulnerable to liability, particularly in light of a recent ruling in the Ninth Circuit Court of Appeals finding no immunity for a mixed-content website. Whether or not the court hears this decision en banc, the scope of Section 230's immunity will shape the future of Internet content.

The History of Section 230

Section 230's Roots

In 1995, a New York trial court controversially found that an Internet service provider could be held liable for the content of its subscribers' posts, as the publisher of the content.[1] The court relied heavily on the provider's exercise of editorial control over the content of messages posted on its bulletin boards, and use of a software program to screen all postings.[2] Had courts followed the decision, website owners would have been left with a thorny choice: Halt any attempts to edit objectionable material, or edit material heavily, knowing it would be subject to the same liabilities as traditional print pub-

CONTINUED ON PAGE 3

Editorial Board

e-Commerce Law Report
West Legalworks
395 Hudson Street, 6th Floor
New York, NY 10014

One Year Subscription ■ 11 Issues ■ $408.00
(ISSN#: PENDING)

Please address all editorial, subscription, and other correspondence to the publishers at west.legalworksregistration@thomson.com

CONTINUED FROM PAGE 1

lications. Overruling this decision, Congress passed Section 230 in 1996.[3] In doing so, it sought to promote Internet development free from government intrusion.[4]

Section 230 states, "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."[5] The statute prohibits the imposition of liability by any state or local law "inconsistent with this section."[6] It defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[7]

Section 230 broadly defines "Internet 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."[8] Section 230 immunizes these entities when they "in good faith . . . restrict access to or availability of material" they consider "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[9]

The Vast Majority of Courts Broadly Uphold Section 230's Immunity

Nearly all courts faced with the mere reposting of third-party content—including five federal appellate courts and two state high courts—have interpreted Section 230 to immunize Internet service providers and websites for content authored by third parties.[10] In the first such case, the Fourth Circuit Court of Appeals set the tone, affirming dismissal of a lawsuit brought against America Online, after an AOL subscriber posted a malicious hoax on an AOL bulletin board. America Online did not take the defamatory material down after notification, allowed subsequent similar postings, and refused to post a retraction.[11] The court noted, in oft-quoted language: "Congress made a policy choice...not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."[12] Given "the amount of information communicated via interactive computer services...[i]t would be impossible for service providers to screen each of their millions of postings for possible problems."[13]

California appeared headed in the opposite direction a few years back when an appellate court in San Francisco decided that Section 230 did not immunize defendants who had reason to believe the material they posted was defamatory, making them, according to the court, "distributors," rather than "publishers."[14] The state supreme court recently reversed the decision, confirming that it, like *Zeran* and other courts, would reject notice-based liability under Section 230. In its decision, the court also questioned whether Section 230 immunity depends on how aggressively a website procures and publishes challenged third-party content.

Despite finding that individual users are more likely to be able to screen the content and to participate in the posting of offensive material, the court found that "there is no basis for deriving . . . any operative distinction between 'active' and 'passive' Internet use. By declaring that no 'user' may be treated as a 'publisher' of third party content, Congress has comprehensively immunized republication by individual Internet users."[15] This principle is in tension with *Batzel v. Smith*, where the Ninth Circuit ruled that such a user must reasonably believe the third-party author intended his material for publication.[16] As such, it remains fertile ground for analysis in future cases.

Practically speaking, in the decade since Section 230 was enacted, courts have made at least three things clear. First, Section 230 applies broadly not only to Internet service providers like America Online, but to all online services to which users can post content, ranging from ordinary interactive websites[17] to e-mail listservs.[18]

Second, although Section 230 immunizes such websites from the posting of third-party content, it does not immunize the content provider him- or herself; thus, in a recent spate of cases, plaintiffs have tried to force Internet providers to disclose the identity of various bloggers, who posted allegedly defamatory content.[19]

Third, by its language, Section 230 does not affect enforcement of federal criminal law, federal intellectual property law, otherwise consistent state law, or communications privacy law.[20] Section 230 bars all tort claims, even when based on an allegation of

negligence in enabling the poster to violate criminal statutes.[21] The applicability of Section 230 beyond these general rules is murkier.

Recent Section 230 Decisions

Recent cases illustrate that there is substantial ambiguity as to the legal outcome where a plaintiff sues a website owner over data that the owner either collects and redistributes in a particular form or combines with third-party content. Despite the 10-year existence of Section 230, however, few appellate courts have considered these increasingly common situations. Collectively, these decisions turn on a court's interpretation of what constitutes an "information content provider," as defined by Section 230.

