THE GOOD SAMARITAN EXEMPTION — SECTION 230 OF THE CDA

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solution too would destroy the medium. Further, in contrast to traditional print articles, it simply is not possible to edit thousands of threads of anonymous conversations with any degree of confidence that the context of the message—and by extension any potentially defamatory statement—would be understood. Ultimately, online chat rooms and bulletin boards more closely resemble conversations in a town square or on a large party line, than carefully thought out, rigorously edited articles in a print magazine.[5]

37.05 The Good Samaritan Exemption (Section 230 of the CDA)

37.05[1] In General

37.05[1][A] Scope, Exclusions and Legislative Purpose

Congress, in the Telecommunications Act of 1996,[1] expressly overruled the *Stratton Oakmont v. Prodigy Services, Inc.*[2] decision discussed in section 37.04[3]. 47 U.S.C.A. § 230(c)—captioned in the legislation as "Protection for 'Good Samaritan' blocking and screening of offensive material" and colloquially referred to by most courts as the CDA[3]—contains three main provisions set forth in two subparts. Subpart 230(c)(1) was intended to overrule the *Stratton Oakmont* de-

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[5]*See* Ian C. Ballon, *Pinning the Blame in Cyberspace: Towards A Coherent Theory for Imposing Vicarious Copyright, Trademark and Tort Liability for Conduct Occurring Over the Internet*, 18 Hastings J. Communications & Ent. L. 729, 759 (1996).

[Section 37.05[1][A]]

[1]47 U.S.C.A. § 230(c).

[2]*Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995); *see generally supra* § 37.04[3] (analyzing the case).

[3]Section 230 was added to the Telecommunications Act of 1934 by the Telecommunications Act of 1996, in a part of the statute also referred to as the Communications Decency Act (or CDA). The bulk of the CDA, other than section 230, which was codified at 47 U.S.C.A. § 223, addressed criminal sanctions for adult material made accessible to minors and was largely struck down by the U.S. Supreme Court as unconstitutional in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *see infra* § 41.02.

Section 230 (which was section 509 of the Telecommunications Act of 1996) is frequently referred to by courts as the Communications Decency Act, or CDA, and occasionally as section 230 of the Telecommunications Act of 1934 (although, of course, there was no Internet in 1934).

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cision, while subpart 230(c)(2)(A) broadly exempts any action undertaken in good faith to restrict access to or the availability of certain offensive material (to create an incentive for interactive computer service providers and users to voluntarily screen and block certain objectionable material), and subpart 230(c)(2)(B), which was added by a later amendment, exempts any action taken to enable or make available the technical means to do so (such as filtering tools)—in other words, liability imposed for doing the very things that Prodigy did in the *Stratton Oakmont* case that had led to liability. In fact, the provisions of the Good Samaritan exemption reach more broadly than the specific objectives that prompted enactment of the law.

Section 230 provides immunity from liability, not immunity from suit.[4]

Subpart 230(c)(1) provides that "[n]o provider or user of an interactive computer service[5] shall be treated as the pub-

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The first edition of this treatise referred to section 230 as the Good Samaritan exemption, reflecting the caption used by Congress in the Telecommunications Act of 1996, although technically, as discussed below, only section 230(c)(2) provides a "Good Samaritan" exemption for undertaking action not otherwise required, whereas section 230(c)(1)—which is the provision most commonly litigated—requires no action at all by an interactive computer service provider or user to benefit from the immunity it provides. Referring to section 230 as the "CDA" is likewise an incomplete characterization of section 230 for the same reason. Section 203(c)(2) is the only part that deals with "communications decency"—encouraging Good Samaritan measures to restrict access to certain material that, while lawful, could be viewed as objectionable—whereas section 230(c)(1) (which creates an exemption from liability for publishing or speaking content originating with a third party) is agnostic to decency. Indeed, the immunity created by section 230(c)(1) would apply equally to decent or indecent content (so long as not obscene or otherwise prohibited by federal criminal law).

In this edition, section 230 is referred to by its colloquial name—the CDA—but, to avoid confusion with the criminal provisions of the statute addressed in chapter 41, it is also referred to as the Good Samaritan exemption created by the Telecommunications Act of 1996.

[4] *General Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178 (10th Cir. 2016) (dismissing appellant's appeal).

[5] An *interactive computer service* is defined under the Act as "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 . . . ." 47 U.S.C.A. § 230(f)(2). An *access software provider* is defined as "a provider of software . . . or enabling tools that do any of the following: (A)

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lisher or speaker[6] of any information provided by another information content provider."[7] Section 230(c)(1) is a self-executing provision that was intended to overrule *Stratton-Oakmont* and any other similar case that would hinder the development of Internet commerce by imposing liability standards on intermediaries that would deter them from operating online. By its terms, the exemption created by subpart 230(c)(1) applies to any claim—not merely defamation—where liability is sought to be imposed on someone as the *publisher* or *speaker* of information provided by someone else, and is self-executing.

Courts subsequently have broadly construed subpart

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filter, screen, allow or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, or translate content." 47 U.S.C.A. § 230(f)(4).

[6]The term *publisher or speaker* is not defined in the statute. The Fourth Circuit, in the first case to construe the CDA, interpreted the term to encompass both traditional publisher and distributor liability – reading *publisher or speaker* broadly to apply to any speech, as well as any traditional editorial functions. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330–33 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The Fourth Circuit concluded that section 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." 129 F.3d at 330. The D.C. Circuit reached a similar conclusion 17 years later by applying the "ordinary meaning" to *publisher*:

> "one that makes public," and "the reproducer of a work intended for public consumption." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1981); *cf. also* RESTATEMENT (SECOND) OF TORTS § 577 (1977) ("Publication of defamatory matter" means both the communication of, and the failure to remove, the relevant content.). Indeed, the very essence of publishing is making the decision whether to print or retract a given piece of content . . .).

Klayman v. Zuckerberg, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence).

In *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1127-29 (N.D. Cal. 2016), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018), the court held that Twitter acted as a publisher of Direct Messages sent by users, even though those messages are private and not available for public view, because the term *publisher* under the CDA should be broadly construed.

[7]An *information content provider* is defined as "any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C.A. § 230(f)(3).

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230(c)(1) to preempt or otherwise provide immunity from virtually all speech-based claims (not merely defamation) brought against interactive computer services or users for content created by others. As articulated by the Second Circuit, "[i]n light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity."[8] Section 230(c)(1) "applies not only to defamation claims, where publication is an explicit element, but also to claims where 'the duty that the plaintiff alleges the defendant violated derives from the defendant's *status* or *conduct* as a publisher or speaker.' "[9] The issue litigated in subsection 230(c)(1) cases therefore frequently is whether a given defendant should be treated as an *information content provider*, in which case the exemption is not available, or merely the publisher or speaker of information provided by another information content provider. Depending on the facts of a given case, an interactive computer service provider or user potentially may even be treated as an information content provider with respect to some content or business functions, while enjoying Good

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[8] *Force v. Facebook, Inc.,* 934 F.3d 53, 64 (2d Cir. 2019) (citing *FTC v. LeadClick Media, LLC,* 838 F.3d 158, 173 (2d Cir. 2016) (collecting cases)), *cert. denied*, 140 S. Ct. 2761 (2020); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("Congress inten[ded] to confer broad immunity for the re-publication of third-party content."); *Jane Doe No. 1 v. Backpage.com, LLC,* 817 F.3d 12, 18 (1st Cir. 2016) ("There has been near-universal agreement that section 230 should not be construed grudgingly."); *Jones v. Dirty World Entm't Recordings LLC,* 755 F.3d 398, 408 (6th Cir. 2014) ("[C]lose cases . . . must be resolved in favor of immunity.") (quoting *Fair Housing Council v. Roommates.com, LLC,* 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*)); *Doe v. MySpace, Inc.,* 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content."); *Almeida v. Amazon.com, Inc*., 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted [Section 230] to establish broad . . . immunity."); *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1123 (9th Cir. 2003) ("§ 230(c) provides broad immunity for publishing content provided primarily by third parties.") (citation omitted); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium."), *cert. denied*, 524 U.S. 937 (1998).

[9] *Force v. Facebook, Inc.,* 934 F.3d 53, 64 n.18 (2d Cir. 2019) (quoting *FTC v. LeadClick Media, LLC,* 838 F.3d 158, 175 (2d Cir. 2016) (quoting *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1102 (9th Cir. 2009)) (emphasis added) (internal quotation marks omitted)), *cert. denied*, 140 S. Ct. 2761 (2020).

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Samaritan immunity from liability for others.[10]

Subpart (c)(2) of section 230 provides that:

> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph: (1).[11]

Subpart 230(c)(2)(B) exempts providers or users of interactive computer services from liability on account of "any action taken to enable or make available to information content providers or otherwise the technical means to restrict access to material described in paragraph: (1)" which really should mean subpart 230(c)(2)(A). This provision addresses a very specific, narrow issue (the provision of screening software or other tools) that, unlike subparts (c)(1) and (c)(2)(A), arises only infrequently.[12]

Subpart (c)(2)(A) inverts the common law rules on distributor and publisher liability by immunizing conduct undertaken to monitor or screen content. Traditionally, the more editorial control exerted, the more likely it was that a company would be subject to the greater potential liability of

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[10]*See, e.g.*, *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (*en banc*) (finding Roommate.com entitled to CDA immunity for some aspects of the Roommates.com website, but not for others; "A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content."); *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 307 F. Supp. 3d 952, 965 (D. Minn. 2018) (dismissing plaintiff's defamation claim against a Senior Moderator of the Allnurses.com website, to the extent based on third party claims she moderated, but not for her own posts), *aff'd on other grounds*, 971 F.3d 747, 752 n.4 (8th Cir. 2020) (noting that the plaintiffs did not challenge, on appeal, the lower court's ruling dismissing the defamation claim).

[11]47 U.S.C.A. § 230(c)(2).

[12]*See infra* § 37.05[4][D].

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a publisher, rather than the lower exposure to defamation claims faced by distributors, such as newspaper vendors and bookstores.[13]

By its terms, section 230(c)(2) requires *action* to be taken for either of the exemptions set forth in section 230(c)(2) to apply. While the applicability of section 230(c)(1) will be determined by the nature of the claim (one seeking to hold a defendant liable as a publisher or speaker) and whether the content at issue comes from another information content provider, entitlement to the exemptions created by subparts (c)(2)(A) and (c)(2)(B) depend on affirmative conduct by an interactive computer service or user and are not self-executing.

By this statute, "Congress sought to spare interactive computer services this grim choice [of taking no action or risking greater liability by voluntarily filtering material] by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete. In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content . . . ."[14]

While subparts (c)(1) and (c)(2) provide independent grounds for an interactive computer service provider or user to qualify for the exemption, the two sections form part of a coherent statutory scheme and in some cases may provide overlapping protection. Section 230(c)(1) exempts cases such as *Stratton Oakmont* where liability is premised on an interactive computer service provider or user acting as a publisher or speaker, while subpart 230(c)(2)(A) broadly exempts liability for actions such as those undertaken by Prodigy in the *Stratton Oakmont* case from which a duty to act otherwise might be inferred. In cases such as *Stratton Oakmont*, interactive computer service providers and users would be deemed exempt under both provisions. In other cases, however, parties may only be entitled to an exemption under one or the other subpart.[15]

By their plain terms, both subparts (c)(1) and (c)(2) reach

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[13]*See, e.g.,* Restatement (Second) of Torts § 581, at 231 (1977); *supra* §§ 37.03[3], 37.04.

[14]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (emphasis in original).

[15]Where an interactive computer service provider or user is entitled to either exemption, the one provided by section 230(c)(1) is preferable.

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more broadly than the facts of *Stratton Oakmont*. Subpart (c)(1) exempts causes of action premised on publisher or speaker liability—not merely defamation—and subparts (c)(2)(A) and (c)(2)(B) exempt *any action*—not merely efforts to filter certain words or screen content.

As explained by the Ninth Circuit,

> Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection (c)(2), for its part, provides an additional shield from liability, but only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable." § 230(c)(2)(A). Crucially, the persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider [or user] of an interactive computer service. *See* § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, *see Roommates*, 521 F.3d at 1162–63, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers [sic][16] from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.[17]

Section 230(c) not only affords immunity for interactive computer service providers and users in U.S. litigation, but it also provides a defense to recognition or enforcement of a foreign judgment of defamation against an interactive computer service provider where liability would be inconsistent with section 230 had the judgment been entered in the United States.[18] Judge Nicholas G. Garaufis of the Eastern District of New York, in a case of first impression, further

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Subpart (c)(1) focuses on the nature of plaintiff's allegations, which may lend itself better to a motion for summary judgment—or even a motion to dismiss or judgment on the pleadings. *See infra* § 37.05[7]. By contrast, because a defendant must show good faith to prevail under section 230(c)(2)(A), it may be more difficult to prove entitlement to that safe harbor short of trial.

[16]The Good Samaritan exemption applies to *interactive computer service* providers and users, not Internet Service Providers, which is the term that the *Barnes* court mistakenly uses.

[17]*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009).

[18]*See* 18 U.S.C.A. § 4102(c); *infra* § 37.09[3] (analyzing the statute and its practical effects). This defense applies to interactive computer service providers only, not users, and only with respect to defamation which,

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held that CDA immunity applies to cases brought in the United States, regardless of where the claim arose or what law applies because the location relevant for purposes of the CDA "must be where redress is sought and immunity is needed . . . ."[19] The Second Circuit subsequently reversed the district court on jurisdictional grounds, expressing no view on whether the CDA would apply to a foreign law dispute adjudicated in a U.S. court,[20] although another district court followed Judge Garaufis in holding that it does[21] in a ruling affirmed by the Ninth Circuit.[22]

The Good Samaritan exemption does not apply to "[f]ederal criminal statute[s,]"[23] "any law[s] pertaining to intellectual property,"[24] or the federal Electronic Communications

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while broadly defined, is still narrower than the full range of claims preempted by the CDA. *See infra* § 37.09[3].

[19]*See Cohen v. Facebook Inc.*, 252 F. Supp. 3d 140, 158–60 (E.D.N.Y. 2017) (dismissing claims brought under Israeli law as preempted by the CDA), *rev'd on jurisdictional grounds sub nom. Force v. Facebook, Inc.*, 934 F.3d 53, 72-75 & n.32 (2d Cir. 2019) (expressing no opinion on whether "the district court's conclusion that Section 230 applies to foreign law claims brought in the United States."), *cert. denied*, 140 S. Ct. 2761 (2020).

[20]*See Force v. Facebook, Inc.,* 934 F.3d 53, 72-75 & n.32 (2d Cir. 2019).

[21]*See Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1161-63 (N.D. Cal. 2017) (following *Cohen v. Facebook* in concluding that the CDA applies to claims brought by family members of a victim of the November 2015 ISIS terrorist attack in Paris, against Google, under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), based on Google's ownership and operation of the YouTube platform, which plaintiffs alleged provided material support to terrorists, and dismissing those claims pursuant to the CDA), *aff'd*, 2 F.4th 871, 887-88 (9th Cir. 2021).

[22]*See Gonzalez v. Google LLC*, 2 F.4th 871, 887-88 (9th Cir. 2021).

[23]47 U.S.C.A. § 230(e)(1) ("Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute."). The exclusion for federal criminal laws has been construed to apply to criminal prosecutions, not civil claims brought under federal criminal statutes. *See, e.g., Doe No. 1 v. Backpage.com, LLC,* 817 F.3d 12, 23 (1st Cir. 2016) (construing section 230(e)(1) to apply to federal criminal statutes but not civil claims brought under federal criminal statutes); *Force v. Facebook, Inc.,* 934 F.3d 53, 71-72 (2d Cir. 2019) (holding section 230(e)(1) inapplicable in a civil action), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 890 (9th Cir. 2021) ("We agree with the First and Second Circuits, and hold that § 230(e)(1) is limited to criminal prosecutions.").

[24]47 U.S.C.A. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."); *see gener-*

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Privacy Act[25] "or any similar State law."[26] The legislative history also makes clear that the exemption is not intended to limit potential liability for cancelbots.[27] Pursuant to a 2018 amendment, the CDA also excludes three categories of federal civil and state law criminal charges relating to sex trafficking and the promotion of prostitution (including related advertising), but these exclusions only apply to the Good Samaritan exemptions created by sections 230(c)(1) (for republication of content originating with another information content provider) and 230(c)(2)(B) (for screening software), not section 230(c)(2)(A) (for good faith measures to restrict objectionable content) which continues to provide a defense for these claims and charges.[28] The scope of these exclusions, and in particular the ones for any law pertaining to intellectual property and sex trafficking, which require more detailed analysis, are analyzed further in section 37.05[5].

Where either subparts (c)(1) or (c)(2) apply, they potentially foreclose a wide array of state civil claims and criminal charges and federal civil laws. The Good Samaritan exemption expressly preempts inconsistent state laws,[29] but not

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ally infra § 37.05[5][B].

[25]47 U.S.C.A. § 230(e)(4). The Electronic Communications Privacy Act is comprised of two separate titles. Title I (18 U.S.C.A. §§ 2510 to 2521) proscribes the intentional interception of electronic communications, while Title II (18 U.S.C.A. §§ 2701 to 2711) prohibits unauthorized, intentional access to stored electronic communications. *See generally infra* §§ 44.06, 44.07. Title I, among other things, prohibits the interception of email communications sent over the Internet or otherwise in interstate commerce. *E.g.*, *United States v. Maxwell*, 42 M.J. 568 (A.F.C.C.A. 1995), *aff'd in part*, 45 M.J. 406 (U.S. Armed Forces Ct. App. 1996); *infra* § 44.06. ECPA, however, generally does not prohibit employers from intercepting employee email unless the employer creates express or implied expectations of privacy in those communications. *See infra* §§ 44.06, 44.07, 58.07[5][A].

[26]47 U.S.C.A. § 230(e)(4) ("Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.").

[27]Conference Report 104–458, 104th Cong. 2d Sess. 194 (1996). A cancelbot is an algorithm or command script that automatically deletes all messages from a specified source. Paul Evan Peters, "In Your Face in Cyberspace," Educom Review, Sept/Oct. 1994.

[28]*See* 47 U.S.C.A. § 230(e)(5); *see generally infra* § 37.05[5][C] (analyzing these exclusions).

[29]47 U.S.C.A. § 230(e)(3) ("No cause of action may be brought and no

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those consistent with its provisions.[30] It also applies to

liability may be imposed under any State or local law that is inconsistent with this section.").

[30]The statute does not "prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C.A. § 230(e)(3). As expressly stated in the statute, the purpose of section 230 is to promote the development of the Internet and other interactive computer services and media, preserve the free market for the Internet and online services without state or federal government regulation, encourage the development of technologies that maximize user control over what information is received by users, remove disincentives for the development and use of blocking and filtering technologies that parents may use to restrict children's access to objectionable or inappropriate online material and ensure the enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer. 47 U.S.C.A. § 230(b).

Virginia has a mini-CDA statute that provides parallel protection for interactive computer services to the federal statute (except that its protection for republication is limited to the internet). *See* Va. Code Ann. § 8.01-49.1. This state provision potentially extends the scope of CDA-like immunity to those state claims under Virginia law that otherwise may not be subject to CDA preemption because they fall within the exclusions to CDA immunity set forth in 47 U.S.C.A. § 230(e), which are analyzed in section 37.05[5]. The Virginia statutes provides, in relevant part:

> No provider or user of an interactive computer service on the Internet shall be treated as the publisher or speaker of any information provided to it by another information content provider. No provider or user of an interactive computer service shall be liable for (i) any action voluntarily taken by it in good faith to restrict access to, or availability of, material that the provider or user considers to be obscene, lewd, lascivious, excessively violent, harassing, or intended to incite hatred on the basis of race, religious conviction, color, or national origin, whether or not such material is constitutionally protected, or (ii) any action taken to enable, or make available to information content providers or others, the technical means to restrict access to information provided by another information content provider.

Conversely, some state statutes simply include express exclusions for conduct by interactive computer service providers. California Penal Code § 530.5(f), which creates criminal penalties for unauthorized use of personal identifying information to attempt to obtain credit or for other purposes, for example, includes an express exemption modeled on the CDA. *See* Cal. Penal Code § 530.59(f) ("An interactive computer service or access software provider, as defined in subsection (f) of Section 230 of Title 47 of the United States Code, shall not be liable under this section unless the service or provider acquires, transfers, sells, conveys, or retains possession of personal information with intent to defraud."). Likewise, Indiana, Kansas, Missouri, Washington, and Wyoming law provide immunity from liability for interactive computer service providers' blocking commercial electronic mail. *See* Ind. Code Ann. § 24-5-22-9; Kan. Stat. Ann. § 50-6,107; Mo. Ann. Stat. § 407.1132; Wash. Rev. Code Ann. § 19.190.050; Wy. Stat. Ann. § 40-12-404.

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federal civil claims,[31] as evidenced by the fact that the statute *excludes* federal criminal laws and claims under the Electronic Communications Privacy Act. Hence, by negative inference, the exemption applies to federal civil statutes other than the ECPA. This conclusion is bolstered by the fact that one of the express policy objectives of the Good Samaritan exemption is to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . . ."[32] To date, courts have applied CDA immunity to federal claims in a number of cases,[33] but found it inapplicable in some instances where liability

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The revenge porn statutes enacted in Arizona, Colorado, Florida, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, and Wisconsin similarly include exclusions or affirmative defenses for interactive computer service providers or provide that the statutes must be construed consistently with the CDA. *See infra* § 51.04[2] (addressing and reprinting those statutes). Section 8 of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act likewise provides that the Act should be construed consistently with the CDA. *See infra* § 51.04[2][A].

[31]As with any federal law, an exclusion or exemption created by one Congress does not bind subsequent Congresses. Absent further Acts of Congress, however, section 230(c) exempts interactive computer service providers and users for any federal claims covered by section 230(c) that are not excluded by one of the provisions of section 230(e), where the terms for eligibility of section 230 otherwise apply.

[32]47 U.S.C.A. § 230(b)(2).

[33]*See, e.g., Doe No. 1 v. Backpage.com*, LLC, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, as precluded by the CDA, in an opinion that was subsequently abrogated with respect to the federal statute at issue by the enactment of a new set of CDA exclusions codified at 47 U.S.C.A. § 230(e)(5)); *Force v. Facebook, Inc.,* 934 F.3d 53, 65-71 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under the Anti-Terrorism Act and Justice Against Sponsors of Terrorism Act ("JASTA"), 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA), *cert. denied*, 140 S. Ct. 2761 (2020); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (holding a claim under the Fair Housing Act precluded by section 230(c)(1)); *Gonzalez v. Google LLC*, 2 F.4th 871, 889-90, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, holding

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that the Justice Against Sponsors of International Terrorism Act (JASTA) did not impliedly repeal the CDA, and rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052-54 (9th Cir. 2019) (reversing the lower court's order granting defendant's motion to dismiss plaintiff's Lanham Act claim based on section 230(c)(2)(B) on other grounds, but holding that a false advertising claim under the Lanham Act was not a law "pertaining to intellectual property" under section 230(e)(2) and therefore potentially could be subject to immunity under the CDA; "even though the Lanham Act is known as the federal trademark statute, not all claims brought under the statute involve trademarks."), *cert. denied*, 141 S. Ct. 13 (2020); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (holding the defendant entitled to CDA protection for some but not all of the functions of its site in a Fair Housing Act case); *Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Sherman Act I (conspiracy) and II (monopolization) and Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claims under Title II of the Civil Rights Act, 42 U.S.C.A. §§ 2000a *et seq.*, and the First Amendment to the U.S. Constitution, and California's Unruh Act, Cal. Civ. Code §§ 51 *et seq.*, with prejudice); *National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (granting judgment on the pleadings, holding that the CDA was applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888-92 (N.D. Cal. 2017) (dismissing with prejudice the claims of a police officer and a deceased officer's father, under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), alleging liability by Twitter, Google, and Facebook, for providing material support to Hamas, a Palestinian entity designated as a foreign terrorist organization, primarily in the form of access to defendants' online social media platforms, because plaintiffs had not plausibly alleged a causal connection between the shooting and defendants' alleged conduct, and because the Communications Decency Act immunized most if not all of the conduct at issue); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1157-71 (N.D. Cal. 2017) (dismissing, as precluded by 47 U.S.C.A.

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was premised on the defendant's own conduct.[34]

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§ 230(c)(1), the claims of family members of a victim of the November 2015 ISIS terrorist attack in Paris against Google under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), based on Google's ownership and operation of the YouTube platform, which plaintiffs alleged provided material support to terrorists, in an early opinion in a case that eventually was decided by the Ninth Circuit); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), with prejudice, holding that (1) liability for providing an account amounts to an allegation that Twitter failed to prevent ISIS from disseminating content through the Twitter platform; and (2) Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (affirming dismissal where the plaintiffs could not allege proximate causation); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016) (dismissing plaintiffs' Complaint with leave to amend, holding Twitter immune under the CDA from liability for a claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), for allegedly providing material support to the Islamic State of Iraq and Syria (ISIS), because ISIS uses Twitter to disseminate its official media publications, raise funds and recruit users); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing as precluded by section 230(c)(2) (with leave to amend) plaintiff's claim under the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030); *Holomaxx Technologies Corp. v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating Holomaxx's virtually identical complaint against Yahoo!); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008) (granting judgment on the pleadings in favor of Comcast under section 230(c)(2) on plaintiff's claim under the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030); *Doe v. Bates*, 35 Media L. Rep. (BNA) 1435, 2006 WL 3813758 (E.D. Tex. 2006) (holding plaintiff's claim, as mother and next friend of a child whose image was posted by a Yahoo! egroup moderator, for relief under 18 U.S.C.A. § 2252A(f) was barred by the CDA); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 538-40 (E.D. Va. 2003) (holding that the CDA precluded a Civil Rights claim alleging that the defendant had failed to protect the plaintiff from harassing and blasphemous comments directed at Muslims in an Internet chat room; "the exclusion of federal criminal claims, but not federal civil rights claims, clearly indicates, under the canon of expressio unius est exclusio alterius, that Congress did not intend to place federal civil rights claims outside the scope of § 230 immunity."), *aff'd mem.*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004).

[34]*See, e.g., FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016) (holding LeadClick liable for FTC Act and Connecticut Unfair Trade Practice Act (CUTPA) violations and ineligible for CDA immunity because it participated in the development of the deceptive content at issue in that case); *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959 (N.D. Cal. 2016) (holding that Twitter was not immune under the CDA from liability for plaintiff's Telephone Consumer Protection Act (TCPA) claim). In *Nunes v. Twitter*, Judge Vince Chhabria, in rejecting the argument that Twitter, in allowing users to send Tweets as text messages, was merely being sued for publish-

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The exclusion of *federal* criminal charges likewise suggests that state criminal laws inconsistent with the Good Samaritan exemption are preempted.[35] This view is further

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ing information that originated with its users, explained that:

> To analogize to a more traditional publishing platform, if someone delivers newspapers containing false gossip, and the person who is the subject of the gossip sues the delivery person for defamation, that lawsuit seeks to treat the delivery person as a publisher. But if the delivery person throws an unwanted newspaper noisily at a door early in the morning, and the homeowner sues the delivery person for nuisance, that suit doesn't seek to treat the delivery person as a publisher. The suit doesn't care whether the delivery person is throwing a newspaper or a rock, and the suit certainly doesn't care about the content of the newspaper. It does not involve the delivery person's "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102. Nor is the lawsuit asking a court to impose "liability arising from content." *Roommate.com*, 521 F.3d at 1162. It merely seeks to stop the nuisance. The same is true of this lawsuit regarding unwanted tweets sent by text to the owners of recycled numbers.

Id. at 967; *see generally supra* § 29.15 (analyzing the TCPA).

[35]Courts have also reached this conclusion. *See, e.g.*, *Backpage.com, LLC v. Hoffman*, 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230); *People v. Gourlay*, Docket No. 278214, 2009 WL 529216, at *3 (Mich. Ct. App. Mar. 3, 2009) (analyzing the statutory scheme of the CDA and concluding that the CDA potentially preempts inconsistent state criminal laws because "the phrase 'any State or local law' includes civil and criminal laws."); *Voicenet Communications, Inc. v. Corbett*, 39 Communications Reg. (P & F) 430, 2006 WL 2506318, at *3–4 (E.D. Pa. Aug. 30, 2006). *Voicenet* was a suit by Usenet newsreader and Internet service providers against state and local law enforcement officials under 42 U.S.C.A. § 1983 for allegedly violating their constitutional and statutory rights in connection with the execution of a search warrant. In addition to holding that the CDA preempted state criminal provisions, the court ruled that the CDA confers a right under section 1983 not to be treated under state criminal laws as the publisher or speaker of information provided by someone else. Note that pursuant to a 2018 amendment, state law criminal charges involving sex trafficking or related advertising are excluded from the scope of CDA protection (except under section 230(c)(2)(A). *See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the scope of the sex

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bolstered by the 2018 amendment to the CDA, which expressly excluded safe harbor protection (under subparts 230(c)(1) and 230(c)(2)(B)) for state criminal charges related to sex trafficking, but also expressly preserved the defense created by section 230(c)(2)(A).[36]

The Good Samaritan exemption does not insulate either interactive computer service providers or users from direct liability for information that they create themselves. Likewise, it does not cover conduct in the physical world. The Good Samaritan exemption applies only in the world of networked computers.[37] Where applicable, however, it leads, in many instances, to results dramatically different from what the outcome would be if the same parties, conduct and claims arose on *terra firma,* rather than in cyberspace.[38]

One court observed that as of early 2012, there had "been

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trafficking exclusions).

In *People v. Bollaert*, 248 Cal. App. 4th 699, 203 Cal. Rptr. 3d 814 (4th Dist. 2016), the court upheld the jury's conviction of the defendant for extortion and unlawful use of personal identifying information, over his objection that he was entitled to immunity as an interactive computer service provider, based on the court's finding that, in operating a website where he required users to disclose their personal information and nude photos of themselves to sign up for his service, Bollaert was acting as an information content provider.

[36]*See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions).

[37]*See* 47 U.S.C.A. § 230(f)(2) (defining *interactive computer service*).

[38]Given the broad scope of its preemptive effect, the continued large volume of litigation under the CDA decades after its passage undoubtedly reflects that lawyers used to the rules of defamation and tort liability on *terra firma* still do not know or cannot quite fathom that no matter how egregious the conduct in most instances intermediaries in cyberspace cannot be held liable for content that originated with third-party users of their sites and services. As underscored in the *Cubby* and *Stratton Oakmont* cases analyzed in section 37.04, which pre-dated the enactment of the Good Samaritan exemption, the laws of the physical world impose liability on intermediaries who knew or should have known about defamatory material or who for one reason or another are held to the liability standard of a publisher. When those same disputes revolve around Internet sites or services, however, the rules are dramatically different. Whereas a newspaper potentially could be held liable for Fair Housing Act violations, Craigslist, the online equivalent of the classified ad section of a newspaper could not. As Chief Judge Easterbrook of the Seventh Circuit explained:

> [Plaintiff may] identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination . . . . It can assemble a list of names to send to the Attorney General for

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approximately 300 reported decisions addressing immunity claims advanced under 47 U.S.C. § 230 in the lower federal and state courts. All but a handful of these decisions find that the website is entitled to immunity from liability."[39]

Although the CDA provides an affirmative defense, one court ruled that the violation by government officials of the right of a user or provider of an interactive computer service to immunity under the CDA as a publisher or speaker of third party content confers a right to bring a civil rights action under 42 U.S.C.A. § 1983.[40]

Despite its success in helping facilitate the development of creative and innovative content and services, the CDA has come under attack from politicians on the left and right and may be scaled back by Congress. The statute has been amended a number of times since it was first signed into law in January 1996. The CDA was amended in 1998 to add section 230(c)(2)(B) providing broader protection for the use of blocking and screening software.[41] It subsequently was amended in 2018 to scale back CDA protections for advertisements and certain federal and state criminal laws as part of a broader effort to restrict child trafficking through enactment of the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) (referred to colloquially as "FOSTA-SESTA").[42] Former President Trump's persistent attacks on reporters, news and media entities, and eventually social media companies, fueled interest in broader efforts to scale back the CDA during the latter half of the Trump Administration. Trump Administration criticisms of the CDA were echoed in *dicta* in a concurring opinion by Supreme Court Justice Thomas in late 2020 (although there is no indication that his views are shared by others on the Court).[43] These attacks from the right were joined by politicians on the left who

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prosecution. But given § 230(c)(1) it cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination.

Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

[39]*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. App. 2012).

[40]*See Voicenet Communications, Inc. v. Corbett*, 39 Communications Reg. (P & F) 430, 2006 WL 2506318 (E.D. Pa. Aug. 30, 2006).

[41]*See generally infra* § 37.05[4] (analyzing section 230(c)(2)(B).

[42]47 U.S.C.A. § 230(e)(5); *see generally infra* § 37.05[5][C].

[43]*See Malwarebytes, Inc. v. Enigma Software Group USA, LLC,* 141

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found common cause with right wing populists in attacking social media companies, so-called "Big Tech" and the law that facilitated U.S. dominance of the Internet, the CDA. Whether these populist sentiments result in legislative changes to the CDA in 2021 or beyond remains to be seen.

There was also, for a time, the possibility that the CDA would be subject to regulatory enforcement by the Federal Communications Commission—although the prospect of this happening grew more remote with President Trump's defeat in the 2020 presidential election and President Biden's subsequent repeal of the Trump Executive Order[44] that had sought to accomplish that result. Prior to the election, in late

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S. Ct. 13, 13-18 (2020) (Thomas, J. concurring in the denial of *certiorari*). Justice Thomas opined that the CDA may have been construed too broadly in eliminating both publisher and distributor liability (*see supra* § 37.04), and applied too broadly to cover conduct and not simply content. He wrote, among other things, that:

> When Congress enacted the statute, most of today's major Internet platforms did not exist. And in the 24 years since, we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world. . . . Without the benefit of briefing on the merits, we need not decide today the correct interpretation of § 230. But in an appropriate case, it behooves us to do so.

Id. Some circuit court judges have also argued for a narrower construction of the CDA or legislative amendment. *See, e.g.*, *Force v. Facebook, Inc.,* 934 F.3d 53, 76-89 (2d Cir. 2019) (Katzmann, C.J. concurring in part, dissenting in part) (arguing that friend- and content-suggestion algorithms do not amount to publication, based on an inapt analogy to someone making phone calls to a friend in the physical world); *Gonzalez v. Google LLC*, 2 F.4th 871, 913-18 (9th Cir. 2021) (Berzon, J. concurring) (arguing that "if not bound by Circuit precedent I would hold that the term 'publisher' under section 230 reaches only traditional activities of publication and distribution—such as deciding whether to publish, withdraw, or alter content—and does not include activities that promote or recommend content or connect content users to each other" and urging the court "to take this case *en banc* to reconsider our case law and hold that websites' use of machine-generated algorithms to recommend content and contacts are not within the publishing role immunized under section 230."); *id.* at 918-38 (Gould, J. concurring in part, dissenting in part) (making an argument for judicial activism, urging "that regulation of social media companies would best be handled by the political branches of our government, the Congress and the Executive Branch, but that in the case of sustained inaction by them, the federal courts are able to provide a forum responding to injustices that need to be addressed by our justice system.").

[44] *Preventing Online Censorship*, Executive Order No. 13,925 of May 28, 2020, 85 Fed. Reg. 34079 (June 2, 2020), *revoked by, Revocation of Certain Presidential Actions and Technical Amendment,* Executive Order 14029 of May 14, 2021, 86 Fed. Reg. 27025 (May 19, 2021). Judicial challenges to the Trump Executive Order had been dismissed for lack of Article

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2020, the outgoing chair of the Federal Communications Commission had asserted jurisdiction to engage in rulemaking under the CDA, in response to Tweets and other criticism of the law by former President Trump.[45] It is unclear whether there will be any appetite at the Commission in future years to proceed with this type of regulation, especially given that the legal basis for FCC rulemaking under the CDA is questionable at best.[46]

One court characterized section 230(c) as a statute intended to "encourage and immunize content moderation

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III standing. *See Center for Democracy & Technology v. Trump,* 507 F. Supp. 3d 213 (D.D.C. 2020); *Rock the Vote v. Trump,* Case No. 20-cv-06021-WHO, 2020 WL 6342927 (N.D. Cal. Oct. 29, 2020).

[45]*See* Thomas M. Johnson, Jr., *The FCC's Authority to Interpret Section 230 of the Communications Act* (Oct. 21, 2020) (statement of the FCC's general counsel, providing the legal basis for former FCC Chairman Ajit Pai's announcement of his intention to move forward with a rulemaking to interpret Section 230 of the Communications Act of 1934), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act

[46]*See* 47 U.S.C.A. § 201(b) (providing that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); Thomas M. Johnson, Jr., *The FCC's Authority to Interpret Section 230 of the Communications Act* (Oct. 21, 2020) (providing the legal rationale for regulating section 230 because of its inclusion in the same chapter of section 201(b) in Title 47). The FCC's former general counsel concluded, in his October 2020 statement, that "[u]ltimately, the five Commissioners of the FCC must decide whether this legal framework should be adopted in any future rulemaking. But in my own judgment, the FCC's legal authority to interpret Section 230 is straightforward: Congress gave the Commission power to interpret all provisions of the Communications Act of 1934—including amendments—and Section 230 is an amendment to the Communications Act. The Commission therefore may proceed with a rulemaking to clarify the scope of the Section 230(c) immunity shield." *Id.*

Nevertheless, there is no evidence that Congress sought to delegate rulemaking authority to the FCC when it enacted section 230. Moreover, the Supreme Court has expressed skepticism of the practice of "regulatory creep" where federal agencies assert jurisdiction to change the scope and terms of statutes enacted by Congress, and has openly questioned whether and to what extent, if any, courts are bound to defer to FCC regulatory determinations. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019) (remanding the case to determine, without addressing, whether district courts are bound by the Hobbs Act to defer to particular FCC determinations in construing the Telephone Consumer Protection Act, 47 U.S.C.A. § 227); *see generally supra* § 29.16 (analyzing this issue at greater length).

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. . . ."[47] While this is certainly true—and the CDA immunizes interactive computer service providers and users from traditional editorial functions—it provides an incomplete view of the broad scope of the CDA, as analyzed in this section. Among other things, the CDA immunizes conduct by users, not merely platforms. It also protects both the removal of content and the failure to remove material (regardless of whether based on an affirmative decision or through inattention). Further, as discussed later in this section it immunizes conduct that takes the form of content online. While content moderation is an important function (and is addressed more extensively in chapter 49) there is an increased risk of judicial misconstruction when courts employ popular terms that stray from the language of a statute (even where, as here, the characterization is accurate, albeit not complete).

The unprecedented political attacks on the CDA—much of it from people who misunderstand its scope or judicial construction or who simply parrot political talking points—also creates an increased risk of judicial misconstruction.

Section 230 and its legislative history are discussed further in section 37.05[1][C], following a discussion of courts that have applied section 230 (in section 37.05[1][B]) and claims that have been held preempted (in the first part of section 37.05[1][C]). Exclusions are separately addressed in section 37.05[5]. Efforts to circumvent the CDA, by seeking to bind interactive computer service providers to injunction orders previously obtained against information content providers, are analyzed in section 37.05[8]. The CDA's interplay with the federal SPEECH Act,[48] which restricts the ability of "libel tourists" to circumvent U.S. law by obtaining judgments overseas and then seeking to enforce them domestically, is separately considered in section 37.09[3].

37.05[1][B] Circuit-by-Circuit and State Court Summary

The First,[1] Second,[2] Third,[3] Fourth,[4] Fifth,[5] Sixth,[6] Sev-

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[47] *In re Zoom Video Communications Inc. Privacy Litigation*, 525 F. Supp. 3d 1017, 1031 (N.D. Cal. 2021).

[48] 18 U.S.C.A. §§ 4101 to 4105.

[Section 37.05[1][B]]

[1] *See Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional

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interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com; rejecting arguments that the defendant should be liable as an information content provider for user comments because it (1) claimed copyright protection in its website content and (2) promoted content to be searchable on Google); *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by the CDA, in an opinion that was abrogated with respect to the federal trafficking statute by the subsequent enactment of 47 U.S.C.A. § 230(e)(5)); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (affirming dismissal of a claim brought by a publicly traded company against an Internet message board operator for allegedly false and defamatory postings by pseudonymous posters). In *Lycos*, the court also affirmed dismissal of the plaintiff's claims against the individual pseudonymous posters because it had failed to plead fraud with particularity.

[2]*See Force v. Facebook, Inc.,* 934 F.3d 53, 65-71 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA, because plaintiffs sought to hold Facebook liable as a publisher of content by Hamas posted to Facebook, and for allegedly not removing that content, and where Facebook's use of algorithms to promote, arrange, and distribute third party content did not change its status as a publisher or amount to development), *cert. denied*, 140 S. Ct. 2761 (2020); *Herrick v. Grindr, LLC*, 765 F. App'x 586, 588-91 (2d Cir. 2019) (affirming dismissal under section 230(c)(1) of product liability, negligence, and intentional and negligent infliction of emotional distress claims, premised on alleged design defects and an alleged duty to warn, in a suit alleging that plaintiff's former boyfriend impersonated him on the Grindr app in a catfishing campaign, holding, among other things, that plaintiff's "manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred by § 230."); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 26-28 (2d Cir. 2015) (holding that plaintiffs' claim for defamation against GoDaddy, as the website hosting service for the site where the allegedly actionable third party material was posted, was preempted by the CDA).

In *FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016), the Second Circuit held that a defendant was not entitled to CDA immunity where it had participated in the development of the deceptive content at issue in that case. The court also expressed skepticism that the operator of an affiliate marketing network could qualify as an interactive computer

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service provider where it routed customers, for a split second, through its HitPath server, before directing them to LeanSpa's website.

In *La Liberte v. Reid,* 966 F.3d 79, 89-90 (2d Cir. 2020), the Second Circuit held that a defendant could not benefit from CDA immunity for posts she authored herself.

[3]*See Obado v. Magedson*, 612 F. App'x 90, 91-94 (3d Cir. 2015) (affirming dismissal for failure to state claims for defamation, intentional and negligent infliction of emotional distress and invasion of privacy against various service providers, search engines and domain name registrars for republishing and allegedly manipulating search engine results to maximize the impact of allegedly defamatory content, based on the CDA); *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015) (affirming dismissal of Kabbaj's claims against Google, Amazon, and Yahoo for defamation, tortious interference with contract, and negligent and intentional infliction of emotional distress under the CDA); *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003). *But see Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-15 (3d Cir. 2021) (disagreeing with the Ninth Circuit and broadly construing the exclusion in section 230(e) for *any law pertaining to intellectual property*, by a 2-1 majority over a strong dissent, holding that plaintiff's state law right of publicity claim was not preempted by the CDA because "Section 230 does not preclude claims based on state intellectual property laws."); *Oberdorf v. Amazon.com Inc.,* 930 F.3d 136, 153 (3d Cir. 2019) (holding that the CDA barred plaintiff's claims to the extent that plaintiff alleged that Amazon failed to provide or to edit adequate warnings regarding the use of a dog collar purchased by the plaintiff from a seller on Amazon.com's marketplace, because the activity fell within a publisher's editorial function, but holding that negligence and strict liability claims were not preempted to the extent based on Amazon's role "as an actor in the sales process . . . ."), *vacated,* 936 F.3d 182 (3d Cir. 2019) (vacating the opinion and granting *en banc* review).

In *Green*, the first and only reported Third Circuit opinion, the plaintiff sued AOL over allegedly defamatory material about him that was posted in its "Romance Over 30" chat room and over a computer virus sent to him from a third party. In ruling that sections 230(c)(1) and 230(c)(2) barred the action, the court rejected arguments that AOL had waived its immunity by the terms of its membership contract and because AOL's Community Guidelines outline standards for online speech and conduct and contain promises that AOL would protect him from other subscribers, which the court treated as a claim that AOL was negligent in promulgating harmful content and in failing to address harmful content on its network.

[4]*See Westlake Legal Grp. v. Yelp, Inc.*, 599 F. App'x 481, 485 (4th Cir. 2015) (holding that a customer review site on which a third party allegedly posted defamatory remarks about the plaintiff was immunized by the CDA because operating an automated system that filters reviews is a traditional editorial function that did not render Yelp an information content provider); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (dismissing plaintiff's claim for defamation based on material posted by a third party); *Zeran v. America Online, Inc.*, 129

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enth,[7] Eighth,[8] Ninth,[9] Tenth[10] and D.C.[11] Circuits have all

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F.3d 327 (4th Cir. 1997) (holding a defamation claim based on a third party's posting on AOL preempted by section 230(c)(1)), *cert. denied*, 524 U.S. 937 (1998).

[5]*See Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008). In *Doe*, plaintiffs, a minor and her mother, sued MySpace for liability over a sexual assault that occurred when the minor, after lying about her age so that she could circumvent the safety features that otherwise would have prevented her from communicating with adult strangers, created a MySpace profile where she posed as an adult, and was thereafter contacted by a 19-year-old boy to whom she provided her telephone number and, after the two communicated offline, she agreed to meet him in person, at which time the assault allegedly occurred.

[6]*See O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) (affirming dismissal of a suit brought against the Texas Office of Court Administration, Google, Fastcase and a German search engine by a man who falsely appeared to be listed as having been convicted of indecency with a child in search results because of the way the Texas Advance Sheet previewed information); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating and reversing a jury award for the plaintiff over highly offensive comments posted on a gossip website, based on the finding that defendants were entitled to immunity under the CDA).

In *dicta* in a footnote in an earlier case, a Sixth Circuit panel had stated that "even if the complaint or proposed amended complaint had alleged that TripAdvisor's users' statements are defamatory, TripAdvisor cannot be held liable for its users' statements under the Communications Decency Act, 47 U.S.C. § 230(c)(1)." *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 599 n.8 (6th Cir. 2013).

The Sixth Circuit had previously declined to reach the issue of the applicability of the CDA in a case where it found that the plaintiff had failed to state a claim against an "adult" dating site based on the warranty disclaimers in the site's Terms and Conditions (making it unnecessary to consider the applicability of the CDA). *See Doe v. SexSearch.com*, 551 F.3d 412, 416 (6th Cir. 2008); *see generally infra* § 37.05[6] (discussing the case).

[7]*See Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (holding a claim under the Fair Housing Act preempted by section 230(c)(1)); *see also Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (affirming dismissal of a claim by college athletes who were secretly video-recorded in locker rooms, bathrooms and showers, against the companies that provided Internet access and web hosting services to sites that sold copies of these videos; discussing the CDA extensively in *dicta*).

Former Chief Judge Easterbrook wrote the opinions in both *Craigslist* and *GTE Corp*. In *GTE Corp.*, he raised a number of questions about the potential scope of the CDA without resolving them. He ultimately affirmed the lower court's dismissal based on the defendant's failure to allege any duty on the part of the web hosts to monitor and prevent misconduct, thereby making it unnecessary to reach the issue of

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construed section 230(c)(1) broadly to preclude claims against

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section 230's applicability and its proper scope. In his comments in *dicta*, Judge Easterbrook suggested that subpart (c)(1) might be merely a definitional section, while subpart (c)(2) sets forth the scope of the immunity provided by the Good Samaritan exemption. This hypothesis, however, is inconsistent with the text of section (c)(1), which does not read like a definitional section, and with the structure of section 230 as a whole, which includes a separate definitions section in section 230(f).

In *Craigslist,* Judge Easterbrook appeared to have retreated from this position in affirming the entry of judgment for the defendant, finding plaintiff's Fair Housing Act claim preempted by section 230(c)(1). However, Judge Easterbrook subsequently cited both *GTE* and *Craigslist* in *Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) for the proposition that "subsection (c)(1) does not create an 'immunity' of any kind." In *Chicago v. StubHub*, the Seventh Circuit held that a suit by the City of Chicago asserting that an Internet ticket resale service was responsible for collecting a special city amusement tax on ticket sales was not preempted by the CDA. Judge Easterbrook wrote that subsection (c)(1) "limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.' " *Id.*; *see also Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630 (Ill. App.) (applying Seventh Circuit law in ruling that plaintiff's negligent supervision claim was not preempted by the CDA because section 230(c)(1) "limits who may be called the publisher or speaker of information that appears online . . . [and therefore] could foreclose any liability that depends on deeming the ICS user or provider a publisher or speaker . . . [but] was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve use of the Internet."), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012).

Outside the Seventh Circuit and Illinois state court, *Chicago v. StubHub* and *Lansing* may be distinguished as cases where liability was not premised on republication of third party speech. *See, e.g., Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 n.4 (N.C. App. 2012) (distinguishing *Chicago v. StubHub* because "the issue before the Seventh Circuit in that case was the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content."). Judge Easterbrook's view in *Chicago v. StubHub* that "subsection 230(c)(1) does not create an 'immunity' of any kind," however, may reflect a narrower interpretation of the scope of CDA preemption than is applied in other circuits, at least to the extent that liability is premised on an interactive computer service provider's failure to act. *See infra* § 37.05[3][B] (discussing this issue in greater detail).

Chicago's suit against StubHub ultimately ended after the Illinois Supreme Court ruled that municipalities may not require electronic intermediaries to collect and remit amusement taxes on resold admission tickets. *See Chicago v. StubHub, Inc.*, 663 F.3d 933 (7th Cir. 2011); *Chicago v. StubHub, Inc.*, 979 N.E.2d 844 (Ill. 2012).

In *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016), the court reversed and remanded the lower court's order dismissing defamation and false

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light claims asserted by an accused rapist against Gawker over user comments posted on Gawker's website in connection with an article Gawker had published about plaintiff Huon suing the website Above the Law for implying that he was a rapist in an article published on the same day he was acquitted of rape, entitled "Acquitted Rapist Sues Blog for Calling Him Serial Rapist." Judge Williams, writing for himself, Judge Easterbrook and Southern District of Illinois Judge Yandle (who was sitting by designation), explained that although the "Gawker Defendants may well be correct in contending that none of Huon's various allegations actually occurred, . . ." they had stated a claim by alleging that some of the allegedly defamatory comments had been authored by Gawker employees, allegedly to generate revenue. *Id.* at 741-43. Judge Williams wrote that "[d]iscovery is the proper tool for Huon to use to test the validity of his allegations, and if he is unable to marshal enough facts to support his claim the Gawker Defendants can move for summary judgment." *Id.* at 742. The court declined to parse through Huon's specific allegations, most of which Gawker alleged amounted to traditional publishing activities insulated by the CDA, because it did not need to "wade into that debate, since at least some of the allegedly defamatory comments were authored by Gawker employees—thus making Gawker an 'information content provider' under § 230(f)." *Id.* at 743.

[8] *See East Coast Test Prep LLC v. Allnurses.com, Inc.*, 971 F.3d 747, 751-53 (8th Cir. 2020) (affirming dismissal of trade libel claim arising out of user comments about plaintiff's test preparation service on defendant's online forum for nursing professionals); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010). In *Johnson*, the court held that plaintiffs' defamation claim against an ISP that provided hosting services to www.complaintsBoard.com, where allegedly defamatory statements about plaintiffs' Kozy Kittens Cattery business had been posted, was preempted by the CDA because sections 230(c)(1) and 230(e)(3) collectively "bar[red] plaintiffs from holding ISPs legally responsible for information that third parties created and developed" and the record contained no evidence that the InMotion, the ISP, "designed its website to be a portal for defamatory material or do anything to induce defamatory postings." *Id.* at 791–92.

In *Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779–80 (8th Cir. 2012), the court, in reversing the entry of a preliminary injunction barring a school district from suspending two students for operating a blog on which they and a third student posted racist and derogatory comments about other students at their school, declined to address whether the CDA was applicable to the case but noted in *dicta* that the CDA would not necessarily have protected the plaintiffs even if it was applicable because their own posts contributed to the disruption at school that led to their suspension.

[9] *See Gonzalez v. Google LLC,* 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared

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revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Weimer v. Google, Inc.*, 829 F. App'x 296, 297 (9th Cir. 2020) (affirming dismissal of pro se plaintiff's § 1983 and other claims against Google and Microsoft arising out of their alleged provision of third party pornographic material through their search engines); *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-99 (9th Cir. 2020) (affirming dismissal of plaintiff's state law claims seeking to impose liability on Facebook for "allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor" as barred by the CDA, and rejecting arguments that Facebook's monetization of content transformed it into an information content provider or that extending § 230(c)(1) immunity would render § 230(c)(2)(A) mere surplusage), *cert. denied,* 141 S. Ct. 1067 (2021); *Igbonwa v. Facebook, Inc.*, 786 F. App'x 104 (9th Cir. 2019) (affirming dismissal of plaintiff's claims of negligence, defamation, and discrimination against Facebook and its CEO, Mark Zuckerberg, because he sought to hold them liable as publisher or speaker of third party content), *cert. denied*, 141 S.Ct. 913 (2020); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-1101 (9th Cir. 2019) (affirming dismissal of claims against The Experience Project website for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability Act, Cal. Health & Safety Code §§ 11700, *et seq.,* as preempted by section 230(c)(1), in a suit brought by the mother of a man who participated in an anonymous heroin-related forum, where the deceased user solicited and found someone on the forum to sell him heroin, which turned out to have been laced with fentanyl, which caused his death, because Ultimate Software, through its Experience Project, acted as a publisher in recommending user groups and sending email notifications of posts, and did not become a developer of content (or owe a duty of care to the decedent, or collude with the drug dealer) by providing neutral tools that a user could exploit to create a profile or perform a search); *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for defamation, libel, false light, public disclosure of private facts, intrusion upon seclusion, intentional and negligent infliction of emotional distress, negligent supervision and retention, and California's Unfair Competition Law (UCL), "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016) (affirming dismissal of a defamation claim brought against Yelp over unfavorable customer reviews); *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. (2009); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007) (holding that the CDA preempted a right of publicity claim); *Batzel v. Smith*, 333 F.3d 1018, 1022, 1031 (9th Cir. 2003) (rejecting the argument that by minor wording changes and the addition of a "moderator's message" to a third-party posting (and by his decision to publish or not publish certain messages) a website owner was jointly responsible with the speaker as an information content provider); *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1120 (9th Cir. 2003) (holding an

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interactive computer service providers or users based on

Internet dating site exempt under the CDA from liability for various claims arising out of a third party's submission of a phony profile purporting to belong to the plaintiff); *see also Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) (broadly construing section 230(c)(2)(B)); *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019) (narrowing somewhat its previous interpretation of section 230(c)(2)(B) in *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009), in holding that the term *otherwise objectionable* does not give an interactive computer service provider the unfettered discretion to select what criteria makes a software program "objectionable" under section 230, and carving out an exception where the company whose content has been blocked is a direct competitor of the interactive computer service provider, while nevertheless still broadly construing the safe harbor), *cert. denied*, 141 S. Ct. 13 (2020); *see generally infra* § 37.05[4] (analyzing the case in the context of section 230(c)(2)).