Of those courts that have analyzed these mixed-content situations, most, mainly trial courts, have construed Section 230 broadly. Notably, the Ninth Circuit found immunity for an Internet dating service where a third party created a false profile of an actress based on a questionnaire the service provided to any user seeking to post a profile.[22]

In another case, a federal district court, reasoning that Section 230 allows the screening of "objectionable" content, found immunity for Google after it refused to run advertisements on the plaintiff's website.[23] Another federal district court found immune an online directory service even though it facilitated the creation of entries through a form and prompts.[24] In another case, a federal district court found Amazon.com immune for publication of images by third parties even though it had encouraged the third parties to publish the images.[25]

Finally, a New Jersey court found that even though a website operator helped "shape" the content of third party postings, selectively edited the postings, and banned users deemed disruptive, Section 230 still provided immunity.[26] Nevertheless, some courts have gone the opposite direction, rejecting Section 230's immunity in mixed-content cases.[27]

Decisions from the Ninth Circuit are currently at center stage in the debate about the scope of Section 230 immunity. The court recently decided not to grant immunity to a mixed-content website, despite two earlier decisions to the contrary. These earlier cases properly recognized that Congress intended defendants to exercise editorial control over the website content, and that such control does not convert them into "content providers."

Batzel and Carafano

The Ninth Circuit decided two cases in 2003, finding immunity even in unusual circumstances. In *Batzel v. Smith,* the court found immunity for the director of Amsterdam's famed Rijksmuseum, who posted to a listserv an e-mail he received in his capacity as its moderator, so long as the district court determined on remand that the sender intended his e-mail for publication.[28] The director, in posting the messages, engaged in a traditional editorial process: He selected which emails merited publication to the relevant audience, and made minor alterations to them, including the one at issue.[29]

The *Batzel* opinion is notable not only for its holding—that the Ninth Circuit would, like most courts, interpret Section 230 broadly—but more importantly for its expansive reasoning. The court examined the foundation of Section 230, finding that Congress primarily intended to encourage interactive service providers and users to "self-police the Internet for obscenity and other offensive material."[30] Further, as the court noted: "If efforts to review and omit third-party defamatory, obscene or inappropriate material make a computer service provider or user liable for posted speech, then website operators and Internet service providers are likely to abandon efforts to eliminate material from their site."[31]

Applying these principles, the court found that the director's alterations to the e-mail and choice to publish it did not "rise to the level of 'development.'"[32] Rather, "the central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted. . . . The 'development of information' . . . means something more substantial than merely editing portions of an e-mail and selecting material for publication."[33]

Earlier that year, the court had made a similar ruling, this time where the website operator arguably contributed more content to the postings than in *Batzel*. In *Carafano v. Metrosplash.com,* the court found immune an online matchmaking service that had allowed someone to post a false profile of actress Christianne Carafano.[34] The same individual also posted a fake e-mail address that, when contacted,

provided Carafano's home address and phone number.[35] As a result, numerous individuals harassed Carafano, prompting her lawsuit.

The court, faced for the first time with a website that facilitated the creation of content, found nonetheless that the service, Matchmaker, was not an "information content provider" under Section 230.[36] Matchmaker required participating individuals to complete a detailed questionnaire with pre-prepared multiple choice and free response essay questions.[37]

Citing the "robust" protection Section 230 had afforded other defendants and the "restrictive definition of 'information content provider,'" the court found the existence of the questionnaire irrelevant, because "selection of the content was left exclusively to the user."[38] Even the site's classification of user characteristics into categories did not "transform Matchmaker into a 'developer' of 'underlying misinformation.'"[39]

Moreover, Matchmaker's facilitation of highly structured searches based on questionnaire responses advanced the Congressional policy "to promote the continued development of the Internet and other interactive computer services."[40]

About Face: Roommate.com

Despite the *Batzel* and *Carafano* decisions, as well as similar precedent in other jurisdictions,[41] the Ninth Circuit issued a surprising opinion in *Fair Housing Council of San Fernando Valley v. Roommate.com,* finding that Section 230 does not immunize a roommate finding service from claims under the Fair Housing Act.[42] In this closely watched case, Roommate.com has petitioned for en banc review.