The *en banc* panel in *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) scaled back somewhat the broad scope previously given to the exemption in the Ninth Circuit—particularly in *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119 (9th Cir. 2003)—by expansively defining the exclusion for information content providers. In *Carafano*, a third party had created a profile by filling out a questionnaire supplied by the defendant-dating site. Because a third party, not the defendants, created the profile, the Ninth Circuit had held that the defendants in *Carafano* were exempt from liability. In *Roommate.com,* however, the Ninth Circuit held that the defendant acted as an information content provider when it created a questionnaire that site users used to create profiles for a roommate matching site, where the contents of those profiles were at issue in the case. The en banc panel characterized the language used in *Carafano* as "unduly broad" and expressly disavowed language in that case that suggested that an interactive computer service was "automatically immune so long as the content originated with another information content provider." 521 F.3d at 1171 & n.31. The Ninth Circuit reaffirmed the holding for the defendant in *Carafano* but on narrower grounds—characterizing the form/questionnaire in that case as a neutral tool used by a third party to create the actionable profile where plaintiff's claim amounted to one for negligence in failing to screen. By contrast, the plaintiff's claim in *Roommate.com* centered on the very questions written by the site and used by users to create their profiles.

The Ninth Circuit also has recognized certain fact-specific exceptions to CDA coverage. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit held that plaintiff's negligent undertaking claim was preempted by the CDA but ruled that her promissory estoppel claim was not, where the defendant allegedly affirmatively undertook to provide assistance in removing material that it would not otherwise have been required to remove under the CDA, but did not do so. In ruling that a quasi-contract claim for promissory estoppel was not preempted by section 230(c)(1) because it was not premised on publication or speaking, the Ninth Circuit was careful to explain that it was not opining on whether the claim might be preempted by section 230(c)(2)(A), which Yahoo! had

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not raised in its appeal. *See generally infra* §§ 37.05[4][B], 37.05[6] (discussing the case in greater detail).

Similarly, in *Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), the Ninth Circuit held that the CDA did not bar a claim by an aspiring model against the owners of Model Mayhem, a social networking site for people in the modeling industry, for negligently failing to warn her about two individuals who used the website as part of a scheme to lure her to a fake audition, where they proceeded to rape her, where the information that formed the basis for plaintiff's failure to warn claim was allegedly acquired by the defendant offline. The court held that the plaintiff did not seek to hold Internet Brands liable as a publisher or speaker, but rather for its own failure to warn her about how third parties targeted and lured victims through Model Mayhem (which Internet Brands allegedly knew because it had sued the former owners of Model Mayhem in 2010 alleging that it faced liability for civil suits based the prior misconduct of the two men who went on to rape the plaintiff). The appellate panel explained that "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content. Any obligation to warn could have been satisfied without changes to the content posted by the website's users." *Id.* at 851. The court conceded that posting or emailing a warning could be deemed an act of publishing information, but wrote that "section 230(c)(1) bars only liability that treats a website as a publisher or speaker of content provided by somebody else: in the words of the statute, 'information provided by another information content provider.' " *Id.*, *quoting* 47 U.S.C.A. § 230(c)(1). The panel held that "[a]n alleged tort based on a duty that would require . . . a self-produced warning therefore falls outside the scope of section 230(c)(1)." 824 F.3d at 851. The panel conceded that broadly speaking Internet Brands acted as the "publisher or speaker" of user content by hosting the plaintiff's Model Mayhem profile and this action could have been described as the "but for" cause of her injuries because "[w]ithout it Flanders and Callum would not have identified her and been able to lure her to their trap" but the court wrote that "[p]ublishing activity is a but-for cause of just about everything Model Mayhem is involved in" and "the CDA does not provide a general immunity against all claims derived from third-party content." *Id.* at 853; *infra* § 37.05[3][B][ii] (analyzing the case in substantially greater detail); *see also Beckman v. Match.com, LLC*, 668 F. App'x 759 (9th Cir. 2016) (affirming dismissal of claims for negligent misrepresentation, violation of the Federal Trade Commission Act (unfair trade practices) and negligence *per se* arising out of a brutal attack on the plaintiff by a man she met on Match.com, but remanding for further consideration plaintiff's potential failure to warn claim under *Doe No. 14*); *see generally infra* § 37.05[3][B][ii] (discussing *Beckman*). Subsequent case law has confirmed that the exception created by *Doe No. 14* is narrowly limited to cases where a duty to warn arose offline, rather than from online material. *See infra* § 37.05[3][B][ii].

Likewise, in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), the Ninth Circuit found grounds for carving out a narrow exception when a communication was not intended for further distribution, ruling that ma-

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terial "provided by another information content provider" necessarily means "provided" for publication, such that the exemption would not apply if the author never intended that a communication be posted. *Id.* at 1034. This fact-specific exception is unlikely to arise very often. On remand, summary judgment was entered in favor of the defendant based on *res judicata* because an earlier suit on the same grounds had been involuntarily dismissed for lack of prosecution by a federal court in North Carolina. *See Batzel v. Smith*, 372 F. Supp. 2d 546 (C.D. Cal. 2005). In a rare instance where the exception was raised in a case, a district court read *Batzel* narrowly based on its facts. *See Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 931 (D. Ariz. 2008) (ruling that the *Batzel* exception would not apply where the original author changed his mind, and asked that an allegedly defamatory post be removed, because the statutory term provided does not imply an ongoing process).

The Ninth Circuit also has issued decisions finding the CDA inapplicable without creating an express exception. In *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676 (9th Cir. 2019), the Ninth Circuit held that HomeAway.com and Airbnb, which operated platforms that facilitated online bookings by guests for host accommodations, could be compelled to comply with a local Santa Monica city ordinance prohibiting short term rentals for less than 30 days, while processing transactions, to determine if user listings complied with the local ordinance, because the ordinance did not expressly require the platforms to monitor and remove listings that were not in compliance (even if that was the logical result of the ordinance), because the only obligation to monitor content would arise at the time of a booking transaction, which the court characterized as "content that, while *resulting from* the third-party listings, is distinct, internal and nonpublic." *Id.* at 682. Needless to say, these hyper-technical distinctions—between public and private, and external and internal content, and between a duty to monitor and remove third party content from a platform (which is precluded by the CDA) vs. a duty to not process a back-end transaction (which was deemed acceptable by the Ninth Circuit)—are hard to square with the broad sweep of the CDA and its plain terms.

Likewise, in *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091-95 (9th Cir. 2021), the Ninth Circuit found the CDA inapplicable to a negligent design claim alleging that Snap should be held liable for an accident caused by a driver who allegedly was using the Snapchat Speed filter at the time of the accident. The appellate court held that plaintiff's suit was not intended to hold Snap liable as a publisher or speaker (but rather for its allegedly negligent design of the Speed filter) and, further, that the case did not involve third party content but the Snap filter itself and the incentive system Snap allegedly created.

In *Medifast, Inc. v. Minkow*, 577 F. App'x 706 (9th Cir. 2014), an unreported decision, a Ninth Circuit panel remanded for further consideration the question of whether the defendant was insulated from liability under the CDA for republishing statements that were liber *per se,* where the defendant raised the issue of CDA immunity for the first time on appeal.

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[10]*See Silver v. Quora, Inc.*, 666 F. App'x 727 (10th Cir. 2016) (affirming dismissal of claims of libel and defamation brought by an investment banker against Quora, a question and answer website, over postings by two users, who allegedly used fake names in violations of Quora's Terms and Conditions to post allegedly defamatory statements about the plaintiff), *cert. denied*, 137 S. Ct. 2305 (2017); *Shrader v. Beann*, 503 F. App'x 650, 654-55 (10th Cir. 2012) (affirming dismissal of claims for defamation, false light invasion of privacy, intentional infliction of emotional distress, and civil conspiracy, arising out of defendant's email publication, as precluded by the CDA, and affirming an award of attorneys' fees to the defendant as provided for under Colorado law when a defendant prevails in a tort action); *Getachew v. Google, Inc.*, 491 F. App'x 923, 925-26 (10th Cir. 2012) (affirming dismissal of negligence and intentional infliction of emotional distress claims based on the results displayed by search engine queries and links to third party content about him because "Google cannot be held liable for search results that yield content created by a third party."); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (affirming summary judgment in favor of the defendant on plaintiff's claims for defamation and negligence based on the CDA).

In FTC v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009), the Tenth Circuit purported to reaffirm the broad scope of *Ben Ezra*, *Weinstein & Co*. but held that an interactive service provider was liable as an information content provider where it solicited, paid for and sold the offending content at issue in the suit and suggested that such liability could be found whenever "it in some way specifically encourages development of what is offensive about the content." *Id.* at 1199. As discussed later in section 37.05, *Accusearch* may be best explained in terms of its unique facts.

In *General Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178 (10th Cir. 2016), an appellate panel held that the CDA provides immunity from liability, not immunity from suit, and accordingly dismissed appellant's appeal.

[11]*See Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Sherman Act I (conspiracy) and II (monopolization) and Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018) (applying *Klayman* and *Zeran* in holding that plaintiff's claims against Google for defamation, tortious interference with a business relationship, and intentional infliction of emotional distress, premised on Google's refusal to remove a user's blog post, in alleged violation of its "Blogger Content Policy," were preempted by section 2301(c)(1)); *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (affirming dismissal of negligence and intentional assault claims against Facebook and its founder because they did not create or provide the

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content originating with others, although the Tenth Circuit[12] (and to a lesser extent the Ninth Circuit)[13] have broadly construed the term *development*, such that an interactive computer service provider could be treated as an *information content provider* in a manner that potentially limits the scope of subpart (c)(1) immunity in some circumstances.

The Ninth Circuit[14] also has applied section 230(c)(2)(B), which addresses making available the technical means to restrict access, as discussed below in section 37.05[4][D].

The Eleventh Circuit discussed the CDA in *dicta* in a reported decision in 2006[15] and subsequently applied it to find a defamation claim preempted in an unreported opinion in 2014.[16]

The California,[17] Florida,[18] New Hampshire,[19] Texas,[20]

Facebook page that allegedly promoted religious hate and violence). In *Klayman,* the District of Columbia Circuit brushed aside as irrelevant the assertion that Facebook collected data on its users and their activities, which it employed to make its advertising more profitable, because it had no bearing on Klayman's theories of liability. *See id.* at 1358.

[12]*See FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009). *Accusearch* is discussed in greater detail in the preceding footnote and below in sections 37.05[3][C] and 37.05[3][D].

[13]*See Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (discussed in a footnote *citing* Ninth Circuit case law, earlier in this section, and in greater detail below in section 37.05[3][C]).

[14]*See Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1050-52 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

[15]*See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321–23 (11th Cir. 2006) (analyzing but finding it unnecessary to decide whether the CDA preempted the appellant's Florida right of publicity claim); *infra* § 37.05[5][B] (discussing the case).

[16]*See Dowbenko v. Google*, 582 F. App'x 801 (11th Cir. 2014) (holding plaintiff's defamation claim against Google, premised on the allegation that Google purportedly used algorithms to manipulate its search results so that an allegedly defamatory article about Mr. Dowbenko appeared immediately below his own website in Google search results, was preempted by the CDA).

[17]*See Hassell v. Bird*, 5 Cal. 5th 522, 234 Cal. Rptr. 3d 867 (2018) (holding that a plaintiff could not make an "end-run" on the CDA by obtaining a default judgment against an information content provider in a case where an interactive computer service provider could have asserted the CDA as a defense if it had been joined in the proceeding, and then seek to enforce an injunction obtained as part of the default judgment

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against the service provider to have material taken down, without allowing the service provider to assert the CDA as a defense in the second action); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006) (holding that the CDA preempted libel and conspiracy claims against users based on both publisher and distributor liability). *Hassell v. Bird* is analyzed in section 37.05[8].

In *Barrett*, the California Supreme Court reversed an intermediate appellate court's opinion that had held that distributor liability could be imposed where a defendant was provided with notice. *See generally supra* § 37.04 (discussing distributor and publisher liability). The court followed *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) in holding a user exempt from liability for an article that she reposted on a newsgroup without any alterations. In so holding, the court rejected the suggestion that the Good Samaritan exemption was only available for passive users. The court conceded, however, that "[a]t some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." 40 Cal. 4th at 60 n.19.

Justice Moreno concurred in the opinion to express his view that publishers that conspire with original content providers to defame would not be entitled to immunity under section 230(c)(1).

Barrett v. Rosenthal has been applied by other courts in California. *See, e.g., Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding plaintiff's defamation claim barred by the CDA). In *Pham*, the plaintiff had alleged that the defendant was liable for adding additional information to an allegedly defamatory email that the defendant re-circulated. The court, however, held that the defendant did not make a material contribution where nothing he added was itself defamatory.

The CDA likewise has been applied in other cases by intermediate appellate courts in California. *See, e.g., Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (affirming an order granting defendant's demurrer without leave to amend); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833–35, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (dismissing claims on demurrer against eBay for, among others, negligence, based on the CDA); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 698, 104 Cal. Rptr. 2d 772 (1st Dist. 2001) (holding that the CDA preempted claims of premises liability and nuisance based on Internet use at a public library); *see also Witkoff v. Topix, LLC*, No. B257656, 2015 WL 5297912 (Cal. Ct. App. Sept. 18, 2015) (unpublished, and therefore uncitable opinion, affirming the trial court's decision to sustain defendant Topix, LLC's demurrer, reasoning that even though it created a website forum on Oxycodone, as a publisher of information from third parties, it remained immune under the CDA from claims of public nuisance and wrongful death).

[18]*See Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (holding that the CDA preempted a negligence claim even where the defendant had actual notice).

[19]*See Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 422, 448-53, 242 A.3d 814, 819-23 (2020) (reversing dismissal of plaintiff's breach of

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Washington,[21] and Wisconsin[22] Supreme Courts and the New York Court of Appeals,[23] intermediate appellate courts in

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contract claim, alleging that Facebook had violated specific promises made in its Terms of Use by deleting plaintiff's Instagram account, where the CDA defense was not apparent from the face of plaintiff's small claims court complaint and the court was not inclined to "prematurely" address the merits of the dispute, but nonetheless holding, "[t]o the extent that Teatotaller's claim is premised upon Facebook's decision to remove its 'Instagram account, including all the content, data, and followers that had been accumulated through paid and unpaid activity,' its claim may require the court to treat Facebook as a publisher.").

[20]*See In re Facebook, Inc.*, __ S.W.3d ____, 2021 WL 2603687 (Tex. 2021) (affirming dismissal of plaintiff's claims for negligence, negligent undertaking, gross negligence, and products liability based on Facebook's alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms, as preempted by the CDA, while construing the FOSTA exclusion to CDA immunity (47 U.S.C.A. § 230(e)(5)) broadly, and allowing plaintiffs to proceed with claims under Tex. Civ. Pract. & Rem. Code Ann. § 98.002 (a Texas statute creating a civil cause of action against those who intentionally or knowingly benefit from participation in a sex-trafficking venture)).

[21]*See J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc) (affirming that minor plaintiffs sufficiently stated Washington state law claims that were not preempted by the CDA where they alleged that the defendants developed Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message."). *J.S. v. Village Voice Media Holdings* was explained in terms of Washington state's high threshold for dismissing claims (compared to most other states and federal courts) and criticized as inconsistent with the plain terms of the CDA by the Wisconsin Supreme Court in *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 725 (Wisc.), *cert. denied*, 140 S. Ct. 562 (2019).

[22]*Daniel v. Armslist, LLC*, 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of negligence, negligence *per se,* aiding and abetting, public nuisance, civil conspiracy, negligence infliction of emotional distress, wrongful death, and piercing the corporate vail, arising out of the use of a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people; "Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."), *cert. denied,* 140 S. Ct. 562 (2019).

[23]*See Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *see also Beyer v. Parents for Megan's Law*, 44 Misc. 3d 1206, 2014 WL 305742 (Suffolk County Sup. 2014) (unreported trial court opinion holding

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Connecticut,[24] Florida,[25] Georgia,[26] Illinois,[27] Indiana,[28] New

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the defendant organization was insulated from liability for republishing on its website an edited version of an article that previously appeared in *NewsDay*, and for refusing to take it down); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010) (trial court opinion dismissing a defamation claim brought against Yelp! Inc. by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, and holding not preempted, but dismissing on the merits, a deceptive acts or practices claim based on the allegation that for $300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback).

[24]*See Vazquez v. Buhl*, 150 Conn. App. 117, 90 A.3d 331 (2014) (holding a website operator insulated from liability by the CDA for providing a link to a third party's article); *see also Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003–04 (Super. Ct. 2000) (trial court decision holding negligence and breach of contract claims against AOL based on user emails preempted by the CDA; granting AOL's motion to strike for failing to state a claim upon which relief can be granted).

[25]*See Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So. 3d 727, 728-29 (Fla. Dist. Ct. App. 2014), *review denied*, 168 So. 3d 226 (Fla. 2015) (holding that the preemptive effect of the CDA extended to equitable claims for declaratory and injunctive relief filed by an investor against the operator of an interactive investment website, seeking removal of allegedly defamatory statements made by a third party).

[26]*See Internet Brands, Inc. v. Jape*, 760 S.E.2d 1, 328 Ga. App. 272 (2014) (holding that the CDA barred a defamation claim by a user against the operator of an Internet forum for boating enthusiasts, based on comments posted by another user of the forum). In a subsequent case, *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 816 S.E.2d 77, 79-81 (2018), Georgia's intermediate appellate court reversed dismissal of plaintiff's negligence claim arising out of car crash in which driver allegedly had been using Snapchat's "Speed Filter" sharing feature, because plaintiffs "seek to hold Snapchat liable for its own conduct, principally for the creation of the Speed Filter and its failure to warn users that the Speed Filter could encourage speeding and unsafe driving practices"); *see also Maynard v. Snapchat, Inc.,* 357 Ga. App. 496, 851 S.E.2d 128 (2020) (affirming dismissal of plaintiff's complaint, holding that Snapchat did not owe the driver a duty to alter its product design to prevent injuries from a third party's alleged misuse of the speed filter feature); *Neff v. McGee*, 346 Ga. App. 522, 816 S.E.2d 486 (2018) (reversing denial of Neff's anti-SLAPP motion in a suit brought by the driver/individually named defendant in *Maynard*, alleging defamation for statements made by Maynard's counsel in an article about the case and McGee's alleged use of the Speed filter at the time of the accident).

[27]*See Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 279 Ill. Dec. 113, 799 N.E.2d 916, 920 (2d Dist. 2003) (affirming dismissal of a complaint asserting defamation against a website aimed at warning the public of health fraud, which posted an article authored by a third party that contained disparaging comments accusing the plaintiff, an alleged medical consul-

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Mexico,[29] North Carolina,[30] Texas[31] and Washington,[32] and

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tant, of being a liar and a charlatan); *see also Gains v. Romkey*, No. 11-0594, 2012 WL 7007002 (Ill. App. 3 Dist. 2012) (following *Fonorow* in affirming that the defendant was insulated from liability for defamation by the CDA, in an unreported opinion); *Eagle Ridge Townhouse Association, Inc. v. Snapp*, No. 2-18-0634, 2019 WL 3938706, at *15-17 (Ill. App. Ct. 2d Dist. Aug. 19, 2019) (affirming summary judgment for defendants on plaintiff's defamation claim arising out of the online publication of minutes of a board meeting, in an unpublished opinion).

[28]*See Miller v. Federal Express Corp.*, 6 N.E.3d 1006 (Ind. Ct. App. 2014) (affirming summary judgment for the defendants in a suit for defamation and intentional infliction of emotional distress based on posts made to a newspaper website by employees of the two corporate defendants, whose posts were made using company computers, based on the finding that the appellants' claims were preempted by the CDA).

[29]*See Woodhull v. Meinel*, 145 N.M. 533, 202 P.3d 126 (Ct. App. 2008) (broadly construing the scope of section 230(c)(1) but finding defendant's entitlement to the exemption to present a factual question precluding summary judgment based on defendant's requesting that users post potentially defamatory material to make fun of plaintiff), *cert. denied*, 145 N.M. 655, 203 P.3d 870 (2009).

[30]*See Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing an order for summary judgment for the plaintiff on its unfair or deceptive trade practices claim based on a North Carolina law making it unlawful to sell a ticket for more than $3 over its face value, finding an online marketplace that enabled third parties to buy and sell tickets to sporting events, concerts and similar events was entitled to CDA immunity and was entitled to summary judgment).

[31]*See GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged victims of the nonconsensual posting of pornographic images of themselves to two "revenge porn" websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App. Beaumont 2010) (affirming the entry of a no-evidence motion for summary judgment in favor of the defendant on plaintiff's claim for defamation based on the CDA, in a case where the plaintiff alleged that the defendant website vouched for the accuracy of anonymously posted user information and failed to verify its accuracy); *see also Davis v. Motiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. Apr. 2, 2015) (unreported decision holding that the CDA barred the plaintiff's negligent entrustment, negligent supervision, and negligent undertaking claims against an employer arising out of its alleged failure to prevent one of its employees from using its technology to post sexual advertisements; the plaintiff had alleged that the employer had actual or constructive knowledge of its employee's activity but the court ruled that subpart 230(c)(2) of the CDA immunized the employer from liability for its good faith efforts to restrict access to certain materials through its monitoring and logging policies)

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trial courts in Delaware,[33] Massachusetts,[34] and New Jersey,[35] among others, have analyzed CDA cases and, for the most part, like the majority of federal circuit courts that have considered the issue, have construed subpart 230(c)(1) of the CDA very broadly.

37.05[1][C] Analysis and List of Claims Potentially Preempted or Precluded by the CDA

The Good Samaritan exemption has been held to provide a complete defense to, among others, claims for libel and/or defamation (in numerous federal circuit[1] and district[2] court

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[32]*See Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001) (granting summary judgment for the defendant on claims for negligent misrepresentation, tortious interference and breach of contract, based on the CDA).

[33]*See Page v. Oath Inc*., C.A. No. S20C-07-030 CAK, 2021 WL 528472, at *6-7 (Del. Sup. Feb. 11, 2021) (dismissing the defamation and tortious interference claims of former Trump campaign aide Carter Page over 7 articles published in the online *Huffington Post* which were contributed by third parties, holding that Huffington Post was an information content provider and plaintiff's claims, which were based on third-party contributions, were preempted by the CDA).

[34]*See Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168, at *4-7 (Mass. Super. Ct. Apr. 28, 2020) (dismissing claims against an online firearms marketplace for negligence, public nuisance, and aiding and abetting the sale of a firearm allegedly used to shoot a police officer).

[35]*See Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005).

[Section 37.05[1][C]]

[1]*See, e.g., Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–19 (1st Cir. 2007) (affirming dismissal of a claim for defamation under section 230(c)(1) and rejecting the argument that "the construct and operation" of defendant's website, including a feature that allowed a single person to post under multiple screen names, made Lycos an information content provider); *Ricci v. Teamsters Union Local 456,* 781 F.3d 25, 26-28 (2d Cir. 2015) (affirming dismissal under the CDA of plaintiffs' defamation claim against GoDaddy, as the host for a website where allegedly defamatory third party material was posted); *Obado v. Magedson*, 612 F. App'x 90, 91-94 (3d Cir. 2015) (affirming dismissal of plaintiff's claim for defamation against various service providers, search engines and domain name registrars for republishing and allegedly

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manipulating search engine results to maximize the impact of allegedly defamatory content, based on the CDA), *aff'g*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing with prejudice claims against Yahoo, Google, Neustar, eNom, Intelius, Switchboard LLC & Whitepages, Inc. and Xcentric Ventures for displaying, distributing or linking to allegedly defamatory third party blog posts about the plaintiff and for allegedly selectively editing the posts, failing to remove them, and manipulating search results to give them greater prominence); *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015) (affirming dismissal of Kabbaj's claims against Google, Amazon, and Yahoo for defamation, tortious interference with contract, and negligent and intentional infliction of emotional distress under the CDA); *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.) (holding that section 230 barred a tort action against AOL for its allegedly negligent failure to remove allegedly defamatory material from a chat room on its network), *cert. denied*, 540 U.S. 877 (2003); *Westlake Legal Group v. Yelp, Inc.*, 599 F. App'x 481, 483 (4th Cir. 2015) (holding that Yelp was not an information content provider and therefore had immunity under the CDA for plaintiffs' defamation claim); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (dismissing plaintiff's claim for defamation against a commercial gripe site based on material posted by a third party); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating a jury award and reversing the lower court's denial of the defendant's motion for judgment); *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 971 F.3d 747, 751-53 (8th Cir. 2020) (affirming dismissal of trade libel claim based on user comments about plaintiff's test preparation service posted on defendant's online forum for nursing professionals); *Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010) (affirming the lower court's sua sponte dismissal with prejudice of plaintiffs' defamation claim against an ISP because sections 230(c)(1) and 230(e)(3) collectively "bar[red] plaintiffs from holding ISPs legally responsible for information that third parties created and developed" and the record contained no evidence that the website host "designed its website to be a portal for defamatory material or do anything to induce defamatory postings."); *Igbonwa v. Facebook, Inc.*, 786 F. App'x 104 (9th Cir. 2019) (affirming dismissal of plaintiff's claims of negligence, defamation, and discrimination against Facebook and its CEO, Mark Zuckerberg, because he sought to hold them liable as publisher or speaker of third party content), *cert. denied*, 141 S.Ct. 913 (2020); *Caraccioli v. Facebook, Inc.,* 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for defamation, libel and other torts "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016) (affirming dismissal of a defamation claim brought against Yelp for its consumer rating system, which assigned various stars to businesses based on user submissions, and its alleged dissemination and promotion of negative reviews via Google); *Silver v. Quora, Inc.,* 666 F. App'x 727 (10th Cir. 2016) (affirming dismissal of claims of libel and defamation brought by an investment banker against Quora, a question and answer website, over postings by

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two users, who allegedly used fake names in violations of Quora's Terms and Conditions to post allegedly defamatory statements about the plaintiff), *cert. denied*, 137 S. Ct. 2305 (2017); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (holding that section 230 proscribed a defamation claim against AOL based on material created by a third party); *Dowbenko v. Google*, 582 F. App'x 801 (11th Cir. 2014) (holding plaintiff's defamation claim against Google, premised on the allegation that Google purportedly used algorithms to manipulate its search results so that an allegedly defamatory article about Mr. Dowbenko appeared immediately below his own website in Google search results, was preempted by the CDA); *Bennett v. Google, LLC*, 882 F.3d 1163, 1165-68 (D.C. Cir. 2018) (holding that plaintiff's claims against Google for defamation, tortious interference with a business relationship, and intentional infliction of emotional distress, premised on Google's refusal to remove a user's blog post, in alleged violation of its "Blogger Content Policy," were preempted by section 2301(c)(1)).