Roommate.com is very fact-specific. The website required users to respond to a series of online questionnaires by choosing from answers in drop-down and select-a-box menus.[43] It also included a space for users to post essays.[44] Some questions allowed users to express preferences about potential roommates based on gender, sexual orientation, and children.[45] The service allowed users to create personal profiles showing this information and search lists of compatible roommates, and it sent newsletters to members seeking housing, listing compatible members.[46]

Judge Alex Kozinski, writing for the majority, addressed three sets of information separately. First, citing the Section 230 provision that any person "responsible, in whole or in part, for the creation or development of information" is an Internet content provider, the court found that Roommate.com was "responsible" for the questionnaires because it created the forms and answer choices.[47] Second, the court found publication and distribution of profiles also made Roommate.com a content provider, because it facilitated the channeling of discriminatory housing preferences.[48] Finally, the court found Roommate.com was immune from challenges to information in the essay section of user profiles.[49]

The court's fractured opinion—in which the three-judge panel produced three separate opinions—is ill-reasoned, on several grounds. First, the decision appears very result-driven. The decision evidences the court's sincere concern with allowing Internet technology to undermine federal fair housing law, yet the court scarcely considered whether the information Roommate.com "contributed" could violate the Fair Housing Act, citing briefly to the plaintiff's theory that it could and noting it need not decide the issue then.[50]

Moreover, courts may unfortunately apply the decision's sweeping dicta to the detriment of the vast majority of websites who are dependent on content provided by third parties and whose day-to-day content does not implicate federal housing laws or comparable statutes. This is particularly evident from a hypothetical the majority opinion poses—whether the owners of a website "harassthem.com" would be liable for the posting of names, addresses, social security numbers, and the like.[51] But Section 230 hardly sanctions such conduct, and indeed does not provide immunity for the posters themselves; in the situation posed, the content provider would undoubtedly be liable for the information. In addition, rather than analyze who authored the challenged content—the proper focus under Section 230—by offering this hypothetical, the court mistakenly shifted the attention to the content of the challenged speech.

Second, unlike in *Carafano* and *Batzel*, the court appeared to ignore the policy reasons behind Section 230: Congress sought to immunize the editing of online content provided by third parties.[52] It also ignored the express Congressional intent to overrule a case with essentially the same holding—that publishers of Internet content are liable to the same degree as print publications for content.[53] Moreover,

it overlooked portions of the statute itself, which expressly immunize content providers who "in good faith . . . restrict access to or availability of material" they consider "objectionable."[54]

As the court in *Batzel* explained, interpreting Section 230 to allow only the removal of information from the Internet—rather than the screening of content—"cannot fly. . . . There is no basis for believing that Congress intended a one-bite-at-the-apple form of immunity."[55] This analysis, ignored by the court in *Roommate.com,* is invaluable to understanding the broad immunity Congress intended when it enacted Section 230.

Finally, the court's attempt to distinguish the case from *Carafano* evidences a technical approach to Section 230 that cannot withstand scrutiny, and is likely to leave website operators in considerable confusion over their use of questionnaires and posting of user profiles.[56] The court noted that *Carafano* differs in "at least one significant aspect," in that Matchmaker did not solicit the content provider to post information about *Carafano*.[57]

Yet this distinction implies that Matchmaker could be liable for any defamatory content it "solicited" merely by posting a questionnaire—a holding that would be wholly inconsistent with *Carafano*. In addition, the court noted, Roommate.com "channels the information based on members' answers to various questions."[58] But in *Carafano,* too, users could conduct searches based on answers provided in response to Matchmaker's questions, and such "interactivity" is precisely what Congress sought to encourage and protect when it enacted Section 230.[59]

Practical Implications of Recent Decisions

The decision in *Roommate.com* has created confusion in the Section 230 world, which beforehand remained relatively stable. Nonetheless, courts have yet to fully explore the scope of Section 230 as applied to mixed content. Internet service providers and website owners should consider the following practical points.

First, Roommate.com, even if affirmed, does not alter the basic principle that sites can use third-party content without fear of tort liability. This holds true so long as the site does not solicit content in the very fact-specific ways of the defendants in *Carafano* and *Roommate.com*. For example, *Roommate.com* does not mean that a site exposes itself to liability merely by asking its audience for feedback on a particular story, or by allowing users to post anonymously to bulletin boards.