[2]*See, e.g., Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing, as precluded by the CDA, defamation and other non-copyright claims, brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website); *Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *3-4 (D. Md. Oct. 23, 2020) (dismissing (with prejudice) eleven claims, including defamation, arising out of Twitter's decision to permanently suspend plaintiff's Twitter account for violating Twitter's policies against hateful conduct, based on Tweets that plaintiff directed at Trevor Noah and *The Daily Show with Trevor Noah*); *Brikman v. Twitter, Inc.*, 19-cv-5143 (RPK) (CLP), 2020 WL 5594637, at *2-4 (E.D.N.Y. Sept. 17, 2020) (dismissing, with prejudice, pro se plaintiffs' defamation claims arising out of Tweets by allegedly disgruntled members of plaintiffs' synagogue); *Laake v, Dirty World LLC*, No. CV-19-5444-PHX-DMF, 2020 WL 1866124, at *2-3 (D. Ariz. Apr. 14, 2020) (dismissing plaintiff's defamation claim against gossip site thedirty.com, over a user comment posted under the pseudonym *psychic vampire slayer*, as preempted by the CDA); *Chukwurah v. Google, LLC*, Civil Action No. PX-19-782, 2020 WL 510158, at *2 (D. Md. Jan. 31, 2020) (dismissing pro se plaintiff's defamation claim against Google for linking to allegedly defamatory material in response to search engine queries, as immunized by the CDA); *Green v. YouTube,* Civil No. 18-cv-203-PB, 2019 WL 1428890, at *5-6 (D.N.H. Mar. 13, 2019) (recommending dismissal of *pro se* plaintiff's claims that Twitter deleted one or more of his posts and 500 or more of his followers, that YouTube closed one of his channels and put two "false strikes" on a second channel and prevented him from streaming five videos on a third channel, and that Facebook deleted his account and "virtual property" associated with the account, as barred by the CDA), *report and recommendation adopted,* 2019 WL 1428311 (D.N.H. Mar. 29, 2019); *DeLima v. YouTube, LLC,* Civil No. 17-cv-733-PB, 2018 WL 4473551, at * 4-5 (D.N.H Aug. 30, 2018) (recommending dismissal of plaintiff's defamation claim against Blogspot and Google for reprinting third party material, as barred by the CDA),

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report and recommendation adopted, 2018 WL 4471721 (D.N.H. Sept. 18, 2018), *aff'd,* Nos. 18-1666, 18-1728, 18-1804, 18-1831, 18-1947, 18-2023, 2019 WL 1620756 (1st Cir. Aprl 3, 2019), *cert. denied*, 140 S. Ct. 555 (2019); *Jefferson v. Zukerberg*, Civil Action No. RDB-17-3299, 2018 WL 3241343, at *4-5 (D. Md. July 3, 2018) (granting defendants' motion to dismiss, based on the CDA); *Frenken v. Hunter*, Case No. 17-cv-02667-HSG, 2018 WL 1964893, at *2-3 (N.D. Cal. Apr. 26, 2018) (granting Twitter's motion to dismiss without leave to amend a *pro se* plaintiff's suit alleging that Twitter violated its own policies in allowing her then recently deceased former husband to post messages that she alleged supported claims for defamation and false invasion of privacy); *Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, Case No. 1:16-cv-00168, 2018 WL 1183372, at *2-3 (D. Utah Mar. 6, 2018) (dismissing plaintiff's amended defamation claim based on CDA preemption); *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 307 F. Supp. 3d 952, 964-65 (D. Minn. 2018) (dismissing with prejudice plaintiff's defamation claim against the Allnurses.com website arising out of statements made by four users of that website, and dismissing plaintiff's claim against a Senior Moderator of that website, to the extent based on third party claims she moderated, rather than her own posts), *aff'd on other grounds*, 971 F.3d 747, 752 n.4 (8th Cir. 2020) (noting that the plaintiffs did not challenge, on appeal, the lower court's ruling dismissing the defamation claim); *Ayyadurai v. Floor64, Inc. d/b/a Techdirt*, 270 F. Supp. 3d 343, 367-68 (D. Mass. 2017) (dismissing plaintiff's defamation claim against Techdirt over the article "Funniest/Most Insightful Comments of the Week at Techdirt," which was comprised of user comments reposted by Techdirt with hyperlinks back to the original comments (which were all posted in the "Reader Comments" section of previous Techdirt posts) and also included "intermittent introductory and editorial comments written by Beadon" which were not themselves alleged to be defamatory, because merely adopting or ratifying comments by selecting them for republication did not make the defendant either a creator or developer of the article); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 987 (S.D. Tex. 2017) (dismissing with prejudice plaintiff's claims for defamation, breach of implied contract and intentional infliction of emotional distress as barred by the CDA, under the Texas Citizens Participation Act), *appeal dismissed*, No. 17-20565, 2018 WL 1224417 (5th Cir. Feb. 15, 2018); *Advanfort Co. v. Maritime Executive, LLC*, Civil Action No. 1:15-cv-220, 2015 WL 2238076, at *14-15 (E.D. Va. May 12, 2015) (dismissing plaintiff's defamation claim as potentially preempted by the CDA, with leave to amend); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311 (M.D. Fla. 2015) (granting summary judgment for the defendant on claims for defamation, tortious interference with a contractual relationship, tortious interference with a prospective economic relationship and a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)); *Russell v. Implode-Explode Heavy Industries, Inc.,* No. 08-cv-2468, 2013 WL 5276557, at *4–9 (D. Md. Sept. 18, 2013) (granting judgment on the pleadings, holding that a website was immune from liability under state law claims brought by a Native American tribe over a blog article authored and posted by third-party that contained allegedly defamatory and libelous content about the tribe's home loan program); *Gavra v. Google Inc.,* 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17,

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2013) (dismissing plaintiff's claims without leave to amend, holding that the CDA immunized Google from liability for an attorney's claims for invasion of privacy, defamation, and "blackmail/extortion" arising from Google's alleged failure to remove unflattering videos posted by a former client); *Regions Bank v. Kaplan,* 8:12-CV-1837-T-17MAP, 2013 WL 1193831, at *18 (M.D. Fla. Mar. 22, 2013) (dismissing claims of defamation *per se* and invasion of privacy arising from a "Fraud-Net" alert bulletin published by a third party on the Florida Bankers Association's website that allegedly contained false and defamatory statements); *Mmubango v. Google, Inc.,* CIV. A. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013) (dismissing with prejudice plaintiff's claims for defamation and negligence arising out of Google's alleged refusal to remove from its search engine links to negative statements about the plaintiff that were posted on wikiscams.com, an unrelated website); *Merritt v. Lexis Nexis,* 12-CV-12903, 2012 WL 6725882 (E.D. Mich. Oct. 23, 2012) (recommending sua sponte dismissal of plaintiff's defamation claim upon concluding that LexisNexis was immune under the CDA for plaintiff's claim that Lexis Nexis "published, and continued to publish false information until pressured by authorities to remove the information . . ." because it could not be held liable for traditional functions of a publisher), *report and recommendation adopted*, No. 12-12903, 2012 WL 6725881 (E.D. Mich. Dec. 27, 2012); *Hadley v. GateHouse Media Freeport Holdings, Inc.,* Case No. 12 C 1548, 2012 WL 2866463 (N.D. Ill. July 10, 2012) (dismissing defamation claim based on publication of statements that implied that plaintiff had committed a crime); *Directory Assistants, Inc. v. Supermedia, LLC*, 884 F. Supp. 2d 446 (E.D. Va. 2012) (dismissing with prejudice claims against an individual user who forwarded by email articles posted online); *Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (dismissing and granting summary judgment on a claim for defamation against online booksellers over promotional statements for a book posted on the defendants-booksellers' websites), *appeal dismissed*, Appeal No. 11–7077, 2012 WL 3068437 (D.C. Cir. 2012); *Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (granting summary judgment for the defendant, the operator of a gripe site, on claims for defamation, false light and intentional and negligent interference with economic relations based on the CDA); *Black v. Google Inc.*, No. 10-02381 CW, 2010 WL 3222147 (N.D. Cal. Aug. 13, 2010) (dismissing a defamation claim where the plaintiffs alleged that Google "sponsored or endorsed" a third party site and failed to provide an adequate dispute resolution system for complaints about user comments), *aff'd mem.,* 457 F. App'x 622 (9th Cir. 2011); *Novins v. Cannon*, Civ. No. 09-5354, 2010 WL 1688695 (D.N.J. Apr. 27, 2010) (dismissing a defamation claim brought against users for allegedly republishing a defamatory web post or email); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 877–80 (N.D. Ind. 2010) (granting judgment on the pleadings on libel and false light claims that sought to hold the defendant liable for user comments posted to its interactive website, commenting on a posted newspaper article); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (holding a claim by the Independent party candidate for governor to compel Ask.com to block from its search engine an allegedly defamatory page that included him in a list

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opinions and state law decisions),[3] negligence,[4] negligent

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of individuals that, when viewed as a snippet, appeared to identify him with the Communist Party, barred by the CDA); *Eckert v. Microsoft Corp.*, No. 06-11888, 2007 WL 496692 (E.D. Mich. Feb. 13, 2007); *Dimeo v. Max*, 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006) (holding that section 230(c)(1) overrides the traditional treatment of publishers under statutory and common defamation law), *aff'd*, 248 F. App'x 280 (3d Cir. 2007); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006) (holding preempted plaintiff's claims for defamation, invasion of privacy and negligence over Google's archiving messages posted by USENET users, provision of search tools that allow access to allegedly defamatory material and caching content), *aff'd*, 242 F. App'x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 156 (2008); *Whitney Information Network, Inc. v. Verio, Inc.*, 79 U.S.P.Q.2d 1606, 2006 WL 66724 (M.D. Fla. Jan. 11, 2006); *Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238, 1248–49 (D. Minn. 2005); *Smith v. Intercosmos Media Group, Inc.,* No. Civ. A. 02-1964, 2002 WL 31844907 (E.D. La. Dec. 17, 2002) ("any claim made by the plaintiffs for damages or injunctive relief with regard to either defamation and libel, or negligence and fault . . . are precluded by the immunity afforded by section 230(c)(1) [of the CDA] and subject to dismissal).

[3]*See, e.g.*, *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006) (holding that the CDA preempted libel and conspiracy claims against users based on both publisher and distributor liability); *Phan v. Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding barred by the CDA a claim for defamation based on the defendant forwarding an allegedly defamatory email and supplementing it with a brief comment); *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So. 3d 727, 728-29 (Fla. Dist. Ct. App. 2014), *review denied*, 168 So. 3d 226 (Fla. 2015) (holding that the preemptive effect of the CDA extended to equitable claims for declaratory and injunctive relief filed by an investor against the operator of an interactive investment website, seeking removal of allegedly defamatory statements made by a third party); *Brendan N. Fleming, LLC v. Duncan*, Case No. 2010CV0966 (Columbia Cty., Ga. Sup. Ct. Judgment on the Pleadings Granted Dec. 15, 2010) (dismissing a defamation claim brought against Yahoo! over a user post as preempted by the CDA); *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 799 N.E.2d 916, 920 (2d Dist. 2003) (affirming dismissal of plaintiff's claim for defamation against a website aimed at warning the public of health fraud, which posted an article authored by a third party that contained disparaging comments about the plaintiff, an alleged medical consultant, as being a liar and a charlatan); *Eagle Ridge Townhouse Association, Inc. v. Snapp*, No. 2-18-0634, 2019 WL 3938706, at *15-17 (Ill. App. Ct. 2d Dist. Aug. 19, 2019) (affirming summary judgment for defendants on plaintiff's defamation claim arising out of the online publication of minutes of a board meeting, in an unpublished opinion); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19 (2011); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010); *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (N.Y. Sup. Ct. 2009); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App. Beaumont 2010) (affirming the entry of a no-evidence motion for summary judgment in favor of the

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defendant on a claim for defamation based on the CDA, in a case where the plaintiff alleged that the defendant website vouched for the accuracy of anonymously posted user information and failed to verify its accuracy).

[4]*See, e.g., Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003); *Herrick v. Grindr, LLC*, 765 F. App'x 586, 588-91 (2d Cir. 2019) (affirming dismissal under section 230(c)(1) of product liability, negligence, and intentional and negligent infliction of emotional distress claims, premised on alleged design defects and an alleged duty to warn, in a suit alleging that plaintiff's former boyfriend impersonated him on the Grindr app in a catfishing campaign); *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (dismissing with prejudice as preempted by the CDA claims for negligence and gross negligence over MySpace's alleged deletion of celebrity imposter user profiles); *Getachew v. Google, Inc.*, 491 F. App'x 923, 925-26 (10th Cir. 2012) (affirming dismissal of negligence and intentional infliction of emotional distress claims based on the results displayed by search engine queries and links to third party content about him because "Google cannot be held liable for search results that yield content created by a third party."); *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020) (denying leave to amend to add negligence and strict liability claims arising out of a mobile messaging service's failure to warn or implement sufficient policies to protect underage users from sexual exploitation because "Plaintiff's failure to warn claims are inextricably linked to the harmful content solicited and posted by Kik's users. This is precisely the type of claim for which Congress has determined that interactive computer website providers should be immune."); *J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *3-7 (N.D. Cal. Aug. 20, 2020) (dismissing plaintiff's negligence claim, arising out of Craiglist's alleged failure to monitor advertisements for illegal sex trafficking of a minor); *Murguly v. Google LLC*, Civil Action No. 19-14471 (MAS) (TJB), 2020 WL 907919, at *3 (D.N.J. Feb. 25, 2020) (dismissing a *pro se* plaintiff's claim that a platform negligently failed to detect an alleged advanced pay scheme before allegedly sending an email alert for a fake job offer); *924 Bel Air Road, LLC v. Zillow Group, Inc.*, Case No. 2:19-CV-01368-ODW (AFMx), 2020 WL 774354, at *2-4 (C.D. Cal. Feb. 18, 2020) (dismissing, without leave to amend, plaintiff's negligence claim in a suit arising from an unknown third party "claiming" the Zillow listing for a $100 Million property and creating a false sales record that caused the property to be removed from the 'elite status of a $100M plus property' list and allegedly shifted market perceptions about the property, over plaintiff's argument that its negligence claim was not premised on the unknown user's publication of false information but on Zillow's own allegedly "inadequate monitoring system" that allowed the user to post false content to the site, as merely another way of saying that Zillow should be held liable for republishing the user's content; "Ultimately, Bel Air's allegations boil down to a charge that Zillow must prevent users from falsely claiming

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a Residence Page or posting false content. Yet, reviewing each user's activity and postings to ensure their accuracy is precisely the kind of activity for which Congress intended section 230 to provide immunity."), *appeal dismissed,* No. 20-55283, 2020 WL 8910588 (9th Cir. Oct. 23, 2020); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319 (D.N.J. 2015) (holding preempted by the CDA a Grindr user's claims against the social network for negligence and negligent infliction of emotional distress arising out of his arrest for engaging in a sexual encounter with a minor who used the service to arrange the encounter); *Beckman v. Match.com,* 2:13-CV-97 JCM NJK, 2013 WL 2355512 (D. Nev. May 29, 2013) (dismissing with prejudice plaintiff's claims for negligence *per se* and negligent misrepresentation arising out of a brutal attack on the plaintiff by a man she met on Match.com because Match.com was immune under the CDA for claims based on information originating with a user of its website), *aff'd in relevant part*, 668 F. App'x 759 (9th Cir. 2016); *Mmubango v. Google, Inc.,* CIV. A. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013) (dismissing with prejudice plaintiff's claims for defamation and negligence arising out of Google's alleged refusal to remove from its search engine links to negative statements about the plaintiff that were posted on wikiscams.com, an unrelated website); *AF Holdings, LLC v. Doe,* 5:12-CV-02048-EJD, 2012 WL 4747170 (N.D. Cal. Oct. 3, 2012) (holding that plaintiff was immune from liability under the CDA for negligence arising from his "allowing the 'Doe' defendant to use his IP address and Internet connection to unlawfully distribute and reproduce a video" in an online peer-to-peer file sharing site); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (dismissing claims for negligence and negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 *et seq*. and various related regulations, among other claims, based on an eBay user's alleged sale of vacuum tubes); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (negligence and gross negligence); *Gibson v. Craigslist, Inc.,* No. 08 Civ. 7735(RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (suit by a crime victim alleging breach of duty by Craigslist in failing prevent the sale of a handgun used by its purchaser to shoot the plaintiff); *Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006), *aff'd*, 242 F. App'x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 156 (2008); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833–35, 121 Cal. Rptr. 2d 703 (4th Dist. 2002); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003–04 (Super. Ct. 2000); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001); *Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168, at *4-7 (Mass. Super. Ct. Apr. 28, 2020) (dismissing claims against an online firearms marketplace for negligence, public nuisance, and aiding and abetting the sale of a firearm used to shoot a police officer); *Okeke v. Cars.com*, 40 Misc. 3d 582, 586–88, 966 N.Y.S.2d 843, 846–48 (N.Y. Civ. Ct. 2013) (holding Cars.com immune under the CDA from liability for negligence arising from an the attempted purchase of a vehicle in response to an allegedly fraudulent advertisement posted by third party on the cars.com website; dismissing plaintiff's claim); *GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged

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entrustment,[5] negligent misrepresentation,[6] negligent supervision,[7] negligent undertaking,[8] intentional infliction of emo-

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victims of the nonconsensual posting of pornographic images of themselves to two "revenge porn" websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA); *Daniel v. Armslist, LLC,* 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of plaintiff's negligence and negligence *per se* claims, arising out of the use a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people; "Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."), *cert. denied*, 140 S. Ct. 562 (2019).

[5]*See Davis v. Motiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. Apr. 2, 2015) (unreported decision holding that the CDA barred the plaintiff's negligent entrustment, negligent supervision, and negligent undertaking claims against an employer arising out of its alleged failure to prevent one of its employees from using its technology to post sexual advertisements; the plaintiff had alleged that the employer had actual or constructive knowledge of its employee's activity but the court ruled that subpart 230(c)(2) of the CDA immunized the employer from liability for its good faith efforts to restrict access to certain materials through its monitoring and logging policies).

[6]*See, e.g., Beckman v. Match.com,* 2:13-CV-97 JCM NJK, 2013 WL 2355512 (D. Nev. May 29, 2013) (dismissing with prejudice plaintiff's claims for negligence *per se* and negligent misrepresentation arising out of a brutal attack on the plaintiff by a man she met on Match.com because Match.com was immune under the CDA for claims based on information originating with a user of its website), *aff'd in relevant part*, 668 F. App'x 759 (9th Cir. 2016); *Cross v. Facebook, Inc*., 14 Cal. App. 5th 190, 206-07, 222 Cal. Rptr. 3d 250, 263-64 (1st Dist. 2017) (affirming the trial court's order granting Facebook's anti-SLAPP motion on claims for breach of contract, negligent misrepresentation, and negligent interference—based on Facebook's alleged failure to remove pages critical of the plaintiff—which were held to be preempted by the CDA); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001).

[7]*See Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for negligent supervision and retention and other torts "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Davis v. Motiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. Apr. 2, 2015) (unreported decision holding that the CDA barred the plaintiff's negligent entrustment, negligent supervision, and negligent undertaking claims against an employer arising out of its alleged failure to prevent one of its employees from using its technology to post sexual advertisements; the plaintiff had alleged that the employer had actual or constructive knowledge of its employee's activity but the court ruled that subpart 230(c)(2) of the CDA immunized the employer from liability for its good faith efforts to restrict access to certain materials through its moni-

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tional distress,[9] negligent infliction of emotional distress,[10]

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toring and logging policies).

[8]*See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102-06 (9th Cir. 2009) (affirming dismissal of plaintiff's claim for negligent undertaking under Oregon law); *Davis v. Motiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. Apr. 2, 2015) (unreported decision holding that the CDA barred the plaintiff's negligent entrustment, negligent supervision, and negligent undertaking claims against an employer arising out of its alleged failure to prevent one of its employees from using its technology to post sexual advertisements; the plaintiff had alleged that the employer had actual or constructive knowledge of its employee's activity but the court ruled that subpart 230(c)(2) of the CDA immunized the employer from liability for its good faith efforts to restrict access to certain materials through its monitoring and logging policies).

[9]*See, e.g., Herrick v. Grindr, LLC*, 765 F. App'x 586, 588-91 (2d Cir. 2019) (affirming dismissal under section 230(c)(1) of product liability, negligence, and intentional and negligent infliction of emotional distress claims, premised on alleged design defects and an alleged duty to warn, in a suit alleging that plaintiff's former boyfriend impersonated him on the Grindr app in a catfishing campaign, holding, among other things, that plaintiff's "manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred by § 230."); *Obado v. Magedson*, 612 F. App'x 90, 91-94 (3d Cir. 2015) (affirming dismissal for failure to state claims for defamation, intentional and negligent infliction of emotional distress and invasion of privacy against various service providers, search engines and domain name registrars for republishing and allegedly manipulating search engine results to maximize the impact of allegedly defamatory content, based on the CDA); *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015) (affirming dismissal of Kabbaj's claims against Google, Amazon, and Yahoo for defamation, tortious interference with contract, and negligent and intentional infliction of emotional distress under the CDA); *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for intentional and negligent infliction of emotional distress and other torts "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Getachew v. Google, Inc.*, 491 F. App'x 923, 925-26 (10th Cir. 2012) (affirming dismissal of negligence and intentional infliction of emotional distress claims based on the results displayed by search engine queries and links to third party content about him because "Google cannot be held liable for search results that yield content created by a third party."); *Bennett v. Google, LLC*, 882 F.3d 1163, 1165-68 (D.C. Cir. 2018) (holding that plaintiff's claims against Google for defamation, tortious interference with a business relationship, and intentional infliction of emotional distress, premised on Google's refusal to remove a user's blog post, in alleged violation of its "Blogger Content Policy," were preempted by section 2301(c)(1)); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing claims for intentional and negligent infliction of emotional distress, brought against Twitter by a

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nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website, after Twitter had removed the images in response to Morton's takedown notices); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 987 (S.D. Tex. 2017) (dismissing with prejudice plaintiff's claims for defamation, breach of implied contract and intentional infliction of emotional distress as barred by the CDA, under the Texas Citizens Participation Act), *appeal dismissed*, No. 17-20565, 2018 WL 1224417 (5th Cir. Feb. 15, 2018); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Ramey v. Darkside Productions, Inc.*, No. 02–730(GK), 2004 WL 5550485 (D.D.C. May 17, 2004) (granting summary judgment for the defendant where the plaintiff alleged that defendant published an advertisement in its adult directory, paid for by a third party, which included an unauthorized intimate photo of the plaintiff); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005); *GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged victims of the nonconsensual posting of pornographic images of themselves to two "revenge porn" websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA).

[10] *See, e.g.*, *Herrick v. Grindr, LLC*, 765 F. App'x 586, 588-91 (2d Cir. 2019) (affirming dismissal under section 230(c)(1) of product liability, negligence, and intentional and negligent infliction of emotional distress claims, premised on alleged design defects and an alleged duty to warn, in a suit alleging that plaintiff's former boyfriend impersonated him on the Grindr app in a catfishing campaign, holding, among other things, that plaintiff's "manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred by § 230."); *Obado v. Magedson*, 612 F. App'x 90, 91-94 (3d Cir. 2015) (affirming dismissal for failure to state claims for defamation, intentional and negligent infliction of emotional distress and invasion of privacy against various service providers, search engines and domain name registrars for republishing and allegedly manipulating search engine results to maximize the impact of allegedly defamatory content, based on the CDA); *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015) (affirming dismissal of Kabbaj's claims against Google, Amazon, and Yahoo for defamation, tortious interference with contract, and negligent and intentional infliction of emotional distress under the CDA); *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for intentional and negligent infliction of emotional distress and other torts "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing claims for intentional and negligent infliction of emotional distress, brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had dis-

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assault,[11] harassment,[12] false light,[13] public disclosure of

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seminated her images without authorization in Tweets soliciting subscriptions to its website, after Twitter had removed the images in response to Morton's takedown notices); *Zimmerman v. Facebook, Inc.*, Case No. 19-cv-04591-VC, 2020 WL 5877863, at *1 (N.D. Cal. Oct. 2, 2020) (dismissing claims of intentional misrepresentation, breach of contract, intentional infliction of emotional distress, and breach of implied covenant of good faith and fair dealing, brought by a *pro se* plaintiff, because "claims relating to the defendants' decision to block their Facebook profiles are barred by the Communications Decency Act . . ."), *appeal dismissed,* No. 20-17054, 2020 WL 9257959 (9th Cir. Nov. 30, 2020); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319 (D.N.J. 2015) (holding preempted by the CDA a Grindr user's claims against the social network for negligence and negligent infliction of emotional distress arising out of his arrest for engaging in a sexual encounter with a minor who used the service to arrange the encounter); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of plaintiff's intentional infliction of emotional distress claim, arising out of the use a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people; "Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."), *cert. denied,* 140 S. Ct. 562 (2019).

[11]*See Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence).

[12]*See, e.g., Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005).

[13]*See Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for intentional and negligent infliction of emotional distress and other torts "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's false light invasion of privacy and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website); *Frenken v. Hunter*, Case No. 17-cv-02667-HSG, 2018 WL 1964893, at *2-3 (N.D. Cal. Apr. 26, 2018) (granting Twitter's motion to dismiss without leave to amend a *pro se* plaintiff's suit alleging that Twitter violated its own policies in allowing her then recently deceased former husband to post messages that she alleged supported claims for defamation and false invasion of privacy); *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing claims against Yahoo, Google, Neustar, eNom, Intelius, Switchboard LLC & Whitepages, Inc. and Xcentric Ventures for

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private facts,[14] intrusion upon seclusion,[15] tortious (negligent or intentional) interference with contractual relations or pro-

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displaying, distributing or linking to allegedly defamatory third party blog posts about the plaintiff and for allegedly selectively editing the posts, failing to remove them, and manipulating search results to give them greater prominence, all of which he alleged portrayed him in a false light), *aff'd*, 612 F. App'x 90 (3d Cir. 2015); *Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 877–80 (N.D. Ind. 2010) (granting judgment on the pleadings on libel and false light claims that sought to hold the defendant liable for user comments about a newspaper article posted to defendant's interactive website); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302-03 (D.N.H. 2008) (holding that the CDA preempted plaintiffs' privacy claims (for intrusion on her solitude, public disclosure of private facts and false light), but did not preempt her right of publicity claim).

[14]*See Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for public disclosure of private facts and other tort claims "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing with prejudice claims for publication of private facts, invasion of privacy, intrusion upon seclusion and false light), *aff'd*, 612 F. App'x 90 (3d Cir. 2015); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302-03 (D.N.H. 2008) (holding that the CDA preempted plaintiffs' privacy claims (for intrusion on her solitude, public disclosure of private facts and false light), but did not preempt her right of publicity claim).

[15]*See Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for intrusion upon seclusion and other torts "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California intrusion upon seclusion claim (as well as claims for right of publicity violations under Cal. Civ. Code § 3344, unjust enrichment and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200), arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity pursuant to 47 U.S.C.A. § 230(c)(1)); *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing with prejudice claims for publication of private facts, invasion of privacy, intrusion upon seclusion and false light), *aff'd*, 612 F. App'x 90 (3d Cir. 2015); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302-03 (D.N.H. 2008) (holding that the CDA preempted plaintiffs' privacy claims (for intrusion on her solitude, public disclosure of private facts and false light), but did not preempt her right of publicity claim).

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spective economic advantage/business expectancy,[16] breach

[16]*See, e.g., Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com); *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015) (affirming dismissal of Kabbaj's claims against Google, Amazon, and Yahoo for defamation, tortious interference with contract, and negligent and intentional infliction of emotional distress under the CDA); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (tortious interference with business expectancy); *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263, 1267-72 (D.C. Cir. 2019) (affirming dismissal of federal and state claims, including tortious interference with economic advantage, which alleged that Google, Microsoft, and Yahoo! had conspired to populate and monetize online search results with information about "scam" locksmiths, because plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *Bennett v. Google, LLC*, 882 F.3d 1163, 1165-68 (D.C. Cir. 2018) (holding that plaintiff's claims against Google for defamation, tortious interference with a business relationship, and intentional infliction of emotional distress, premised on Google's refusal to remove a user's blog post, in alleged violation of its "Blogger Content Policy," were preempted by section 2301(c)(1)); *Sen v. Amazon.com, Inc.*, Case No.: 3:16-CV-01486-JAH-JLB, 2018 WL 4680018 (S.D. Cal. Sept. 28, 2018) (granting summary judgment for Amazon.com on plaintiff's claim for tortious interference, premised on a user's product review on Amazon.com), *aff'd in relevant part,* 793 F. App'x 626 (9th Cir. 2020); *Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *3-4 (D. Md. Oct. 23, 2020) (dismissing (with prejudice) eleven claims, including that of tortious interference with contract, arising out of Twitter's decision to permanently suspend plaintiff's Twitter account for violating Twitter's policies against hateful conduct, based on Tweets that plaintiff directed at Trevor Noah and *The Daily Show with Trevor Noah*); *Lewis v. Google LLC*, 461 F. Supp. 3d 938, 952-55 (N.D. Cal. 2020) (dismissing claims brought by political commentator Bob Lewis alleging that YouTube and Google wrongfully demonetized, censored, restricted and removed his videos, holding that defendants' "alleged demonetization of Plaintiff's postings . . . constitutes a publishing function under § 230. . . . Deciding whether to limit advertising on a posting is not different in nature from removing a post altogether. Both fall under the rubric of publishing activities."), *aff'd on other grounds,* 851 F. App'x 723 (9th Cir. 2021); *Asurvio LP v. Malwarebytes Inc.*, Case No. 5:18-cv-05409-EJD, 2020 WL 1478345, at *3-6 (N.D. Cal. Mar. 26, 2020) (dismissing (without leave to amend) claims of Lanham Act false advertising, business disparagement, tortious interference with contractual relations, common law unfair competition, and violation of the Texas Theft Liability Act, in a suit alleging that Malwarebytes wrongfully categorized Asurvio's software as malware or a "Potentially Unwanted Program," holding that Malwarebytes was immune under both 47 U.S.C.A. § 230(c)(1) and (c)(2)(B), for allegedly wrongly filtering and characterizing plaintiff's software as a

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potentially unwanted program); *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 WL 6540452, at *7-8 (N.D. Cal. Nov. 2, 2016) (holding plaintiff's claim for intentional interference preempted by the CDA, but allowing plaintiff's claim for breach of the implied covenant of good faith and fair dealing to proceed under *Barnes v. Yahoo*); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1319-22 (M.D. Fla. 2015) (granting summary judgment for the defendant on claims for defamation, tortious interference with a contractual relationship, tortious interference with a prospective economic relationship and a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); holding that the defendant website operator did not lose immunity for tweeting out links to user posts, trimming posts to meet the character limitations imposed by Twitter, adding the Twitter user IDs @rocalabs and @pissedconsumer or by using search optimization practices to highlight critical posts or providing summary statistics of user posts); *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (holding that a sports betting website operator was immune from state law claims for misappropriation of trade secrets, misappropriation of licensable commercial property, civil theft, and tortious interference with contractual relations, because it was not a "developer" of user-generated content under the CDA, even though it awarded loyalty points for user posts; dismissing plaintiff's claims with leave to amend); *Directory Assistants, Inc. v. Supermedia, LLC*, 884 F. Supp. 2d 446 (E.D. Va. 2012) (dismissing with prejudice claims against an individual user who forwarded by email articles posted online); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474-76 (E.D.N.Y. 2011) (interference with contractual and prospective contractual relations); *Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (granting summary judgment for the defendant, the operator of a gripe site, on claims for defamation, false light and intentional and negligent interference with economic relations based on the CDA); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing as preempted by section 230(c)(2) (with leave to amend) claims for intentional interference with contract and intentional interference with prospective business advantage); *Holomaxx Technologies Corp. v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating Holomaxx's virtually identical complaint against Yahoo!); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010) (dismissing as preempted by the CDA claims for negligent and intentional interference with contractual relations and prospective economic advantage and fraud arising out of Google's use of its keyword suggestion tool in connection with its AdWords program); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008); *Whitney Info. Whitney Information Network, Inc. v. Verio, Inc.*, 79 U.S.P.Q.2d 1606, 2006 WL 66724 (M.D. Fla. Jan. 11, 2006); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (no liability where images on Amazon.com had been provided by a vendor on its zShops platform); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 452–53 (E.D.N.Y. 2004) (dismissing the *pro se* plaintiff's tortious interference claim based on alleged search result manipulation); *Cross v. Facebook, Inc*., 14 Cal. App. 5th 190, 206-07, 222 Cal. Rptr. 3d 250, 263-64 (1st Dist. 2017) (affirming the trial court's order granting

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of contract,[17] breach of implied contract,[18] breach of the

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Facebook's anti-SLAPP motion on claims for breach of contract, negligent misrepresentation, and negligent interference—based on Facebook's alleged failure to remove pages critical of the plaintiff—which were held to be preempted by the CDA); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001) (business expectancy); *see also Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931 (C.D. Ill. Aug. 3, 2012) (dismissing plaintiff's complaint on other grounds but writing in *dicta* that plaintiff's state law claims for unjust enrichment, civil conspiracy, intentional interference with current and prospective economic advantage and Illinois Human Rights Act violations were barred by the CDA because they were "really variations of defamation and invasion of privacy claims . . . ," while plaintiff's Lanham Act and right of publicity claims likely would not be barred and it was unclear whether plaintiff's RICO claim would be either;), *aff'd*, 512 F. App'x 635 (7th Cir. 2013).

[17] *See, e.g., Clarks v. Private Money Goldmine*, Case No.: GJH-19-1014, 2020 WL 949946, at *7-8 (D. Md. Feb. 26, 2020) (dismissing claims for fraud, breach of contract, and unjust enrichment against REI Network, LP, which operated www.privatemoneygoldmine.com, an online subscription service that connected prospective private money borrowers and lenders, FM 41, Inc., a general partner of REI, and John Douglas Smith, FM 41's president, as barred by both the statute of limitations and the CDA, in a suit arising out of an allegedly fraudulent preliminary payment scheme, where defendants hosted a platform that allowed prospective lenders to post their information online and interact with prospective borrowers, who paid the site a subscription fee to join); *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *Jurin v. Google Inc.*, 768 F. Supp. 2d 1064 (E.D. Cal. 2011) (dismissing without leave to amend breach of contract and breach of the duty of good faith and fair dealing claims premised on an alleged failure by Google to adhere to its AdWords policy); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1199–1201 (N.D. Cal. 2009) (dismissing plaintiff's complaint with prejudice); *Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008) (dismissing plaintiff's claim with leave to amend); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 24-34, 274 Cal. Rptr. 3d 360, 368-77 (1st Dist. 2021) (affirming the lower court's demurrer without leave to amend, dismissing plaintiff's breach of contract claim arising from plaintiff's permanent suspension from Twitter for violating its Terms of Service); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206-07, 222 Cal. Rptr. 3d 250, 263-64 (1st Dist. 2017) (affirming the trial court's order granting Facebook's anti-SLAPP motion on claims for breach of contract, negligent misrepresentation, and negligent interference—based on Facebook's alleged failure to remove pages critical of the plaintiff—which were held to be preempted by the CDA); *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 401, 405, 163 Cal. Rptr. 3d 919,

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implied duty of good faith and fair dealing,[19] invasion of privacy[20] and right of publicity[21] (or appropriation[22]) viola-

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920, 924 (4th Dist. 2013) (affirming grant of anti-SLAPP motion in favor of the owner of the Orange County Register based on a claim that the newspaper breached its user agreement with the plaintiff by failing to remove user comments about the plaintiff from its website); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003–04 (Super. Ct. 2000); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001). In *Schneider*, the court explained that "assuming Schneider could prove the existence of an enforceable promise to remove the comments, Schneider's claim is based entirely on the purported breach—failure to remove the posting—which is an exercise of editorial discretion. This is the activity the statute seeks to protect." 108 Wash. App. at 465, 31 P.3d at 41–42.

By contrast, in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit held that plaintiff's quasi-contractual promissory estoppel claim was not preempted by section 230(c)(1) where it was premised on neither publication nor speaking, but an affirmative undertaking communicated by Yahoo's Director of Communications to help remove a phony profile, which the plaintiff alleged that she relied upon to her detriment. The court, however, did not address whether plaintiff's claim might be preempted by section 230(c)(2)(A). *See infra* §§ 37.05[4] (analyzing the potential applicability of section 230(c)(2)(A) to *Barnes* and noting conflicting authority); 37.05[6] (analyzing *Barnes*).

[18]*See, e.g., La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 987 (S.D. Tex. 2017) (dismissing with prejudice plaintiff's claims for defamation, breach of implied contract and intentional infliction of emotional distress as barred by the CDA, under the Texas Citizens Participation Act), *appeal dismissed*, No. 17-20565, 2018 WL 1224417 (5th Cir. Feb. 15, 2018).

[19]*See, e.g.*, *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *Lancaster v. Alphabet Inc.,* No. 15-cv-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (dismissing plaintiff's claim for breach of covenant of good faith and fair dealing arising out of YouTube's removal of videos from plaintiff's YouTube channel); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (dismissing with prejudice plaintiff's claim against eBay for breach of the duty of good faith and fair dealing based on publication of sales listings on eBay.com that were created by third parties); *Jurin v. Google Inc.*, 768 F. Supp. 2d 1064 (E.D. Cal. 2011) (dismissing without leave to amend breach of contract and breach of the duty of good faith and fair dealing claims premised on an alleged failure by Google to adhere to its AdWords policy).

[20]*See, e.g., Obado v. Magedson*, 612 F. App'x 90, 91-94 (3d Cir. 2015) (affirming dismissal for failure to state claims for defamation, intentional and negligent infliction of emotional distress and invasion of privacy

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against various service providers, search engines and domain name registrars for republishing and allegedly manipulating search engine results to maximize the impact of allegedly defamatory content, based on the CDA); *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Parker v. Paypal, Inc.*, No. 16-cv-04786, 2017 WL 3508759, at *6-7 (E.D. Pa. Aug. 16, 2017) (dismissing plaintiff's claims for unjust enrichment and violations of California's right of publicity and Pennsylvania's right to privacy, brought against Amazon.com, and premised on the sale of unauthorized copies of plaintiff's book on the Kindle store, as barred by the CDA); *Gavra v. Google Inc.,* 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013) (dismissing with prejudice an attorney's claims for invasion of privacy, defamation, and "blackmail/extortion" arising from Google's alleged failure to remove unflattering videos posted by a former client); *Regions Bank v. Kaplan,* 8:12-CV-1837-T-17MAP, 2013 WL 1193831, at *18 (M.D. Fla. Mar. 22, 2013) (dismissing claims of defamation *per se* and invasion of privacy arising from a "Fraud-Net" alert bulletin published by a third party on the Florida Bankers Association's website that allegedly contained false and defamatory statements); *Shah v. MyLife.Com, Inc.,* 3:12-CV-1592 -ST, 2012 WL 4863696, at *3 (D. Or. Sept. 21, 2012) (recommending that defendants' motion to dismiss be granted; holding that MyLife.com and Google, Inc. "cannot be sued for simply republishing information provided by third parties, including any claim under state law for invasion of privacy by an internet posting of personal information obtained from another party."); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 877–80 (N.D. Ind. 2010) (false light); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006), *aff'd mem.,* 242 F. App'x 833 (3d Cir. 2007), *cert. denied,* 552 U.S. 156 (2008); *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 279 Ill. Dec. 113, 799 N.E.2d 916 (2d Dist. 2003) (false light invasion of privacy and defamation).

[21] *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 n.5 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007); *Callahan v. Ancestry.com, Inc*., Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California right of publicity claim under Cal. Civ. Code § 3344, and claims for intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200, arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity pursuant to 47 U.S.C.A. § 230(c)(1)); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's right of publicity claim under Cal. Civ. Code § 3344, unfair competition, false light invasion of privacy, and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website, where "[a]ll of Morton's non-copyright claims attempt[ed] to treat Twitter as being equivalent to SpyIRL for purposes of considering liability for the latter's tweets."); *Ripple Labs Inc. v. YouTube LLC*, Case No. 20-cv-02747-LB, 2020 WL 6822891, at *6-7 (N.D. Cal. Nov. 20, 2020) (dismissing right of

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tions, common law misappropriation,[23] common law or state statutory trademark infringement or dilution,[24] trade secret

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publicity and unfair competition claims arising out of YouTube's alleged failure to remove impersonations of Ripple's cryptocurrency enterprise from its video-sharing platform); *Parker v. Paypal, Inc*., No. 16-cv-04786, 2017 WL 3508759, at *6-7 (E.D. Pa. Aug. 16, 2017) (dismissing plaintiff's claims for unjust enrichment and violations of California's right of publicity and Pennsylvania's right to privacy, brought against Amazon.com, and premised on the sale of unauthorized copies of plaintiff's book on the Kindle store, as barred by the CDA); *Joude v. WordPress Foundation*, No. C 14–01656 LB, 2014 WL 3107441, at *7 (N.D. Cal. July 3, 2014) (applying *Perfect 10* in granting judgment on the pleadings for Automattic on plaintiff's right of publicity claim arising from user content); *Perfect 10, Inc. v. Giganews, Inc.,* CV11-07098 AHM SHX, 2013 WL 2109963, at *15-16 (C.D. Cal. Mar. 8, 2013) (dismissing with leave to amend plaintiff's California right of publicity and unfair competition claims as barred by the CDA because the pornographic images found on defendant's website that were at issue in the case originated with third parties). *But see Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-15 (3d Cir. 2021) (disagreeing with the Ninth Circuit and broadly construing the exclusion in section 230(e) for *any law pertaining to intellectual property*, in a 2-1 ruling issued over a strong dissent, holding that plaintiff's state law right of publicity claim was not preempted by the CDA because "Section 230 does not preclude claims based on state intellectual property laws."); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 702-04 (S.D.N.Y. 2009); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 298, 304 (D.N.H. 2008) (criticizing the Ninth Circuit's analysis). Whether a state law right of publicity claim is subject to CDA preemption will depend on where the claim is litigated. *See infra* § 37.05[5][B] (analyzing the interplay between the CDA and state and federal IP laws and discussing other cases).

[22]*See, e.g.*, *Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238, 1248–49 (D. Minn. 2005) (holding a claim for appropriation under Minnesota law preempted by the CDA). A claim for appropriation may be stated "when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one." Restatement (Second) of Torts § 652C, comment b.

[23]*See, e.g.*, *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1127 (D. Nev. 2013) (dismissing plaintiffs' complaint for common law misappropriation under Florida law with leave to amend). *But see Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090-91 (D. Nev. 2013) (denying the defendant's motion to dismiss plaintiff's amended complaint where plaintiff alleged that the website provider "acted as a 'developer' within the meaning of the CDA by promoting the publication of protected 'service plays' and thereby contributing to the misappropriation of Plaintiffs' trade secrets and commercial property."); *see generally supra* § 5.04 (analyzing common law misappropriation).

[24]*See, e.g.*, *Lasoff v. Amazon.com Inc.,* Case No. C-151 BJR, 2017 WL 372948, at *3-4 (W.D. Wash. Jan. 26, 2017) (granting summary judgment for the defendant on plaintiff's New Jersey state law claims for, among

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misappropriation,[25] civil theft,[26] unjust enrichment,[27] conver-

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other things, statutory and common law unfair competition and statutory trademark infringement, based on CDA preemption, in a case arising out of Amazon.com's alleged use of his mark in sponsored links advertisements), *aff'd on other grounds*, 741 F. App'x 400 (9th Cir. 2018); *Free Kick Master LLC v. Apple Inc.*, 140 F. Supp. 3d 975, 982-83 (N.D. Cal. 2015) (dismissing plaintiff's common law trademark infringement claim against Google Play and the Amazon AppStore, arising out of free apps they made available, as preempted by the CDA, where plaintiff did not allege that "either of them had any role whatsoever in the creation of the apps at issue, the choice of name for those apps, or any other action that would place either defendant in the role of speaker or author of the accused products."); *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice California state law claims for trademark infringement and dilution and unfair competition premised on Yahoo's alleged use of *parts.com* as a keyword for sponsored link advertisements). Whether a state trademark claim is preempted by the CDA will depend on where the claim is litigated. *See infra* § 37.05[5][B] (analyzing the interplay between the CDA and state and federal IP laws).

[25]*See, e.g.*, *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1127 (D. Nev. 2013) (dismissing plaintiff's complaint with leave to amend; holding that a sports betting website operator was immune from Florida law claims for misappropriation of trade secrets and common law misappropriation of licensable commercial property because it was not a "developer" of user-generated content under the CDA, even though it awarded loyalty points for user posts). The court subsequently ruled that plaintiff's amended complaint stated claims for trade secret misappropriation and common law misappropriation that were not preempted by the CDA. *See Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090-91 (D. Nev. 2013) (holding plaintiff's trade secret and common law misappropriation claims survived dismissal because they alleged that the website provider "acted as a 'developer' within the meaning of the CDA by promoting the publication of protected 'service plays' and thereby contributing to the misappropriation of Plaintiffs' trade secrets and commercial property.").

As analyzed in section 37.05[5][B], civil claims under the federal Defend Trade Secrets Act (DTSA),18 U.S.C.A. §§ 1830 to 1839, are expressly subject to CDA preclusion. *See* 18 U.S.C.A. §§ 1833 note, 1836 note, 1839 note; Pub L. 114-153 § 2(g), 130 Stat. 376, 382 (2016) ("This section and the amendments made by this section shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress."); *supra* § 10.12[2] (analyzing the DTSA, including the provision making a DTSA claim expressly subject to the CDA in a suit against an interactive computer service provider or user); *infra* § 37.05[5][B] (analyzing the interplay between the CDA and DTSA). At least one court has concurred. *See Craft Beer Stellar, LLC v. Glassdoor, Inc.*, Civil Action No. 18-10510-FDS, 2018 WL 5505247, at *3 (D. Mass. Oct. 17, 2018) (dismissing plaintiff's DTSA claim against Glassdoor for material posted by a user; "Because Congress has clearly dictated that the DTSA should *not* be construed to be a law 'pertaining to intellectual property' for the purposes of *any* other Act of Congress, the DTSA is clearly not

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such a law for the purposes of § 230(e)(2). The DTSA claim is thus subject to the immunity provisions of § 230, and accordingly that claim will be dismissed."). State law claims for misappropriation of trade secrets may or may not be subject to CDA preemption, depending where the action is heard. *See infra* § 37.05[5][B].

[26]*See, e.g.*, *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (holding that a sports betting website operator was immune from plaintiff's civil theft claim under Florida law, Fla. Stat. § 772.11).

[27]*See, e.g., Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California unjust enrichment claim (and right of publicity, intrusion upon seclusion, and unlawful and unfair business practices claims), arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity pursuant to 47 U.S.C.A. § 230(c)(1)); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's unjust enrichment claim, brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website, after Twitter had removed the images in response to Morton's takedown notices); *Clarks v. Private Money Goldmine*, Case No.: GJH-19-1014, 2020 WL 949946, at *7-8 (D. Md. Feb. 26, 2020) (dismissing claims for fraud, breach of contract, and unjust enrichment against REI Network, LP, which operated www.privatemoneygoldmine.com, an online subscription service that connected prospective private money borrowers and lenders, FM 41, Inc., a general partner of REI, and John Douglas Smith, FM 41's president, as barred by both the statute of limitations and the CDA, in a suit arising out of an allegedly fraudulent preliminary payment scheme, where defendants hosted a platform that allowed prospective lenders to post their information online and interact with prospective borrowers, who paid the site a subscription fee to join); *Franklin v. X Gear 101, LLC*, 17 Civ. 6452 (GBD) (GWG), 2018 WL 3528731, at *19 (S.D.N.Y. July 23, 2018) (dismissing claims for unjust enrichment and conversion against Instagram and GoDaddy as barred by the CDA); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474-76 (E.D.N.Y. 2011); *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628 (E.D. Va. 2010), *aff'd in relevant part on other grounds,* 676 F.3d 144, 165–66 (4th Cir. 2012); *Ramey v. Darkside Productions, Inc.*, No. 02–730(GK), 2004 WL 5550485 (D.D.C. May 17, 2004) (granting summary judgment for the defendant where the plaintiff alleged that defendant published an advertisement in its adult directory, paid for by a third party, which included an unauthorized intimate photo of the plaintiff); *see also Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931 (C.D. Ill. Aug. 3, 2012) (dismissing plaintiff's complaint on other grounds but writing in *dicta* that plaintiff's state law claims for unjust enrichment, civil conspiracy, intentional interference with current and prospective economic advantage and Illinois Human Rights Act violations were barred by the CDA because they were "really variations of defamation and invasion of privacy claims . . . ," while plaintiff's Lanham Act

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sion,[28] aiding and abetting,[29] click fraud,[30] manipulation of search engine results,[31] removal of a user video,[32] social

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and right of publicity claims likely would not be barred and it was unclear whether plaintiff's RICO claim would be either;), *aff'd*, 512 F. App'x 635 (7th Cir. 2013).

[28]*See, e.g.*, *Daniels v. Alphabet Inc.*, Case No. 20-cv-04687-VKD, 2021 WL 1222166, at *11-13 (N.D. Cal. Mar. 31, 2021) (dismissing claims for breach of the implied covenant of good faith and fair dealing, conversion, unjust enrichment, money had and received, and unfair competition, as preempted by section 230(c)(1), and dismissing plaintiff's breach of contract claim under section 230(c)(2), in a suit brought by MAGA rapper Young Pharaoh over videos he uploaded to YouTube, which were removed for violating YouTube's community guidelines or policy on harassment and bullying, and for allegedly shadowbanning him and preventing him from monetizing videos on his YouTube channel); *Franklin v. X Gear 101, LLC*, 17 Civ. 6452 (GBD) (GWG), 2018 WL 3528731, at *19 (S.D.N.Y. July 23, 2018) (dismissing claims for conversion and unjust enrichment against Instagram and GoDaddy as barred by the CDA).

[29]*See, e.g., Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *3-4 (D. Md. Oct. 23, 2020) (D. Md. Oct. 23, 2020) (dismissing with prejudice eleven claims, including aiding and abetting, arising out of Twitter's decision to permanently suspend plaintiff's Twitter account for violating Twitter's policies against hateful conduct, based on Tweets that plaintiff directed at Trevor Noah and *The Daily Show with Trevor Noah*); *Brikman v. Twitter, Inc.*, 19-cv-5143 (RPK) (CLP), 2020 WL 5594637, at *3 (E.D.N.Y. Sept. 17, 2020) ("[p]laintiff's suggestion that Twitter had aided and abetted defamation '[m]erely [by] arranging and displaying others' content' on its platform fails to overcome Twitter's immunity under the CDA because such activity 'is not enough to hold [Twitter] responsible as the "developer" or "creator" of that content.' "); *Goddard v. Google, Inc.*, No. C 08-2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008); *Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168, at *4-7 (Mass. Super. Ct. Apr. 28, 2020) (dismissing claims against an online firearms marketplace for negligence, public nuisance, and aiding and abetting the sale of a firearm used to shoot a police officer); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of plaintiff's aiding and abetting claim, arising out of the use of a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people; "Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."), *cert. denied,* 140 S. Ct. 562 (2019).

[30]*Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009) (dismissing with prejudice plaintiff's complaint based on alleged harm from click fraud); *see generally supra* § 28.11 (analyzing click fraud).

[31]*See, e.g., Obado v. Magedson*, 612 F. App'x 90, 91-94 (3d Cir. 2015) (affirming dismissal with prejudice as preempted by the CDA claims that Yahoo and Google allegedly manipulated search results to give greater prominence to allegedly derogatory blog posts about the plaintiff); *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) (affirming dismissal of a suit

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brought against the Texas Office of Court Administration, Google and Fastcase by a man who falsely appeared to be listed as having been convicted of indecency with a child in search results because of the way the Texas Advance Sheet previewed information); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269–70 (9th Cir. 2016) (affirming dismissal of a defamation claim brought against Yelp where the plaintiff alleged that Yelp disseminated negative reviews via Google; "Just as Yelp is immune from liability under the CDA for posting user-generated content on its own website, Yelp is not liable for disseminating the same content in essentially the same format to a search engine, as this action does not change the origin of the third-party content."); *Getachew v. Google, Inc.*, 491 F. App'x 923, 925-26 (10th Cir. 2012) (affirming dismissal of negligence and intentional infliction of emotional distress claims based on the results displayed by search engine queries and links to third party content about him because "Google cannot be held liable for search results that yield content created by a third party."); *Dowbenko v. Google*, 582 F. App'x 801 (11th Cir. 2014) (holding plaintiff's defamation claim against Google, premised on the allegation that Google purportedly used algorithms to manipulate its search results so that an allegedly defamatory article about Mr. Dowbenko appeared immediately below his own website in Google search results, was preempted by the CDA); *Manchanda v. Google,* 16-CV-3350 (JPO), 2016 WL 6806250, at *2-3 (S.D.N.Y. Nov. 16, 2016) (dismissing claims for defamation, libel, slander, tortious interference with contract, breach of fiduciary duty, breach of the duty of loyalty, unlawful trespass, civil RICO, unjust enrichment, intentional infliction of emotional distress, and negligent infliction of emotional distress, based on the defendant search engines (Google, Yahoo and Microsoft)'s alleged provision of offending website content, as precluded by the CDA); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1321-22 (M.D. Fla. 2015) (granting summary judgment for the defendant on claims for defamation, tortious interference with a contractual relationship, tortious interference with a prospective economic relationship and a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); holding that the defendant website operator did not lose immunity for using search optimization practices to highlight critical posts or providing summary statistics of user posts); *Baldino's Lock & Key Service, Inc. v. Google, Inc.*, 88 F. Supp. 3d 543, 546-47 (E.D. Va. 2015) (dismissing plaintiff's Lanham Act false advertising and RICO claims under 18 U.S.C.A. §§ 1964(c) and 1962(a) (investment of proceeds), as precluded by the CDA, in a suit brought by a locksmith who alleged that Google's directory produced over 1,000 results for locksmiths in Virginia when only 325 were licensed in that state), *aff'd on other grounds*, 624 F. App'x 81 (4th Cir. 2015); *American Income Life Insurance Co. v. Google, Inc.*, No. 2:11–CV–4126–SLB, 2014 WL 4452679 (N.D. Ala. Sept. 18, 2014) (dismissing with prejudice, as preempted by the CDA, plaintiff's claim under the Alabama Deceptive Trade Practices Act, Ala. Code §§ 8–19–1 *et seq.*, alleging that Google chose "to reward with prominent placement in all its search engine results" third party content on *scam.com* and *pissedconsumer.com*, which allegedly referred to the plaintiff as a scam, and based on the argument that Google's algorithms effectively created content about the plaintiff, which the court rejected as merely amounting to republication of third party

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media posts,[33] or a person's social media profile (or account,

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content); *see also infra* §§ 9.09, 9.11 (addressing search engine practices more broadly, including other conduct held preempted by the CDA). *But see e-ventures Worldwide, LLC v. Google Inc.*, 188 F. Supp. 3d 1265 (M.D. Fla. 2016) (denying defendant's motion to dismiss claims by a search engine optimization company alleging that Google had improperly classified its business as "pure spam" because the CDA is an affirmative defense and "[w]hile the CDA defense may properly be considered if it is apparent from the face of the complaint, . . ." in this case the plaintiff alleged bad faith in connection with the removal of its websites from Google's search results); *e-ventures Worldwide, LLC v. Google Inc.*, Case No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017) (declining to apply the CDA but granting summary judgment for Google under the First Amendment because "Google's actions in formulating rankings for its search engine and in determining whether certain websites are contrary to Google's guidelines and thereby subject to removal are the same as decisions by a newspaper editor regarding which content to publish, which article belongs on the front page, and which article is worthy of publication. The First Amendment protects these decisions, whether they are fair or unfair, or motivated by profit or altruism."); *see generally supra* § 9.09 (addressing First Amendment protection for search engines and search engine results).