In addition, although Section 230 should protect the ability of a party to select and publish offensive material, future decisions may explore whether someone who actively pursues and posts offensive third-party content may escape liability. For now, the posting of third-party content remains well-protected under cases like *Zeran* and *Barrett*. Indeed, even the divided *Roommate.com* court agreed on this point.[60]

Second, in light of *Roommate.com,* websites that feature content or pre-prepared questionnaire "answers" that visitors can select should ensure this content does not independently violate federal or state laws. This concern is unlikely to apply to most sites. Nor is it clear whether, in the future, the Ninth Circuit will find any site that merely solicits third-party content with specific questions to be the "provider" of that content. Nevertheless, website operators should remain cautious about allowing users to post their own comments if the space provided for doing so overtly urges readers to post information that a court might deem illegal.

Third, websites may remove portions of offensive or libelous third-party content and retain immunity under Section 230. Indeed, this was the express Congressional intent behind Section 230, which immunizes entities when they "in good faith . . . restrict access or availability of material" they consider "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[61]

Even the dissent in *Batzel,* in proposing a workable test for immunity in the mixed-content context, acknowledged as much, finding that "[a]n important purpose of §230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. Preserving CDA immunity, even when a service user or provider retains the power to delete offensive communications, ensures

that such entities are not punished for regulating themselves."[62]

Fourth, the marketing and promotion of third-party content should not jeopardize Section 230 immunity. For example, in *Blumenthal v. Drudge*, a federal district court found that America Online, which hosted the now infamous political blog Drudge Report, was immune from liability for the blog's content.[63] The court found this to be the case even though AOL paid Drudge for his content, reserved the right to remove content or request changes, and advertised Drudge's "[m]averick gossip."[64] Thus, websites may promote the activities of its bloggers, and even their ability to edit the content, knowing that Section 230 immunizes their conduct.

Conclusion

The current debate in the Ninth Circuit regarding the scope of Section 230's immunity is a microcosm of cases to be considered by courts nationwide, as user-generated and mixed content continue to flourish. Understanding the current state of the law and watching future decisions will be critical to making decisions about what content a website operator can post without fear of liability.

NOTES

1. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *6 (N.Y. Sup. May 24, 1995).
2. *Id.* at *4.
3. *See* S. Conf. Rep. No. 104-230 (1996). In contrast, in the United Kingdom, generally, once the owner of a website receives notice of defamatory content, he or she may be sued as the publisher of the statement. *See Godfrey v. Demon Internet Ltd.,* 3 W.L.R. 1020 (Q.B. 1999).
4. 47 U.S.C. §230(b)(1)(2).
5. *Id.* §230(c)(1).
6. *Id.* §230 (e)(3).
7. *Id.* §230(f)(2).
8. *Id.* §230(f)(3).
9. *Id.* §230(c)(2)(A).
10. *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Barrett v. Rosenthal*, 40 Cal.4th 33 (Cal. 2006); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001); *see also Barrett v. Fonorow*, 799 N.E.2d 916 (Ill. App. 2003); *Gentry v. eBay Inc.*, 99 Cal. App. 4th 816 (Cal. App. 2002); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. App. 2001); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (Cal. App. 2001); *Jane Doe One v. Oliver*, 755 A.2d 1000 (Conn. Super. 2000), *aff'd,* A.C. 21269 (Conn. App. 2002) (per curiam). *But see Doe v. GTE Corp.* 347 F.3d 655, 660-61 (7th Cir. 2003) (stating in dicta that Section 230(c)(2), a means of defining (c)(1), may not provide any immunity at all, and that Section 230 may permit the states to regulate Internet service providers in their capacity as intermediaries).
11. *Zeran,* 129 F.3d at 328-330.
12. *Id.* at 331.
13. *Id.* at 333.
14. *Barrett v. Rosenthal*, 114 Cal. App. 4th 1379 (2004), *rev'd,* 40 Cal. 4th 33 (2006).
15. *Id.* at 62. *See also Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) ("Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others").
16. 333 F.3d at 1035.
17. *See, e.g., Donato v. Moldow*, 865 A.2d 711 (N.J. App. 2005) (finding Section 230 applies to a website operator who posted information, conducted polls, and allowed users to post comments).
18. *See generally Barrett,* 40 Cal. 4th 33. Likewise, in *Batzel,* the Ninth Circuit applied Section 230 to the poster of an e-mail on a listserv, so long as the poster reasonably believed the author had intended the e-mail for publication. 333 F.3d at 1035. A few courts have held otherwise. *See, e.g., 800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273 (D.N.J. 2006) (declining to apply Section 230 to a search engine).
19. *See, e.g., Doe v. Cahill*, 884 A.2d 451 (Conn. 2005).
20. 47 U.S.C. §230(e).
21. For example, the Florida Supreme Court found that Section 230 immunizes an interactive service even where the plaintiff alleges negligence, in furtherance of criminal statutes, such as child pornography laws. *See generally Doe v. America Online*, 783 So.2d 1010 (2001).
22. *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003).
23. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007).