[32]*See, e.g.*, *Daniels v. Alphabet Inc.*, Case No. 20-cv-04687-VKD, 2021 WL 1222166, at *11-13 (N.D. Cal. Mar. 31, 2021) (dismissing claims for breach of the implied covenant of good faith and fair dealing, conversion, unjust enrichment, money had and received, and unfair competition, as preempted by section 230(c)(1), and dismissing plaintiff's breach of contract claim under section 230(c)(2), in a suit brought by MAGA rapper Young Pharaoh over videos he uploaded to YouTube, which were removed for violating YouTube's community guidelines or policy on harassment and bullying, and for allegedly shadowbanning him and preventing him from monetizing videos on his YouTube channel); *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209 (N.D. Cal. Aug. 14, 2020) (dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims and claim for declaratory relief, as barred by section 230(c)(1) of the CDA, because they arose out of defendant's removal of fitness and health videos containing information about unregulated substances that had not yet been approved by the FDA); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 601-06 (S.D.N.Y. 2020) (dismissing plaintiff's claims under California and New York law, arising out of Vimeo's deletion or removal of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021); *Lancaster v. Alphabet Inc.*, Case No. 15-cv-05299-HSG, 2016 WL 3648608 (N.D. Cal. July 8, 2016) (dismissing plaintiff's *pro se* complaint arising out of the defendants' alleged removal of videos from YouTube, as preempted by the CDA).

[33]*See, e.g.*, *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-99 (9th Cir. 2020) (affirming dismissal of plaintiff's state law claims for intentional interference with prospective economic advantage, violation of California

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through suspension or termination,[34] or failing to remove an

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Business and Professions Code §§ 17200 *et seq*., civil extortion, and fraud, which sought to impose liability on Facebook for "allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor[,]" as barred by the CDA, and rejecting the argument that Facebook's monetization of content transformed it into an information content provider), *cert. denied,* 141 S. Ct. 1067 (2021); *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (affirming dismissal with prejudice of plaintiff's Title II Civil Rights complaint where plaintiff sought to "hold Facebook liable as a publisher for hosting, and later blocking, SFJ's online content."); *Brock v. Zuckerberg,* 20-cv-7513 (LJL), 2021 WL 2650070, at *4-5 (S.D.N.Y. June 25, 2021) (dismissing plaintiff's N.Y. state law claims against Facebook for allegedly removing and blocking content); *King v. Facebook, Inc.*, Case No. 19-cv-01987-WHO, 2019 WL 4221768, at *3-5 (N.D. Cal. Sept. 15, 2019) (dismissing plaintiff's claims for removing social media posts that Facebook alleged violated its Terms of Service agreement, but allowing leave to amend to expressly allege a claim for retaliatory breach of the ToS based on the alleged treatment of his speech that was critical of Facebook, if King was able to do so).

[34]*See, e.g.*, *Riggs v. MySpace, Inc.,* 444 F. App'x 986, 987 (9th Cir. 2011) (affirming dismissal of negligence and gross negligence claims, holding that section 230(c)(1) immunized MySpace for its decision "to delete [plaintiff's] user profiles on its social networking website yet not delete other profiles [plaintiff] alleged were created by celebrity imposters.");*Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *1, *3-4 (D. Md. Oct. 23, 2020) (dismissing, with prejudice, eleven civil claims arising out of the permanent suspension of pro se plaintiff's Twitter account for "violation of Twitter's policies against hateful conduct"); *Zimmerman v. Facebook, Inc.*, Case No. 19-cv-04591-VC, 2020 WL 5877863, at *1 (N.D. Cal. Oct. 2, 2020) (dismissing claims without leave to amend, holding that "claims relating to the defendants' decision to block their Facebook profiles are barred by the Communications Decency Act . . ."), *appeal dismissed,* No. 20-17054, 2020 WL 9257959 (9th Cir. Nov. 30, 2020); *Wilson v. Twitter, Inc.*, Case No. 3:20-cv-00054, 2020 WL 3410349, at *10-12 (S.D.W. Va. May 1, 2020) (recommending dismissal, with prejudice, of plaintiff's claims under Title II of the CRA arising out of the termination of his Twitter account for violating Twitter's Terms of Service by sending harassing Tweets), *report and recommendation adopted*, 2020 WL 3256820 (S.D.W. Va. June 16, 2020); *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's non-constitutional federal and state claims, including for damages under the California Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *Federal Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d. 1295, 1304-08 (N.D. Cal. 2019) (dismissing without prejudice, as precluded by the CDA, the claims brought under Title II of the U.S. Civil Rights Act of 1964 and California Unruh Civil Rights Act,

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account or suspend a user[35] or failing to do so fast enough[36]),

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among others, by a Russian news site whose Facebook account was terminated in early 2018 after it was determined by Facebook that the account was controlled by the Russian government's Internet Research Agency, which according to a U.S. intelligence community report had created 470 inauthentic accounts on Facebook that were used to influence the outcome of the 2016 Presidential election); *Dipp-Paz v. Facebook*, 18-CV-9037 (LLS), 2019 WL 3205842, at *3 (S.D.N.Y. July 12, 2019) (holding that plaintiff's claim, arising from suspension of his Facebook account, was barred by the CDA); *Brittain v. Twitter, Inc.*, No. 19-CV-00114-YGR, 2019 WL 2423375 (N.D. Cal. June 10, 2019) (dismissing with prejudice plaintiffs' claims for (1) violation of the First Amendment; (2) violation of federal election law; (3) breach of contract; (4) conversion, (5) negligent infliction of emotional distress; (6) tortious interference; and (7) promissory estoppel, alleging that Twitter improperly suspended four accounts linked to Craig Brittain and his U.S. Senate campaign); *Mezey v. Twitter, Inc.,* No. 18-CV-21069 (KMM), 2018 WL 5306769, at *2 (S.D. Fla. July 19, 2018) (dismissing plaintiff's lawsuit claiming that Twitter "unlawfully suspended" plaintiff's Twitter account, as precluded by section 230(c)(1) immunity); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 24-41, 274 Cal. Rptr. 3d 360, 368-82 (1st Dist. 2021) (affirming trial court's judgment sustaining demurrer to complaint, without leave to amend, where plaintiff had sued for breach of contract, promissory estoppel, and violation of California's unfair competition law (Bus. & Prof. Code, §§ 17200 *et seq*.), where plaintiff's account had been permanently suspended for repeated hate speech violations of Twitter's Terms of Service). *But see Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 422, 448-53, 242 A.3d 814, 819-23 (2020) (reversing dismissal of plaintiff's breach of contract claim, alleging that Facebook had violated specific promises made in its Terms of Use by deleting plaintiff's Instagram account, where the CDA defense was not apparent from the face of plaintiff's small claims court complaint and the court was not inclined to "prematurely" address the merits of the dispute, but holding nonetheless that, "[t]o the extent that Teatotaller's claim is premised upon Facebook's decision to remove its 'Instagram account, including all the content, data, and followers that had been accumulated through paid and unpaid activity,' its claim may require the court to treat Facebook as a publisher.").

[35]*See, e.g.*, *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 26-28 (2d Cir. 2015) (affirming dismissal under the CDA of plaintiffs' defamation claim against GoDaddy, as the host for a website where allegedly defamatory third party material was posted, based on its refusal to remove the material); *Green v. America Online (AOL),* 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 n.11 (9th Cir. 2009); *Bennett v. Google, LLC*, 882 F.3d 1163, 1166-68 (D.C. Cir. 2018) (affirming dismissal of plaintiff's claims against Google for defamation, tortious interference with a business relationship, and intentional infliction of emotional distress, premised on Google's refusal to remove a user's blog post, in alleged violation of its "Blogger Content Policy," as preempted by section 2301(c)(1); quoting an earlier case for the proposition that "the very essence of publishing is making the decision whether to print or retract a given piece of content."); *Morton v. Twitter, Inc.*, Case

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or removal and demonetization of content,[37] or not screening apps listed in an app store to exclude apps containing partic-

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No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4-5 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's right of publicity claim under Cal. Civ. Code § 3344, unfair competition, false light invasion of privacy, and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter, which had removed the images in response to a takedown notice, had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website); *Coffee v. Google, LLC*, Case No. 20-cv-03901-BLF, 2021 WL 493387, at *6-8 (N.D. Cal. Feb. 10, 2021) (dismissing claims for alleged violations of California's unfair competition law, California's Consumers Legal Remedies Act, and unjust enrichment, as barred by the CDA, in a putative class action suit seeking to hold Google Play liable for offering video games on its App store that allegedly allowed users to purchase Loot Boxes, which plaintiffs alleged constituted illegal "slot machines or devices" under California law; "an order requiring Google to screen apps offered through its Google Play store and exclude those containing Loot Boxes. . . [is] conduct that is squarely within the role of a publisher under *Roommates*. Accordingly, it appears from the face of the complaint that Plaintiffs seek to treat Google as the publisher of the video game apps in question."); *Ripple Labs Inc. v. YouTube LLC*, Case No. 20-cv-02747-LB, 2020 WL 6822891, at *6-7 (N.D. Cal. Nov. 20, 2020) (dismissing unfair competition and right of publicity claims arising out of YouTube's alleged failure to remove videos of fraudulent impersonations of Ripple, which were used by scammers to perpetrate a cryptocurrency scam that caused XRP cryptocurrency owners to deposit XRP into the scammers' wallet, and which allegedly violated Ripple's CEO's rights of publicity); *Mmubango v. Google, Inc*., CIV. A. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013) (dismissing with prejudice plaintiff's claims for defamation and negligence arising out of Google's alleged refusal to remove from its search engine links to negative statements about the plaintiff that were posted on wikiscams.com, an unrelated website); *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261, at *8 (D.N.J. July 31, 2014) (holding that the refusal to remove content was immunized by the CDA), *aff'd*, 612 F. App'x 90, 92 (3d Cir. 2015)..

[36]*See Dehen v. Does 1-100,* Case No. 17cv198-LAB (WCG), 2018 WL 4502336, at *3-4 (S.D. Cal. Sept. 18, 2018) (dismissing plaintiff's claims arising out of Twitter's alleged delay in taking down offending content, once Dehen notified it of the alleged impersonation).

[37]*See, e.g.*, *Lewis v. Google LLC*, 461 F. Supp. 3d 938, 952-55 (N.D. Cal. 2020) (dismissing claims brought by political commentator Bob Lewis alleging that YouTube and Google wrongfully demonetized, censored, restricted and removed his videos, holding that defendants' "alleged demonetization of Plaintiff's postings. . . constitutes a publishing function under § 230. . . . Deciding whether to limit advertising on a posting is not different in nature from removing a post altogether. Both fall under the rubric of publishing activities."), *aff'd on other grounds,* 851 F. App'x 723 (9th Cir. 2021).

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ular content,[38] state law violations arising out of a search engine's sale of advertisements triggered by sponsored links,[39] providing links to third-party posts,[40] embedding

[38]*See Coffee v. Google, LLC*, Case No. 20-cv-03901-BLF, 2021 WL 493387, at *6-8 (N.D. Cal. Feb. 10, 2021) (dismissing claims for alleged violations of California's unfair competition law, California's Consumers Legal Remedies Act, and unjust enrichment, as barred by the CDA, in a putative class action suit seeking to hold Google Play liable for offering video games on its app store that allegedly allowed users to purchase Loot Boxes, which plaintiffs alleged constituted illegal "slot machines or devices" under California law; "an order requiring Google to screen apps offered through its Google Play store and exclude those containing Loot Boxes—conduct that is squarely within the role of a publisher under *Roommates*. Accordingly, it appears from the face of the complaint that Plaintiffs seek to treat Google as the publisher of the video game apps in question.").

[39]*See, e.g., Lasoff v. Amazon.com Inc.,* Case No. C-151 BJR, 2017 WL 372948, at *3-4 (W.D. Wash. Jan. 26, 2017) (granting summary judgment on plaintiff's New Jersey state law claims for statutory and common law unfair competition, statutory trademark infringement, tortious interference with prospective economic advantage, gross estoppel, unjust enrichment, and promissory estoppel, based on CDA preemption, in a case arising out of Amazon.com's alleged use of his mark in sponsored links advertisements), *aff'd on other grounds*, 741 F. App'x 400 (9th Cir. 2018); *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice state law claims for trademark infringement and dilution and unfair competition premised on Yahoo's alleged use of *parts.com* as a keyword for sponsored link advertisements); *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628 (E.D. Va. 2010) (dismissing under the CDA plaintiff's unjust enrichment claim seeking recovery of revenue earned from sponsored link advertisements for third parties triggered by "Rosetta Stone"), *aff'd in relevant part on other grounds,* 676 F.3d 144, 165–66 (4th Cir. 2012); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010) (dismissing claims for negligent and intentional interference with contractual relations and prospective economic advantage and fraud arising out of Google's use of the keyword suggestion tool as preempted by the CDA).

In *Rosetta Stone*, District Court Judge Gerald Bruce Lee distinguished *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295–96 (D.N.J. 2006), where the court held that CDA immunity did not bar a claim against a "pay-for-priority" search engine. First, in that case, Judge Lee wrote, the defendant, unlike Google, did not qualify as an interactive service provider. Second, Judge Lee wrote that the court did not deal with a situation, as in Google, where third party advertisers are responsible for selecting the keyword triggers.

In *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010), plaintiff, the owner of a company which marketed and sold its trademarked "Styrotrim" building materials, sued Google because its AdWords program picked up the trademark name "Styrotrim" as a commonly searched term and thereafter suggested it as a keyword to bidders in its AdWords

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program. In holding plaintiffs' claims barred by the CDA, the court emphasized that Google did not provide the content for the sponsored link advertisements triggered by the keyword, that Google's keyword suggestion tool was a neutral tool that did nothing more than provide options to advertisers, and suggesting keywords to competing advertisers was tantamount to the editorial process protected by the *CDA*. *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010). *But see Jurin v. Google Inc.*, 768 F. Supp. 2d 1064 (E.D. Cal. 2011) (denying defendant's motion to dismiss amended false advertising and false association claims arising out of the sale of a keyword as a sponsored link, but dismissing without leave to amend breach of contract and breach of the duty of good faith and fair dealing claims premised on an alleged failure by Google to adhere to its AdWords policy).

In *Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086-87 (C.D. Cal. 2012), Central District of California Senior Judge Lew narrowly applied the CDA without much analysis in denying in part the defendant's motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not claims arising out of the alleged sale of plaintiff's "Cybersitter" mark as a key word to trigger sponsored link advertisements.

Most sponsored link cases involve federal Lanham Act claims, which are not preempted by the CDA. *See generally infra* § 37.05[5][B] (exclusion of claims pertaining to intellectual property); *supra* § 9.11[3] (analyzing sponsored links).

[40]*See, e.g.*, *Obado v. Magedson*, 612 F. App'x 90, 93-94 (3d Cir. 2015) (affirming dismissal of plaintiff's claims that defendants manipulated search results to enhance allegedly actionable third party content, as preempted by the CDA), *aff'g,* Civil No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) (dismissing claims against Yahoo, Google, Neustar, eNom, Intelius, Switchboard LLC & Whitepages, Inc. and Xcentric Ventures for displaying, distributing or linking to allegedly defamatory third party blog posts about the plaintiff and for allegedly selectively editing the posts, failing to remove them, and manipulating search results to give them greater prominence and cause the plaintiff emotional distress); *Chukwurah v. Google, LLC*, Civil Action No. PX-19-782, 2020 WL 510158, at *2 (D. Md. Jan. 31, 2020) (dismissing pro se plaintiff's defamation claim against Google for linking to allegedly defamatory material in response to search engine queries, as immunized by the CDA); *General Steel Domestic Sales, LLC v. Chumley*, Civil Action No. 14-cv-01932-REB-CBS, 2015 WL 4911585, at *9 (D. Colo. Aug. 18, 2015) (holding defendants entitled to CDA immunity for establishing links to third party content and for a few specific posts, but denying defendant's motion for summary judgment with respect to other material which it appeared that the defendant developed), *appeal dismissed*, 840 F.3d 1178 (10th Cir. 2016); *Vazquez v. Buhl*, 150 Conn. App. 117, 90 A.3d 331 (2014) (holding a website operator insulated from liability by the CDA for providing a link to a third party's article).

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linked content,[41] and/or disseminating those links via Twitter[42] (or communicating privately via Direct Messages on Twitter[43]), promoting user posts to be indexed by a search

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[41]*See National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (holding the CDA applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms). In *National Association of the Deaf v. Harvard,* the court held that "[w]here Harvard or someone associated with Harvard is embedding a third party's content that Harvard or someone associated with Harvard did not create or develop in whole or in part—in other words, is publishing a third party's content—Harvard is entitled to CDA immunity . . . ." 377 F. Supp. 3d at 70. Magistrate Judge Katherine A. Robertson explained that, "[b]y definition, embedded content is content hosted on a third-party server that is hyperlinked in its existing form to content that is hosted on a Harvard platform or website. . . . To the extent such content is not content that was created or developed in whole or in part by Harvard, Harvard cannot be an information content provider as to embedded content." *Id.* at 69 (citation omitted). The court noted further that "[e]ven if Plaintiffs can show that the construction and operation of Harvard's platforms and websites limit in some way the content that can be embedded in postings on Harvard's platforms and websites, Harvard would remain a publisher under the CDA as to embedded content." *Id.* at 70; *see also National Association of the Deaf v. Massachusetts Institute of Technology,* Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, in plaintiffs' parallel lawsuit against MIT).

[42]*See Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1319-22 (M.D. Fla. 2015) (granting summary judgment for the defendant on claims for defamation, tortious interference with a contractual relationship, tortious interference with a prospective economic relationship and a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); holding that the defendant website operator did not lose immunity for tweeting out links to user posts, trimming posts to meet the character limitations imposed by Twitter, adding the Twitter user IDs @rocalabs and @pissedconsumer or by using search optimization practices to highlight critical posts or providing summary statistics of user posts); *see also Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016) (holding Twitter itself immune under the CDA from liability for a claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), for allegedly providing material support to the Islamic State of Iraq and Syria (ISIS), because ISIS used Twitter to disseminate its official media publications, raise funds and recruit users).

[43]*See Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1127-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), with prejudice, holding that Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881

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engine,[44] impersonation in connection with a Twitter account,[45] false advertising under state law,[46] ticket scalping,[47]

F.3d 739 (9th Cir. 2018) (affirming dismissal where the plaintiffs could not allege proximate causation).

[44]*See Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com; rejecting the argument that the defendant should be liable as an information content provider for user comments, rather than immunized under the CDA, for promoting content to be searchable on Google).

[45]*See, e.g.*, *Dehen v. Doe*, Case No. 17cv198-LAB (WCG), 2018 WL 4502336, at *3-4 (S.D. Cal. Sept. 19, 2018) (dismissing with prejudice state law claims against Twitter brought by a *pro se* plaintiff, who was a former University of San Diego law student, who alleged a conspiracy by defendants to impersonate and defame her online by the creation of a fake Twitter account parodying her as a fictitious Donald Trump supporter).

[46]*See, e.g.*, *Brodie v. Green Spot Foods, LLC*, 503 F. Supp. 3d 1, 6 (S.D.N.Y. 2020) (dismissing plaintiff's claim against Amazon.com for deceptive practices and false advertising under N.Y. Gen. Bus. Law §§ 349 and 350 as barred by the CDA, in case where plaintiff allegedly suffered injuries after consuming food featured as an "Amazon's Choice" product, where the advertisements at issue were provided by Green Spot Foods); *Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010) (granting summary judgment to the defendant under the CDA on a false advertising claim brought by the New Jersey Attorney General based on New Jersey consumer fraud advertising regulations); *see also Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *Enigma Software Group USA, LLC v. Malwarebytes, Inc*., 946 F.3d 1040, 1052–54 (9th Cir. 2019) (reversing the lower court's order granting defendant's motion to dismiss plaintiff's Lanham Act claim based on section 230(c)(2)(B) on other grounds, but holding that a false advertising claim under the Lanham Act was not a law "pertaining to intellectual property" under section 230(e)(2) and therefore potentially could be subject to immunity under the CDA; "even though the Lanham Act is known as the federal trademark statute, not all claims brought under the statute involve trademarks."), *cert. denied*, 141 S. Ct. 13 (2020); *see generally infra* § 37.05[5][B] (analyzing the scope of the exclusion of preemption for laws "pertaining to intellectual property).

[47]*See Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing an order for summary judgment for the plaintiff on its unfair or decep-

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waste of public funds, premises liability and nuisance (based on Internet use at a public library),[48] nuisance (based on hosting a marketplace for firearms,[49] postings soliciting prostitution,[50] or a forum on Oxycodone[51]), wrongful death,[52] strict

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tive trade practices claim based on N.C. Gen. Stat. § 14-344, a North Carolina law that made it unlawful to sell a ticket for more than $3 over its face value, because StubHub, on online marketplace, was entitled to CDA immunity for a third party transaction that occurred through its website); *see also Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010) (granting summary judgment to an interactive computer service provider under the CDA in a case brought by the New Jersey Attorney General alleging violations of the New Jersey Consumer Fraud Act and advertising regulations promulgated under the Act over ticket sales to a Bruce Springsteen concert).

[48]*See Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772 (1st Dist. 2001); *see also Dyroff v. Ultimate Software Group, Inc.*, Case No. 17-cv-05359-LB, 2017 WL 5665670 (N.D. Cal. Nov. 26, 2017) (dismissing plaintiff's claim for premises liability as preempted by section 230(c)(1) in a suit against a social network brought by the mother of a user of the network who died from an overdose of heroin laced with fentanyl, which he had allegedly obtained from another user of the social network), *aff'd*, 934 F.3d 1093, 1097-99 (9th Cir. 2019).

[49]*See, e.g.*, *Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168, at *4-7 (Mass. Super. Ct. Apr. 28, 2020) (dismissing plaintiff's claim that an online firearms marketplace had created a public nuisance in the design and maintenance of a website that allegedly encouraged people to bypass state and federal gun laws, in a suit brought by a police officer who had been shot with a gun allegedly purchased from the online marketplace); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of plaintiff's public nuisance claim, arising out of the use of a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people; "Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."), *cert. denied*, 140 S. Ct. 562 (2019).

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

[51]*See Witkoff v. Topix, LLC*, No. B257656, 2015 WL 5297912 (Cal. Ct. App. 2d Dist. Sept. 18, 2015) (unpublished opinion affirming the trial court's decision to sustain defendant Topix, LLC's demurrer, reasoning that even though it created a website forum on Oxycodone, as a publisher of information from third parties, it remained immune under the CDA against claims of public nuisance and wrongful death).

[52]*See, e.g.*, *Dyroff v. Ultimate Software Group, Inc.*, Case No. 17-cv-05359-LB, 2017 WL 5665670 (N.D. Cal. Nov. 26, 2017) (dismissing as preempted by section 230(c)(1) claims against a social network brought by the mother of a user of the network who died from an overdose of heroin laced with fentanyl, which he had allegedly obtained from another user of the social network, for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability

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product liability,[53] breach of warranty,[54] common law fraud,[55]

Act, Cal. Health & Safety Code §§ 11700, *et seq.*), *aff'd*, 934 F.3d 1093, 1097-99 (9th Cir. 2019); *Witkoff v. Topix, LLC*, No. B257656, 2015 WL 5297912 (Cal. Ct. App. 2d Dist. Sept. 18, 2015) (unpublished opinion affirming the trial court's decision to sustain defendant Topix, LLC's demurrer, reasoning that even though it created a website forum on Oxycodone, as a publisher of information from third parties, it remained immune under the CDA against claims of public nuisance and wrongful death); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of plaintiff's wrongful death claim, arising out of the use of a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people; "Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."), *cert. denied*, 140 S. Ct. 562 (2019).

[53]*See, e.g., Herrick v. Grindr, LLC*, 765 F. App'x 586, 588-91 (2d Cir. 2019) (affirming dismissal under section 230(c)(1) of product liability, negligence, and intentional and negligent infliction of emotional distress claims, premised on alleged design defects and an alleged duty to warn, in a suit alleging that plaintiff's former boyfriend impersonated him on the Grindr app in a catfishing campaign, holding, among other things, that plaintiff's "manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred by § 230."); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020) (denying leave to amend to add negligence and strict liability claims arising out of a mobile messaging service's alleged failure to warn or implement sufficient policies to protect underage users from sexual exploitation because "Plaintiff's failure to warn claims are inextricably linked to the harmful content solicited and posted by Kik's users. This is precisely the type of claim for which Congress has determined that interactive computer website providers should be immune."); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (dismissing a claim against eBay for strict product liability based on the alleged sale of vacuum tubes by an eBay user); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (dismissing a claim for strict product liability under Texas law for allegedly failing to implement reasonable safety measures to protect minors); *Reyes v. LA Vaporworks*, No. BC618004, 2017 WL 1717406 (L.A. Cty. Sup. Ct. Feb. 16, 2017) (sustaining eBay's demurrer because eBay is an interactive computer service entitled to immunity under the CDA for product liability claims based on allegedly defective vaping products offered by users of its website); *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (N.Y. Sup. Ct. 2009) (dismissing defamation and products liability claims brought against Xcentric Ventures, LLC, the operator of RipOffReport.com, based on user posts, in an unreported opinion).

[54]*See Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (dismissing with prejudice plaintiff's claims against eBay for negligence, intentional conduct, gross negligence, breach of the implied warranty of merchantability, failure to warn, breach of the duty of good

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state consumer fraud and protection statutes,[56] wiretapping/

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faith and fair dealing, violation of the Mississippi Consumer Protection Act, violation of federal law, and punitive damages because the claims were based on publication of sales listings on eBay.com that were created by third parties); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (dismissing claims for breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose and breach of express warranty against eBay based on the alleged sale by an eBay user of vacuum tubes where "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA.").

[55]*See, e.g.*, *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-99 (9th Cir. 2020) (affirming dismissal of plaintiff's state law claims for intentional interference with prospective economic advantage, violation of California Business and Professions Code §§ 17200 *et seq*., civil extortion, and fraud, which sought to impose liability on Facebook for "allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor[,]" as barred by the CDA, and rejecting the argument that Facebook's monetization of content transformed it into an information content provider), *cert. denied,* 141 S. Ct. 1067 (2021); *Clarks v. Private Money Goldmine*, Case No.: GJH-19-1014, 2020 WL 949946, at *7-8 (D. Md. Feb. 26, 2020) (dismissing claims for fraud, breach of contract, and unjust enrichment against REI Network, LP, which operated www.privatemoneygoldmine.com, an online subscription service that connected prospective private money borrowers and lenders, FM 41, Inc., a general partner of REI, and John Douglas Smith, FM 41's president, as barred by both the statute of limitations and the CDA, in a suit arising out of an allegedly fraudulent preliminary payment scheme, where defendants hosted a platform that allowed prospective lenders to post their information online and interact with prospective borrowers, who paid the site a subscription fee to join); *Jurin v. Google Inc*., 695 F. Supp. 2d 1117 (E.D. Cal. 2010) (dismissing as preempted by the CDA claims for negligent and intentional interference with contractual relations and prospective economic advantage and fraud arising out of Google's use of its keyword suggestion tool in connection with its AdWords program).

[56]*See, e.g., Inventel Products, LLC v. Li*, Civ. No. 2:19-9190, 2019 WL 5078807, at *8 (D.N.J. Oct. 10, 2019) (dismissing plaintiff's New Jersey Consumer Fraud Act claim against Google, premised on Google's alleged provision of AdWorks and analytics services arising out of publication of third-parties' allegedly infringing material, as preempted by the CDA; "While the CDA does not limit laws pertaining to intellectual property, 47 USC § 230(e)(2), the CFA is not an intellectual property statute, *see* N.J.S. § 56:8-2 (banning use of improper business practices)."); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (dismissing with prejudice plaintiff's claims against eBay for negligence, intentional conduct, gross negligence, breach of the implied warranty of merchantability, failure to warn, breach of the duty of good faith and fair dealing, violation of the Mississippi Consumer Protection Act, violation of federal law, and punitive damages because the claims were based on publication of sales listings on eBay.com that were created by third parties); *Doe v.*

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eavesdropping,[57] extortion[58] and unfair competition[59] laws,

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Friendfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008) (New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A); *Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113 (2010) (New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-2); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1117–18 (W.D. Wash. 2004) (Washington state statute).

[57]*See Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing as preempted by section 230(c)(2) (with leave to amend) a claim under Cal. Penal Code §§ 630 *et seq*.); *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in dismissing Holomaxx's virtually identical complaint against Yahoo!).

[58]*See Gavra v. Google Inc.,* 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013) (dismissing with prejudice an attorney's claims for invasion of privacy, defamation, and "blackmail/extortion" arising from Google's alleged failure to remove unflattering videos posted by a former client); *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC*, C-10-2351 EMC*, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs' extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[59]*See, e.g., Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim under Mass. Gen. L. ch. 93A, brought against the operator of RipoffReport.com); *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims under California's Unfair Competition Law and various tort theories "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263, 1267-72 (D.C. Cir. 2019) (affirming dismissal of federal and state civil claims, including unfair competition, which alleged that Google, Microsoft, and Yahoo! had conspired to populate and monetize online search results with information about "scam" locksmiths, because plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *YZ Productions, Inc. v. Redbubble, Inc.*, __ F. Supp. 3d __, 2021 WL 2633552, at *8-10 (N.D. Cal. 2021) (dismissing plaintiff's unfair competition claim as preempted by the CDA); *Daniels v. Alphabet Inc*., Case No. 20-cv-04687-VKD, 2021 WL 1222166, at *11-13 (N.D. Cal. Mar. 31, 2021) (dismissing claims for breach of the implied covenant of good faith and fair dealing, conversion, unjust enrichment, money had and received, and unfair competition, as preempted by section 230(c)(1), and dismissing plaintiff's breach of contract claim under section 230(c)(2), in a suit brought by MAGA rapper Young Pharaoh over videos he uploaded to YouTube, which were removed for violating YouTube's community

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guidelines or policy on harassment and bullying, and for allegedly shadowbanning him and preventing him from monetizing videos on his YouTube channel); *Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California right of publicity claim under Cal. Civ. Code § 3344, and claims for intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200, arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity pursuant to 47 U.S.C.A. § 230(c)(1)); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's unfair competition and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website, where "[a]ll of Morton's non-copyright claims attempt[ed] to treat Twitter as being equivalent to SpyIRL for purposes of considering liability for the latter's tweets."); *Ripple Labs Inc. v. YouTube LLC*, Case No. 20-cv-02747-LB, 2020 WL 6822891, at *6-7 (N.D. Cal. Nov. 20, 2020) (dismissing unfair competition and right of publicity claims arising out of YouTube's alleged failure to remove impersonations of Ripple's cryptocurrency enterprise from its video-sharing platform); *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209, at *2-4 (N.D. Cal. Aug. 14, 2020) (dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims, as barred by the CDA, because they arose out of defendant's removal of fitness and health videos containing information about unregulated substances that had not yet been approved by the FDA); *Asurvio LP v. Malwarebytes Inc.*, Case No. 5:18-cv-05409-EJD, 2020 WL 1478345, at *3-6 (N.D. Cal. Mar. 26, 2020) (dismissing (without leave to amend) plaintiff's common law unfair competition claim, in a suit alleging that Malwarebytes wrongfully categorized Asurvio's software as malware or a "Potentially Unwanted Program," holding that Malwarebytes was immune under both 47 U.S.C.A. § 230(c)(1) and (c)(2)(B), for allegedly wrongly filtering and characterizing plaintiff's software as a potentially unwanted program); *Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claim under California's Unlawful Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, to the extent it relied on allegations that Facebook removed plaintiff's posts or restricted his ability to use the Facebook platform, with prejudice); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1319-22 (M.D. Fla. 2015) (granting summary judgment for the defendant on claims for defamation, tortious interference with a contractual relationship, tortious interference with a prospective economic relationship and a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); holding that the defendant website operator did not lose immunity for tweeting out links to user posts, trimming posts to meet the character limitations imposed by Twitter, adding the Twitter user IDs @rocalabs and @pissedconsumer or by using search optimization practices to highlight critical posts or providing summary statistics of user posts); *Doe No. 1 v. Backpage.com, LLC*, 104 F. Supp. 3d

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149, 162-64 (D. Mass. 2015) (dismissing unfair competition claim as preempted by the CDA), *aff'd on other grounds*, 817 F.3d 12, 24-25 & n.8 (1st Cir. 2016) (expressing no opinion on the district court's holding); *American Income Life Insurance Co. v. Google, Inc.*, No. 2:11–CV–4126–SLB, 2014 WL 4452679 (N.D. Ala. Sept. 18, 2014) (dismissing with prejudice, as preempted by the CDA, plaintiff's claim under the Alabama Deceptive Trade Practices Act, Ala. Code §§ 8–19–1 *et seq.*, alleging that Google chose "to reward with prominent placement in all its search engine results" third party content on *scam.com* and *pissedconsumer.com*, which allegedly referred to the plaintiff as a scam, and based on the argument that Google's algorithms effectively created content about the plaintiff, which the court rejected as merely amounting to republication of third party content); *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice California state law claims for trademark infringement and dilution and unfair competition premised on Yahoo's alleged use of *parts.com* as a keyword for sponsored link advertisements); *Perfect 10, Inc. v. Giganews, Inc.,* CV11-07098 AHM SHX, 2013 WL 2109963, at *15-16 (C.D. Cal. Mar. 8, 2013) (dismissing with leave to amend plaintiff's California unfair competition claim as barred by the CDA because the pornographic images found on defendant's website that were at issue in the case originated with third parties); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474-76 (E.D.N.Y. 2011) (Pennsylvania's unfair trade practices and consumer law); *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (California Business & Professions Code § 17200), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008) (Illinois Consumer Fraud Act); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (California law); *Stoner v. eBay, Inc.*, 56 U.S.P.Q.2d 1852, 2000 WL 1705637 (Cal. Super. Ct. Trial Div. 2000) (California law); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of New York defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing an order for summary judgment for the plaintiff on its unfair or deceptive trade practices claim based on a North Carolina law making it unlawful to sell a ticket for more than $3 over its face value (N.C. Gen. Stat. § 14-344) because StubHub, on online marketplace, was entitled to CDA immunity for a third party transaction that occurred through its website). *But see Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010) (trial court opinion dismissing a defamation claim brought against Yelp! by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, but holding not preempted (although dismissing on the merits) a deceptive acts or practices claim based on the allegation that for $300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback). *Reit v. Yelp!*, in addition to being a lower court decision, was decided prior to

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California's state Constitution,[60] California's Autographed Sports Memorabilia statute,[61] the California Child Trafficking Victim's Protection Act,[62] California's Drug Dealer Liability Act,[63] California's Unruh Civil Rights Act,[64] New

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the time the New York Court of Appeals decided *Shiamili*.

[60]*See Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 606-07 (S.D.N.Y. 2020) (dismissing plaintiff's free speech claim under California's Constitution, arising out of Vimeo's deletion or removal of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

[61]*See, e.g., Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002). In *Gentry*, an appellate court affirmed entry of a judgment of dismissal in a suit by buyers of allegedly fraudulent autographs who had sued eBay for a violation of the statute, Cal. Civ. Code § 1739.7, negligence and unfair competition.

Gentry is an important decision to the extent the court looked beyond the plain terms of the statute at issue—which requires that sellers of autographed sports memorabilia furnish a certificate of authenticity—to determine whether its effect was inconsistent with section 230(c). In finding that it was, the court wrote that "appellants' allegations reveal [that] they ultimately seek to hold eBay responsible for conduct within the reach of section 230, namely, eBay's dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties."

[62]*See, e.g.*, *J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *3-7 (N.D. Cal. Aug. 20, 2020) (dismissing, without leave to amend, plaintiff's claim of beneficiary liability under California's Child Trafficking Victims Protection Act, Cal. Civ. Code § 52.5, arising out of Craiglist's alleged failure to monitor advertisements for illegal sex trafficking of a minor).

[63]*See Dyroff v. Ultimate Software Group, Inc.*, Case No. 17-cv-05359-LB, 2017 WL 5665670 (N.D. Cal. Nov. 26, 2017) (dismissing, as preempted by section 230(c)(1), claims against a social network brought by the mother of a user of the network who died from an overdose of heroin laced with fentanyl, which he had allegedly obtained from another user of the social network, for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability Act, Cal. Health & Safety Code §§ 11700, *et seq*.), *aff'd*, 934 F.3d 1093, 1097-99 (9th Cir. 2019).

[64]*See, e.g.*, *Wilson v. Twitter, Inc.*, Case No. 3:20-cv-00054, 2020 WL 3410349, at *(S.D.W. Va. May 1, 2020) (recommending dismissal, with prejudice, of plaintiff's claims under Title II of the CRA arising out of allegedly unlawful termination of his Twitter account), report and recommendation adopted, 2020 WL 3256820 (S.D.W. Va. June 16, 2020); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 606-07 (S.D.N.Y. 2020) (dismissing plaintiff's claims under California's Unruh Act, Cal. Civil Code §§ 51 *et seq.*, and the New York State Human Rights Law, N.Y. Executive Law §§ 269 *et seq.*, arising out of Vimeo's deletion or removal of content posted

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York's Human Rights Law (N.Y. Executive Law §§ 269 *et seq*.),[65] Florida's securities fraud and cyberstalking laws,[66] Florida's social media platform law (pursuant to section 230(c)(2)(A)),[67] the Illinois Human Rights Act,[68] Maryland's

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by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021); ; *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's non-constitutional federal and state claims, including for damages under the California Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *Federal Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1304-08 (N.D. Cal. 2019) (dismissing without prejudice, as precluded by the CDA, the claims brought under Title II of the U.S. Civil Rights Act of 1964 and California Unruh Civil Rights Act, among others, by a Russian news site whose Facebook account was terminated in early 2018 after it was determined by Facebook that the account was controlled by the Russian government's Internet Research Agency, which according to a U.S. intelligence community report had created 470 inauthentic accounts on Facebook that were used to influence the outcome of the 2016 Presidential election); *Ebeid v. Facebook, Inc*., Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claims under Title II of the Civil Rights Act, the First Amendment to the U.S. Constitution, and California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51 *et seq*., with prejudice, and dismissing with prejudice plaintiff's related claim under California's Unlawful Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq*., to the extent it relied on allegations that Facebook removed plaintiff's posts or restricted his ability to use the Facebook platform).

[65]*Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 605 (S.D.N.Y. 2020) (dismissing plaintiff's claim, arising out of Vimeo's deletion or removal of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

[66]*See Universal Communication Systems, Inc. v. Lycos, Inc*., 478 F.3d 413, 421-22 (1st Cir. 2007).

[67]*See NetChoice, LLC v. Moody,* _ F. Supp. 3d _, 2021 WL 2690876, at *5-6 (N.D. Fla. June 30, 2021) (preliminarily enjoining enforcement of Florida Senate Bill 7072, which sought to regulate social media companies, finding that plaintiffs were likely to succeed on the merits of showing that the law was unconstitutional under the First Amendment and that (1) Fla. Stat. Ann. § 106.072, which purported to prohibit a social media platform from deplatforming a candidate for office, was preempted by 47 U.S.C.A. § 230(c)(2) because "deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2). If this is done in good faith—as can happen—the

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anti-spamming statute,[69] the Massachusetts Anti–Human Trafficking and Victim Protection Act of 2010,[70] New York's Human Rights Law (N.Y. Executive Law §§ 269 *et seq*.),5[71]

Florida provision imposing daily fines is preempted by § 230(e)(3). Good faith, for this purpose, is determined by federal law, not state law. Removing a candidate from a platform based on otherwise-legitimate, generally applicable standards—those applicable to individuals who are not candidates—easily meets the good-faith requirement. Indeed, even a mistaken application of standards may occur in good faith" and (2) parts of Fla. Stat. Ann. § 501.2041 that purport to impose liability for certain decisions to remove or restrict access to content were preempted—specifically Fla. Stat. Ann. §§ 501.2041(6) (creating a private right of action for damages for violations of § 501.2041(2)(b) and (2)(d)1), 501.2041(2)(b) (requiring a social media platform to apply censorship, deplatforming, and shadow banning standards in a consistent manner), 501.2041(2)(d) 1 (prohibiting a social media platform from deplatforming a user or censoring or shadow banning a user's content without notifying the user), 501.2041(2) (making any violation of that subsection an unfair or deceptive act or practice within the meaning of § 501.204—and thus providing a private right of action for damages under § 501.211); *see also infra* § 39.02[1] (analyzing the First Amendment aspects of the case).

[68]*See, e.g.*, *Nieman v. Versuslaw, Inc., 12-3104*, 2012 WL 3201931, at *8 (C.D. Ill. Aug. 3, 2012) (agreeing with the Magistrate Judge that plaintiff's claim under 775 Ill. Comp. Stat. Ann. 5/6–101(A) and/or 775 Ill. Comp. Stat. Ann. 5/6-101(B) was barred by the CDA because this and plaintiff's other state law claims were "really variations of defamation and invasion of privacy claims . . . ," although ultimately resting on other grounds in granting the defendant's motion to dismiss), *aff'd*, 512 F. App'x 635 (7th Cir. 2013).

[69]*See Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536–37 (D. Md. 2006) (holding a Maryland Commercial Electronic Mail Act claim preempted by the CDA). In *Beyond Systems, Inc.*, Judge Messitte of the District of Maryland held that an interactive computer service's claim against another interactive computer service under the Maryland Commercial Electronic Mail Act (MCEMA) was preempted by the CDA. The plaintiff alleged that the defendant was on notice that its service was being used to disseminate unsolicited email. The court, however, found no evidence that any of the offensive emails were created or altered by the defendant and therefore the claim was based on information originating with another information content provider and preempted.

[70]*Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by the CDA, in an opinion that was abrogated with respect to the federal trafficking statute by the subsequent enactment of 47 U.S.C.A. § 230(e)(5)); *infra* § 37.05[5][C].

[71]9 *See Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 605 (S.D.N.Y. 2020) (dismissing plaintiff's claim, arising out of Vimeo's deletion or re-

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the Texas Theft Liability Act,[72] the Texas Penal Code (for obscene or illegal material depicting plaintiffs on "revenge porn" websites),[73] and state statutes in New Jersey, Tennessee and Washington that criminalized advertisements for commercial sexual services or abuse of a minor[74] (although, by a later statutory amendment, only the immunity provided by section 230(c)(2)(A), and not section 230(c)(1), could provide a defense to state criminal statutes governing advertising related to sex trafficking).[75]

CDA immunity also has been applied to foreclose federal claims under the Computer Fraud and Abuse Act,[76] Defend

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moval of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds,* No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

[72]*See Asurvio LP v. Malwarebytes Inc.*, Case No. 5:18-cv-05409-EJD, 2020 WL 1478345, at *3-6 (N.D. Cal. Mar. 26, 2020) (dismissing (without leave to amend) plaintiff's Texas Theft Liability Act claim, in a suit alleging that Malwarebytes wrongfully categorized Asurvio's software as malware or a "Potentially Unwanted Program," holding that Malwarebytes was immune under both 47 U.S.C.A. § 230(c)(1) and (c)(2)(B), for allegedly wrongly filtering and characterizing plaintiff's software as a potentially unwanted program).

[73]*See GoDaddy.com, LLC v. Toups*, 429 S.W.2d 752 (Tex. App. Beaumont 2014) (reversing the lower court and holding that the claims of a putative class of women who were alleged victims of the nonconsensual posting of pornographic images of themselves to two "revenge porn" websites, for intentional infliction of emotional distress, violation of the Texas Penal Code and gross negligence, were preempted by the CDA). State revenge porn laws are addressed in section 51.04[2].

[74]*See Backpage.com, LLC v. Hoffman,* 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230).

[75]*See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions).

[76]*See Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097

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Trade Secrets Act,[77] Fair Housing Act,[78] Sherman Act (antitrust statute),[79] Title II of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000a *et seq.*),[80] Title III of the Americans

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(N.D. Cal. 2011) (dismissing, based on section 230(c)(2) immunity (with leave to amend), plaintiff's claim under the Computer Fraud and Abuse Act); *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in dismissing Holomaxx's virtually identical complaint against Yahoo!); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008) (granting judgment on the pleadings in favor of Comcast under section 230(c)(2) on claims for violations of the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030, infringement of free speech, tortious interference with prospective economic advantage and deceptive or unfair practices barred by the Illinois Consumer Fraud Act, arising out of Comcast's blocking email from e360, a bulk emailer, to Comcast subscribers).

[77]*See Craft Beer Stellar, LLC v. Glassdoor, Inc.*, Civil Action No. 18-10510-FDS, 2018 WL 5505247, at *3 (D. Mass. Oct. 17, 2018) (dismissing plaintiff's Defend Trade Secrets Act claim against Glassdoor for material posted by a user; "Because Congress has clearly dictated that the DTSA should *not* be construed to be a law 'pertaining to intellectual property' for the purposes of *any* other Act of Congress, the DTSA is clearly not such a law for the purposes of § 230(e)(2). The DTSA claim is thus subject to the immunity provisions of § 230, and accordingly that claim will be dismissed."); *see generally infra* § 37.05[5][B] (analyzing the scope of CDA immunity for claims pertaining to intellectual property).

[78]*See Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (holding appellant's Fair Housing Act claim precluded by section 230(c)(1)). *But see Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (remanding for further consideration plaintiff's Fair Housing Act claim and holding the defendant to be entitled to partial immunity under the CDA but also potentially liable as an information content provider for other aspects of its service); *see generally infra* § 37.05[3][C] (discussing both cases).

[79]*See Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Sherman Act I (conspiracy) and II (monopolization) claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located).

[80]*See Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (affirming dismissal with prejudice where plaintiff sought to "hold Facebook liable as a publisher for hosting, and later blocking, SFJ's online content."), *aff'd*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015); *Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *3-4 (D. Md.

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with Disabilities Act (29 U.S.C.A. §§ 12181-12189),[81] section

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Oct. 23, 2020) (dismissing pro se plaintiff's claims under Titles II, III, and VI of the Civil Rights Act after defendant social media platform banned and removed certain posts in alleged violation of Twitter's policies against hateful conduct, based on Tweets that plaintiff directed at Trevor Noah and *The Daily Show with Trevor Noah*); *Lewis v. Google LLC*, 461 F. Supp. 3d 938, 952-55 (N.D. Cal. 2020) (dismissing in cursory fashion political commentator Bob Lewis's Title II claim, along with six other claims, as precluded by the CDA, where plaintiff alleged that YouTube and Google wrongfully demonetized, censored, restricted and removed his videos, holding that defendants' "alleged demonetization of Plaintiff's postings . . . constitutes a publishing function under § 230. . . . Deciding whether to limit advertising on a posting is not different in nature from removing a post altogether. Both fall under the rubric of publishing activities."), *aff'd on other grounds,* 851 F. App'x 723 (9th Cir. 2021); *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's claims for damages under Title II the Civil Rights Act and California's Unruh Civil Rights Act, arising out of Facebook's decision to remove the Russian news network's account, postings, and content); *Federal Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d. 1295, 1304-08 (N.D. Cal. 2019) (dismissing without prejudice, as precluded by the CDA, the claims brought under Title II of the U.S. Civil Rights Act of 1964 and California Unruh Civil Rights Act, among others, by a Russian news site whose Facebook account was terminated in early 2018 after it was determined by Facebook that the account was controlled by the Russian government's Internet Research Agency, which according to a U.S. intelligence community report had created 470 inauthentic accounts on Facebook that were used to influence the outcome of the 2016 Presidential election); *Ebeid v. Facebook, Inc*., Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claims under Title II of the Civil Rights Act, the First Amendment to the U.S. Constitution, and California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51 *et seq*., with prejudice, and dismissing with prejudice plaintiff's related claim under California's Unlawful Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq*., to the extent it relied on allegations that Facebook removed plaintiff's posts or restricted his ability to use the Facebook platform); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 538-40 (E.D. Va. 2003) (dismissing plaintiff's claim under Title II of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a *et seq*., as barred by the CDA), *aff'd mem*., No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004).

[81] *See National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (holding the CDA applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms); *see also National Association of the Deaf v. Massachusetts Institute of Technology,* Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, in plaintiffs' parallel lawsuit against MIT).

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504 of the Rehabilitation Act of 1973 (29 U.S.C.A. § 794),[82] false advertising under the Lanham Act,[83] for civil remedies

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[82]*See National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (holding the CDA applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms); *see also National Association of the Deaf v. Massachusetts Institute of Technology,* Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, in plaintiffs' parallel lawsuit against MIT).

[83]*See Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's Lanham Act false advertising and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website); *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209, at *2-4 (N.D. Cal. Aug. 14, 2020) (dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims, as barred by the CDA, because they arose out of defendant's removal of fitness and health videos containing information about unregulated substances that had not yet been approved by the FDA); *Asurvio LP v. Malwarebytes Inc.*, Case No. 5:18-cv-05409-EJD, 2020 WL 1478345, at *3-6 (N.D. Cal. Mar. 26, 2020) (dismissing (without leave to amend) plaintiff's of Lanham Act false advertising claim, in a suit alleging that Malwarebytes wrongfully categorized Asurvio's software as malware or a "Potentially Unwanted Program," holding that Malwarebytes was immune under both 47 U.S.C.A. § 230(c)(1) and (c)(2)(B), for allegedly wrongly filtering and characterizing plaintiff's software as a potentially unwanted program); *Baldino's Lock & Key Service, Inc. v. Google, Inc.*, 88 F. Supp. 3d 543, 546-47 (E.D. Va. 2015) (dismissing plaintiff's Lanham Act false advertising claim as precluded by section 230(c)(1), in a suit brought by a locksmith who alleged that Google's directory produced over 1,000 results for locksmiths in Virginia when only 325 were licensed in that state), *aff'd on other grounds,* 624 F. App'x 81 (4th Cir. 2015); *see also Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052-54 (9th Cir. 2019) (reversing the lower court's order granting defendant's motion to dismiss plaintiff's Lanham Act claim based on section 230(c)(2)(B) on other grounds, but holding that a false advertising claim under the

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for material constituting or containing child pornography (pursuant to 18 U.S.C.A. § 2252A),[84] for civil claims under the Anti-Terrorism Act (ATA), 18 U.S.C.A. § 2333(a),[85] the

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Lanham Act was not a law "pertaining to intellectual property" under section 230(e)(2) and therefore potentially could be subject to immunity under the CDA; "even though the Lanham Act is known as the federal trademark statute, not all claims brought under the statute involve trademarks."), *cert. denied*, 141 S. Ct. 13 (2020). Trademark infringement claims under the Lanham Act, as claims pertaining to intellectual property, would not be excluded by the CDA. *See* 47 U.S.C.A. § 230(e)(2); *see generally i*nfra § 37.05[5][B].

[84]*See Doe v. Bates*, 35 Media L. Rep. (BNA) 1435, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (holding plaintiff's claim, as mother and next friend of a child whose image was posted by a Yahoo! egroup moderator, for relief under 18 U.S.C.A. § 2252A(f) was barred by the CDA).

[85]*See, e.g.*, *Force v. Facebook, Inc.,* 934 F.3d 53, 65-71 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA, because plaintiffs sought to hold Facebook liable as a publisher of content by Hamas posted to Facebook, and for allegedly not removing that content, and where Facebook's use of algorithms to promote, arrange, and distribute third party content did not change its status as a publisher or amount to development), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888-92 (N.D. Cal. 2017) (dismissing with prejudice the claims of a police officer and a deceased officer's father, under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), alleging liability by Twitter, Google, and Facebook, for providing material support to Hamas, a Palestinian entity designated as a foreign terrorist organization, primarily in the form of access to defendants' online social media platforms, because plaintiffs had not plausibly alleged a causal connection between the shooting and defendants' alleged conduct, and because the Communications Decency Act immunized most if not all of the conduct at issue); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1157-71 (N.D. Cal. 2017) (dismissing, as precluded by 47 U.S.C.A. § 230(c)(1), the claims of family members of a victim of the November 2015 ISIS terrorist attack in Paris against Google under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), based on Google's ownership and operation of the YouTube platform, which plaintiffs alleged

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Justice Against Sponsors of Terror Acts (JASTA), 18

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provided material support to terrorists, in an early opinion in a case that eventually was decided by the Ninth Circuit); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), with prejudice, holding that (1) liability for providing an account amounts to an allegation that Twitter failed to prevent ISIS from disseminating content through the Twitter platform; and (2) Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (affirming dismissal where the plaintiffs could not allege proximate causation); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016) (dismissing plaintiffs' Complaint with leave to amend, holding Twitter immune under the CDA from liability for a claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), for allegedly providing material support to the Islamic State of Iraq and Syria (ISIS), because ISIS uses Twitter to disseminate its official media publications, raise funds and recruit users); *see also Crosby v. Twitter, Inc.,* 921 F.3d 617, 623-25, 627 n.7 (6th Cir. 2019) (affirming dismissal with prejudice of federal and state claims by victims of the Pulse Night Club terrorist attack in Orlando, against Facebook, Google, and Twitter, for, among other things, supporting terrorism, conspiracy, and aiding and abetting under the Justice Against Sponsors of Terrorism Act of 2016, where plaintiffs could not establish proximate causation and the defendants were not secondarily liable for aiding and abetting under the ATA, noting that "[e]ven if ISIS 'committed, planned, or authorized' the Pulse Night club shooting, Plaintiffs would still have to overcome 47 U.S.C. § 230, which provides broad immunity to 'interactive computer services.' "), *aff'g,* 303 F. Supp. 3d 564, 570-71 (E.D. Mich. 2018) (dismissing federal and state claims; citing *Fields v. Twitter, Inc.*, 881 F.3d 739, 750 (9th Cir. 2018) for the proposition that the court did not need to reach the issue of CDA immunity "[b]ecause the amended complaint does not plead facts that plausibly support any viable claims against these defendants . . . .").

In *Fields v. Twitter*, the widows of two U.S. government contractors killed in an ISIS attack in Jordan sued Twitter. While the facts of the case suggested serious causation problems, the district court, in granting Twitter's motion to dismiss plaintiff's initial complaint based on the CDA, explained that "[a]s horrific as these deaths were, under the CDA, Twitter cannot be treated as the publisher or speaker of ISIS's hateful rhetoric and is not liable on the facts alleged." *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 966 (N.D. Cal. 2016). Plaintiffs argued that their claim was not preempted because (1) it was based on Twitter's provision of Twitter accounts to ISIS, not the contents of any particular tweets, which the court rejected because it was inconsistent with the allegations of plaintiffs' complaint, and (2) their claim was based on Direct Messages, not tweets, which Judge Orrick rejected because the CDA applies to republication of material, including material that is nonpublic. *Id.* at *10, *citing Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 324–28, 105 Cal. Rptr. 3d 791 (4th Dist. 2010); *Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 795–96, 804–08, 52 Cal. Rptr. 3d 376 (6th Dist. 2006); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 528, 536–37 (D. Md. 2006).