24. *Prickett v. InfoUSA, Inc.*, 2006 WL 887431, at *5 (E.D. Tex. Mar. 30, 2006).
25. *Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004).
26. *Donato v. Moldow*, 865 A.2d at 719-20.
27. A few courts, seemingly result-oriented, have found Section 230 immunity may be unavailable. *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 199 Fed.Appx. 738, 744 (11th Cir. Aug. 1, 2006) (where a website operator submitted affidavits that it generally did not alter or post consumer complaints on its website, affidavits were insufficient to demonstrate the operator was not a content provider under Section 230); *Doctor's Assocs., Inc. v. QIP Holders, LLC*, 2007 WL 1186026, at *2 n.3 (D. Conn. Apr. 19, 2007) (finding that defendant Quizno's might be a content provider under Section 230 if it helped authors of commercials use plaintiff Subway's mark); *Anthony v. Yahoo!*, 521 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006) (court refused to dismiss case on Section 230 basis where plaintiff alleged defendant had presented outdated profiles to its online dating service and created some of the content at issue); *Teva Pharm. USA Inc. v. Stop Huntingdon Animal Cruelty USA*, 2005 WL 1010454, at *11 (N.J. Super. Ct. Ch. Div. Apr. 1, 2005) (website that posted achievements of animal rights activists was not immune under Section 230 because it selected and revised postings and endorsed radical activities); *Hy Cite Corp. v. Badbusinessbureau.com*, 418 F. Supp. 2d 1142, 1151 (D. Ariz. 2005) (where defendant operated website allowing consumers to post complaints about companies, and forced companies to pay money to remove posts, fact that some content originated with website operator and that website operator solicited reports with promise that individuals might be compensated suggested defendants were "responsible . . . for the creation or development of information" submitted by third parties); *Loan Ctr. of California v. Krowne*, No. FCS029554 (Solano County Court July 27, 2007) (tentative ruling) (finding Section 230 may not immunize a website's characterization of a mortgage lender as "gone" in the title of a third-party post).
28. *Batzel,* 333 F.3d at 1035.
29. *Id.* at 1021.
30. *Id.* at 1028.
31. *Id.*
32. *Id.* at 1031.
33. *Id.*
34. *Carafano,* 339 F.3d 1119.
35. *Id.*
36. *Id.* at 1125.
37. *Id.* at 1121.
38. *Id.* at 1123-24.
39. *Id.* at 1124.
40. *Id.* at 1125.
41. *See, e.g., Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006).
42. --- F.3d ----, 2007 WL 1412650 (9th Cir. 2007).
43. *Id.* at *1.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at *2-*3 (citation omitted).
48. *Id.* at *4-*5.
49. *Id.* at *6.
50. *Id.* at *3.
51. *Id.* at *4.
52. *Id.* at *2.
53. *See* note 3 and accompanying text.
54. 47 U.S.C. §230(c)(2)(A).
55. *Batzel,* 333 F.3d at 1032.
56. It also casts doubt on the decision in *Craigslist, Inc.,* 461 F. Supp. 2d 681, where the court found Section 230 immunizes Craigslist from third-party postings violative of the Fair Housing Act.
57. *Roommate.com,* 2007 WL 1412650, at *4.
58. *Id.* at *5.
59. *Carafano,* 339 F.3d at 1024-25.
60. *See* note 3 and accompanying text.
61. 2007 WL 1412650, at *5-*6.
62. 47 U.S.C. §230(c)(2)(A) (emphasis added).
63. *Batzel,* 333 F.3d at 1040 n.16 (citation omitted) (Gould, J., concurring in part, dissenting in part).
64. 992 F. Supp. 44.