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Following the lower court's CDA holding in *Fields*, other courts subsequently dismissed similar claims, holding, among other things, that the Justice Against Sponsors of Terrorism Act of 2016 (JASTA) did not implicitly repeal the CDA's applicability to claims under JASTA, where JASTA made clear expressly which statutory immunities (relating to sovereign immunity) it intended to repeal. *See, e.g.*, *Force v. Facebook, Inc.,* 934 F.3d 53, 72 (2d Cir. 2019) (holding that the Anti-Terrorism Act's civil remedies provision did not implicitly narrow or repeal section 230(c)(1); "Section 230 provides an affirmative defense to liability under Section 2333 for only the narrow set of defendants and conduct to which Section 230 applies. JASTA merely expanded Section 2333's cause of action to secondary liability; it provides no obstacle—explicit or implicit—to applying Section 230."), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 889-90 (9th Cir. 2021) ("we conclude JASTA did not impliedly repeal § 230."); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 889 (N.D. Cal. 2017); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1158-61 (N.D. Cal. 2017).

Courts also rejected arguments that suits against social media companies for providing material assistance to terrorists were not premised on publication of content from third party users, but instead were directed at the platforms themselves, for providing powerful tools. In *Pennie v. Twitter*, for example, the court rejected this argument for the following reasons:

> First, this characterization of Plaintiffs' claims is false: Plaintiffs explicitly base their claims on the content that Hamas allegedly posts, because absent offending content, there would be no basis for even the frivolous causal connection that Plaintiffs have alleged between Defendants' services and the Dallas attack. *See Gonzalez*, 282 F. Supp. 3d 1150 at 1165–66, 2017 WL 4773366, at *11; *Cohen*, 252 F. Supp. 3d at 157–58. Second, as two other judges of this Court have noted, Defendants could only determine which accounts are affiliated with Hamas by reviewing the content published by those accounts—the substantive posts and media that users share, as well as the names and profile pictures that users choose to identify their accounts. *Fields II*, 217 F. Supp. 3d at 1123 ("A policy that selectively prohibits ISIS members from opening accounts would necessarily be content based as Twitter could not possibly identify ISIS members without analyzing some speech, idea or content expressed by the would-be account holder . . . ."); *Gonzalez*, 282 F. Supp. 3d 1150 at 1165–66, 2017 WL 4773366, at *11 (quoting *Fields II* with approval).

Pennie v. Twitter, Inc., 281 F. Supp. 3d 874, 889-90 (N.D. Cal. 2017). Similarly, the Second Circuit explained:

> Plaintiffs seek to hold Facebook liable for "giving Hamas a forum with which to communicate and for actively bringing Hamas' message to interested parties." . . . But that alleged conduct by Facebook falls within the heartland of what it means to be the "publisher" of information under Section 230(c)(1). So, too, does Facebook's alleged failure to delete content from Hamas members' Facebook pages. *See LeadClick*, 838 F.3d at 174 (stating that acting as the "publisher" under Section 230(c)(1) includes the decision whether to "withdraw" content).
>
> Plaintiffs also argue that Facebook does not act as the publisher of Hamas's content within the meaning of Section 230(c)(1) because it uses algorithms to suggest content to users, resulting in "matchmaking." . . . For example, plaintiffs allege that Facebook's "newsfeed" uses algorithms that predict and

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> show the third-party content that is most likely to interest and engage users. Facebook's algorithms also provide "friend suggestions," based on analysis of users' existing social connections on Facebook and other behavioral and demographic data. And, Facebook's advertising algorithms and "remarketing" technology allow advertisers to target ads to its users who are likely most interested in those ads.
>
> We disagree with plaintiffs' contention that Facebook's use of algorithms renders it a non-publisher. First, we find no basis in the ordinary meaning of "publisher," the other text of Section 230, or decisions interpreting Section 230, for concluding that an interactive computer service is not the "publisher" of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests. . . . Accepting plaintiffs' argument would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties. . . .
>
> Like the decision to place third-party content on a homepage, for example, Facebook's algorithms might cause more such "matches" than other editorial decisions. But that is not a basis to exclude the use of algorithms from the scope of what it means to be a "publisher" under Section 230(c)(1). The matches also might—as compared to those resulting from other editorial decisions—present users with targeted content of even more interest to them, just as an English speaker, for example, may be best matched with English-language content. But it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.
>
> Second, plaintiffs argue, in effect, that Facebook's use of algorithms is outside the scope of publishing because the algorithms automate Facebook's editorial decision-making. That argument, too, fails because "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific edit[orial] or selection process." *Carafano*, 339 F.3d at 1124; *see Marshall's Locksmith*, 925 F.3d at 1271 (holding that "automated editorial act[s]" are protected by Section 230) (quoting *O'Kroley v. Fastcase, Inc*., 831 F.3d 352, 355 (6th Cir. 2016)) . . . .

Force v. Facebook, Inc., 934 F.3d 53, 65-66 (2d Cir. 2019) (footnotes omitted), *cert. denied*, 140 S. Ct. 2761 (2020).

Finally, courts have rejected arguments that platform providers developed terrorist content and therefore should be held liable as information content providers, for providing social media tools, because the provision of neutral tools, including targeted advertising, does not equate to content development. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65-71 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, but holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 890-92 (N.D. Cal. 2017); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1168-69 (N.D. Cal. 2017);

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U.S.C.A. § 2333,[86] the terrorism sanctions regulations issued pursuant to the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701 to 1707, 31 C.F.R. Part 594),[87] and provision of material support to terrorist groups in violation

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see also Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156, 1172-74 (N.D. Cal. 2018) (rejecting the argument that allegedly "actively" recommending ISIS videos to YouTube users constituted development), *aff'd*, 2 F.4th 871, 892-97 (9th Cir. 2021) (holding the recommendation algorithms to be neutral tools).

[86]*See Force v. Facebook, Inc.,* 934 F.3d 53, 65-72 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA, because plaintiffs sought to hold Facebook liable as a publisher of content by Hamas posted to Facebook, and for allegedly not removing that content, and where Facebook's use of algorithms to promote, arrange, and distribute third party content did not change its status as a publisher or amount to development, and holding that JASTA's enactment did not implicitly narrow or repeal section 230(c)(1)), *cert. denied*, 140 S. Ct. 2761 (2020); *Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *3-4 (D. Md. Oct. 23, 2020) (dismissing with prejudice plaintiff's claim that defendant violated JASTA in an unreported opinion); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 889 (N.D. Cal. 2017) (dismissing claims and holding that JASTA did not implicitly repeal the CDA); *see also Gonzalez v. Google, Inc.*, 2 F.4th 871, 889-90 (9th Cir. 2021) (holding that JASTA did not repeal section 230(c)(1)).

Crosby v. Twitter, Inc., 921 F.3d 617, 623-25, 627 n.7 (6th Cir. 2019) (affirming dismissal with prejudice of federal and state claims by victims of the Pulse Night Club terrorist attack in Orlando, against Facebook, Google, and Twitter, for, among other things, supporting terrorism, conspiracy, and aiding and abetting under the Justice Against Sponsors of Terrorism Act of 2016, where plaintiffs could not establish proximate causation and the defendants were not secondarily liable for aiding and abetting, noting that "[e]ven if ISIS 'committed, planned, or authorized' the Pulse Night club shooting, Plaintiffs would still have to overcome 47 U.S.C. § 230, which provides broad immunity to 'interactive computer services.' "). These cases are discussed in greater detail in the preceding footnote in connection with the Anti-Terrorism Act, which JASTA amended.

[87]*See Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1164-75 (N.D. Cal. 2018) (dismissing with prejudice claims brought by the surviving family members of a victim of an ISIS terrorist attack in Paris, under the Antiterrorism Act (ATA), JASTA, and the International Emergency Economic Powers Act (IEEPA), based on Google's alleged provision of access to YouTube to ISIS terrorists, as precluded by the CDA), *aff'd,* 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of the Gonzalez plaintiffs' ATA claims without addressing IEEPA, which was not at issue in the appeal).

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of 18 U.S.C.A. §§ 2339A and 2339B,[88] as well as state civil law claims brought under 18 U.S.C.A. § 2421A of the Fight Online Sex Trafficking Act ("FOSTA") and Stop Enabling Sex Traffickers Act ("SESTA") or "FOSTA-SESTA"[89]—even though other aspects of FOSTA-SESTA are excluded in part from CDA immunity (as analyzed separately in section 37.05[5][C]). Civil RICO claims—brought under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C.A. § 1962)—also may be precluded by section 230(c)(1), when premised on third party content.[90]

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[88]*See Force v. Facebook, Inc.,* 934 F.3d 53, 65-71 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA), *cert. denied*, 140 S. Ct. 2761 (2020).

[89]*See J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *5-7 (N.D. Cal. Aug. 20, 2020) (dismissing plaintiff's state civil law FOSTA/SESTA claim, as preempted by the 47 U.S.C.A. § 230(c)(1), in a suit arising out of Craiglist's alleged failure to monitor advertisements for illegal sex trafficking of a minor; "The plain language of the statute suggests that state civil claims are not carved out from the immunity provided by Section 230, even in sex trafficking cases. . . . Congress' decision not to list Section 2421A(c) (for whatever reason) does not undermine the conclusion that Section 230(e)(5) comprehensively sets out the scope of the intended immunity carve-out, at least as to state civil claims. . . . Given the clarity of the plain language of the amendment of the CDA, and the ambiguity of the legislative history relied upon by Plaintiff, the Court thus finds that the CDA does apply to state law civil sex trafficking claims."); *see also Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's claim under FOSTA/SESTA and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website, where "[a]ll of Morton's non-copyright claims attempt[ed] to treat Twitter as being equivalent to SpyIRL for purposes of considering liability for the latter's tweets."); *see generally infra* § 37.05[5][C] (analyzing FOSTA-SESTA and its interplay with CDA immunity).

[90]*See Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, Case No. 1:16-cv-00168, 2017 WL 2728413, at *4-5 (D. Utah June 23, 2017) (holding that while the operator of a consumer review site enjoyed CDA immunity for its "Overall Satisfaction Rating" which rated companies based on user input, it developed, and therefore did not enjoy immunity for, content it created, including an overlay allegedly superimposed on product pages of

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Courts have also held claims brought under the First Amendment to the U.S. Constitution, under 42 U.S.C.A. § 1983, barred by the CDA[91]

The CDA applies to disputes in U.S. courts brought under U.S. law, even where the claims principally arose in other countries.[92] A district court further held that the CDA immunizes an interactive computer service provider from liability for claims brought under foreign law in U.S. courts because the CDA applies to claims brought in U.S. courts, not necessarily claims that arise in the United States.[93]

Courts previously had also held that section 230(c)(1) of the CDA immunized interactive computer service providers from claims brought under the Trafficking Victims Protection Reauthorization Act to compensate victims of child sex trafficking,[94] but those opinions were abrogated by statutory

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companies that refused to pay to join the site, which said "Not Impressed with [non-paying brand]? Find a company you can trust" and ruling specifically that "while the CDA does not preclude RICO claims entirely, it does preclude civil RICO liability predicated on a defendant's publishing third-party information."); *Manchanda v. Google,* 16-CV-3350 (JPO), 2016 WL 6806250, at *2-3 (S.D.N.Y. Nov. 16, 2016) (dismissing plaintiff's civil RICO claim, premised on the defendant search engines (Google, Yahoo and Microsoft)'s alleged provision of offending website content, as precluded by the CDA); *Baldino's Lock & Key Service, Inc. v. Google, Inc.*, 88 F. Supp. 3d 543, 546-47 (E.D. Va. 2015) (dismissing plaintiff's RICO claims under 18 U.S.C.A. §§ 1964(c) and 1962(a) (investment of proceeds) as precluded by the CDA, in a suit brought by a locksmith who alleged that Google's directory produced over 1,000 results for locksmiths in Virginia when only 325 were licensed in that state), *aff'd on other grounds*, 624 F. App'x 81 (4th Cir. 2015).

[91]*See Ebeid v. Facebook, Inc*., Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claim under the First Amendment to the U.S. Constitution, with prejudice).

[92]*See Gonzalez v. Google, Inc.*, 2 F.4th 871, 888 (9th Cir. 2021).

[93]*See Cohen v. Facebook Inc.*, 252 F. Supp. 3d 140, 158-60 (E.D.N.Y. 2017) (analyzing the extraterritorial effect of the CDA), *rev'd on jurisdictional grounds sub nom. Force v. Facebook, Inc.,* 934 F.3d 53, 72-75 & n.32 (2d Cir. 2019) (expressing no opinion on whether "the district court's conclusion that Section 230 applies to foreign law claims brought in the United States."), *cert. denied*, 140 S. Ct. 2761 (2020).

[94]*See Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by section 230(c)(1)); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011)

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amendment in 2018[95] adding an express exclusion for federal civil sex trafficking claims brought under 18 U.S.C.A. § 1595 (which eliminates the CDA defenses provided by sections 230(c)(1) and 230(c)(2)(B), but still allows interactive computer service providers and users to rely on the exemption provided by section 230(c)(2)(A), where applicable).[96]

Some courts have held that the CDA applies equally to claims for damages and injunctive relief.[97]

Both Congress and the courts have resisted efforts to circumvent the CDA through international forum shopping or other procedural maneuvers. The federal SPEECH Act,[98] which is separately analyzed in section 37.09[3], restricts the ability of "libel tourists" to circumvent U.S. law by obtaining certain judgments overseas that in U.S. courts would be barred by the CDA, and then seeking to enforce them domestically.

Courts have also resisted efforts to undermine the CDA through procedural maneuvers. In *Hassell v. Bird,*[99] for example, the California Supreme Court held that a plaintiff

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(holding claims of a victim of a child sex trafficker under 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595, brought against the publisher of Backpage, where sexually explicit ads of the minor plaintiff were placed, were precluded by the CDA). *But see J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc) (affirming that minor plaintiffs sufficiently stated Washington state law claims that were not preempted by the CDA, in a case that the majority in the Washington Supreme Court en banc opinion characterized as having been brought "to show how children are bought and sold for sexual services online on Backpage.com in advertisements . . . ," where plaintiffs alleged that the defendants developed Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message."); *see generally infra* § 37.05[5][C] (analyzing the subsequent amendment to the CDA to add section 230(e)(5) to address the claims raised by these suits).

[95]*See* The Allow States and Victims to Fight Online Sex Trafficking Act of 2017. Pub. L. No. 115-164, 132 Stat. 1253 (2018); *see generally infra* § 37.05[5][C].

[96]*See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the CDA's sex trafficking exclusions and their interplay with other parts of section 230).

[97]*See Hassell v. Bird*, 5 Cal. 5th 522, 541, 544-45, 234 Cal. Rptr. 3d 867, 881, 884-85 (2018); *see generally infra* § 37.05[8] (analyzing the applicability of the CDA to requests for injunctive relief).

[98]18 U.S.C.A. §§ 4101 to 4105.

[99]*Hassell v. Bird*, 5 Cal. 5th 522, 234 Cal. Rptr. 3d 867 (2018); *see*

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cannot make an "end-run" on the CDA by obtaining a default judgment against an information content provider in a case where an interactive computer service provider could have asserted the CDA as a defense if it had been joined in the proceeding, and then seek to enforce an injunction obtained as part of the default judgment against the service provider to have material taken down, without allowing the service provider to assert the CDA in the second action.

Courts also have allowed interactive computer service providers to assert the CDA offensively (even though it is merely a defense) to enjoin enforcement of laws, where the enforcement action would be precluded by the CDA. For example, Google relied on the CDA to enjoin enforcement of a Canadian court order requiring it to delist certain search results on a world-wide basis.[100] Internet companies successfully enjoined enforcement of Florida's social media platform law, based in part on the CDA.[101] Likewise, before it was seized in a government raid in 2018, Backpage.com relied on

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generally infra § 37.05[8] (analyzing the case in greater detail).

[100]*See Google LLC v. Equustek Solutions Inc.*, Case No. 5:17-cv-04207-EJD, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017) (preliminarily enjoining enforcement of the Canadian court order because Google was likely to prevail in establishing that it was immune under section 230 from claims seeking to force it to remove links to third party websites; "By forcing intermediaries to remove links to third-party material, the Canadian order undermines the policy goals of Section 230 and threatens free speech on the global internet.").

[101]*NetChoice, LLC v. Moody,* _ F. Supp. 3d _, 2021 WL 2690876, at *5-6 (N.D. Fla. June 30, 2021) (preliminarily enjoining enforcement of Florida Senate Bill 7072, which sought to regulate social media companies, finding that plaintiffs were likely to succeed on the merits of showing that the law was unconstitutional under the First Amendment and that (1) Fla. Stat. Ann. § 106.072, which purported to prohibit a social media platform from deplatforming a candidate for office, was preempted by 47 U.S.C.A. § 230(c)(2) because "deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2). If this is done in good faith—as can happen—the Florida provision imposing daily fines is preempted by § 230(e)(3). Good faith, for this purpose, is determined by federal law, not state law. Removing a candidate from a platform based on otherwise-legitimate, generally applicable standards—those applicable to individuals who are not candidates—easily meets the good-faith requirement. Indeed, even a mistaken application of standards may occur in good faith" and (2) parts of Fla. Stat. Ann. § 501.2041 that purport to impose liability for certain decisions to remove or restrict access to content were preempted—specifically Fla. Stat. Ann. §§ 501.2041(6) (creating a private right of action for damages for violations of § 501.2041(2)(b) and (2)(d)1), 501.2041(2)(b) (requiring a social media platform to apply censorship, deplatforming, and

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its potential entitlement to the CDA defense to enjoin enforcement of state criminal laws that would have prevented it from accepting paid advertisements, and which would have been found preempted by the CDA,[102] although these cases would be decided differently today because of Congress's subsequent enactment of section 230(e), which precludes reliance on section 230(c)(1) for state criminal charges related to sex trafficking (but allows an interactive computer service provider or user to avoid liability by reliance on section 230(c)(2)(A), if applicable).[103] The CDA also was used offensively in *Backpage.com, LLC v. Dart*,[104] to enjoin a sheriff's threats to credit card companies to stop doing business with Backpage.com because it hosted advertisements for adult listings, where the Seventh Circuit found that the sheriff would not sue Backpage.com directly because similar claims he brought against a different online service were held preempted by the CDA. In *Dart*, Judge Posner explained, although the CDA provides merely a defense, not a claim, where the government threatens action that would allow for First Amendment and CDA defenses to be raised, but declines to bring the suit, a plaintiff's only remedy is an

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shadow banning standards in a consistent manner), 501.2041(2)(d) 1 (prohibiting a social media platform from deplatforming a user or censoring or shadow banning a user's content without notifying the user), 501.2041(2) (making any violation of that subsection an unfair or deceptive act or practice within the meaning of § 501.204—and thus providing a private right of action for damages under § 501.211); *see also infra* § 39.02[1] (analyzing the First Amendment aspects of the case).

[102]*See Backpage.com, LLC v. Hoffman,* 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230).

[103]*See generally infra* § 37.05[5][C] (analyzing the scope of the CDA exclusions created by 47 U.S.C.A. § 230(e)(5)).

[104]*Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015).

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injunction against the violation of First Amendment rights.[105]

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[105]*See Backpage.com, LLC v. Dart*, 807 F.3d 229, 238-39 (7th Cir. 2015), *citing Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) In that case, Cook County Sheriff Tom Dart had sued unsuccessfully to shut down Craigslist's adult section, in a suit held preempted by the CDA. *See Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009). Craigslist nevertheless ultimately shuttered its adult section. Judge Posner explained that, "[t]he suit against Craigslist having failed, the sheriff decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers." 807 F.3d at 231. Sheriff Dart sent threatening letters dated June 29, 2015 to VISA and MasterCard, implying that he would take legal action if they continued to work with Backpage.com. The letter, according to Judge Posner, "was not merely an expression of Sheriff Dart's opinion. It was designed to compel the credit card companies to act . . . ." *Id.* at 232. He followed up the letters with calls advising he would be holding a press conference a few days later to either announce that they had stopped accepting advertisements from Backpage.com or pointing out their ties to sex trafficking. *Id.* at 232-33. In response to the letters, both VISA and MasterCard stopped allowing their credit cards to be used to pay for any advertisements on Backpage.com, not merely adult advertisements. Judge Posner wrote that "Visa and MasterCard were victims of government coercion aimed at shutting up or shutting down Backpage's adult section (more likely aimed at bankrupting Backpage . . .)." *Id.* at 234. He observed that the ads in the "adult" section of Backpage included listings for activities that were not illegal and that throttling Backpage also reached advertisements in other sections that it offered.

Judge Posner explained that Sheriff Dart "was free to express his views as a private citizen." And even in his official capacity, the sheriff "can express his distaste for Backpage and its look-alikes; that is, he can exercise what is called '[freedom of] government speech.' " *Id.* at 234-35, *citing Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833–34 (1995); *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011). "A government entity, including therefore the Cook County Sheriff's Office, is entitled to say what it wants to say—but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens." *Backpage.com, LLC v. Dart*, 807 F.3d at 235. Judge Posner explained:

> In his public capacity as a sheriff of a major county (Cook County has a population of more than 5.2 million), Sheriff Dart is not permitted to issue and publicize dire threats against credit card companies that process payments made through Backpage's website, including threats of prosecution (albeit not by him, but by other enforcement agencies that he urges to proceed against them), in an effort to throttle Backpage. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). For where would such official bullying end, were it permitted to begin? Some public officials doubtless disapprove of bars, or pets and therefore pet supplies, or yard sales, or lawyers, or "plug the band" (a listing of music performances that includes such dubious offerings as "SUPERCELL Rocks Halloween at The Matchbox Bar & Grill"), or men dating men or women dating

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Xcentric Ventures, the owner of RipOff Report, also used the CDA as a basis to obtain an injunction barring a county prosecutor in Iowa from continuing a criminal investigation into Xcentric and its owner over critical posts that appeared on RipOff Report about a prosecution brought by the county prosecutor, where the court found that any criminal action likely would have been preempted by the CDA.[106] Not all efforts to enjoin enforcement of state laws based on the CDA, however, have been successful.[107] Because CDA immunity

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women—but ads for all these things can be found in non-adult sections of Backpage and it would be a clear abuse of power for public officials to try to eliminate them not by expressing an opinion but by threatening credit card companies or other suppliers of payment services utilized by customers of Backpage, or other third parties, with legal or other coercive governmental action.

With very limited exceptions, none applicable to this case, censorship—"an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive," *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001), as distinct from punishing such dissemination (if it falls into one of the categories of punishable speech, such as defamation or threats) after it has occurred—is prohibited by the First Amendment as it has been understood by the courts. "Threatening penalties for future speech goes by the name of 'prior restraint,' and a prior restraint is the quintessential first-amendment violation." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009).

Backpage.com, LLC v. Dart, 807 F.3d at 235. Accordingly, the Seventh Circuit panel reversed the lower court's refusal to grant Backpage.com relief with instructions to enter an injunction directing Sheriff Dart and those acting on his behalf to "take no actions, formal or informal, to coerce or threaten credit card companies, processors, financial institutions, or other third parties with sanctions intended to ban credit card or other financial services from being provided to Backpage.com." *Id.* at 239. The injunction was also required to direct Sheriff Dart to transmit a copy of the order to Visa and MasterCard and all other recipients of his June 29, 2015 letter. *Id.* Backpage's website was seized and shut down in a raid by the federal government in April 2018 and a new exclusion limiting CDA immunity in cases involving advertising for sex trafficking was enacted shortly thereafter. *See infra* § 37.05[5][C].

[106] *See Xcentric Ventures, LLC v. Smith*, No. C15-4008-MWB, 2015 WL 4940812, at *15, *23 (N.D. Iowa 2015), *report and recommendation adopted*, No. C 15-4008-MWB, 2015 WL 5184114 (N.D. Iowa Sept. 4, 2015).

[107] *See Google, Inc. v. Hood*, 822 F.3d 212, 216-28 (5th Cir. 2016) (dissolving a preliminary injunction issued against a State Attorney General who had issued an administrative subpoena and was threatening to prosecute an interactive computer service provider for allowing search results that allegedly led to sites offering counterfeit pharmaceuticals and pirated music, where the provider would have been entitled to CDA immunity if it had been sued, because the administrative subpoena served was not self-executing and the prospect of an enforcement action was "not sufficiently imminent or defined to justify an injunction."), *vacating*, 96 F. Supp. 3d 584 (S.D. Miss. 2015).

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may depend on the specific facts of a case, some disputes may be ill suited to declaratory relief actions.[108]

CDA immunity also has been broadly applied to user conduct, including even violent acts in the physical world, where liability against an interactive computer service provider or user for its own alleged conduct or failure to take action, however characterized or framed, ultimately is premised on publication of third party content (such as social network profiles or communications in chat rooms). Thus, for example, courts have held that the CDA preempts claims by parents against Internet sites and services where children have met adults who then allegedly abused them,[109] a suit against a social network by parents whose son met someone

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[108]*See, e.g., Turo, Inc. v. City of Los Angeles,* Case No. 2:18-cv-06055-CAS (GJSx), 2019 WL 186608, at *4 (C.D. Cal. Jan. 14, 2019) (holding plaintiff's claim for declaratory relief not yet ripe where the city had not yet taken any enforcement action against Turo because the court could not issue an advisory opinion, noting that "[t]he issue of whether an entity is immune under the CDA depends on the nature of the activity that is the subject of the action."); *see also Turo Inc. v. City of Los Angeles*, 847 F. App'x 442 (9th Cir. 2021) (vacating and reversing the lower court's entry of a preliminary injunction against Turo), *rev'g,* Case No. 2:18-cv-06055-CAS (GJSx), 2020 WL 3422262, at *6-9 (C.D. Cal. June 19, 2020) (applying *Dryoff* and *HomeAway* in denying Turo's motion to dismiss the defendant's counterclaim, holding section 230 inapplicable because the City sought to hold Turo liable for its role in facilitating online rental car transactions, not as the publisher or speaker of its users' listings, and preliminarily enjoining Turo from commercial activity at LAX airport)..

[109]*See, e.g.*, *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008); *Doe IX v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1249-61 (S.D. Fla. 2020) (dismissing, with prejudice, minor plaintiff's claims under the Trafficking Victims Protection Act arising out of a mobile messaging service's alleged failure to warn or implement sufficient policies to protect underage users from sexual exploitation because her claim was premised on third party content and did not satisfy the narrow exception created by FOSTA in 47 U.S.C.A. § 230(e)(5)(A) for surmounting CDA immunity by alleging knowing participation); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001); *see generally infra* § 37.05[5][C] (analyzing the FOSTA/SESTA exclusions to the CDA).

In *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007), *aff'd on other grounds*, 551 F.3d 412 (6th Cir. 2008), the district court had held that the CDA preempted the common law tort and contract claims brought by an anonymous user of an "adult" dating service based on the service's failure to prevent minors from joining, but the Sixth Circuit ultimately affirmed the court's dismissal based on SexSearch's Terms and Conditions, without reaching the issue of the CDA's applicability. *See*

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on the network who gave them heroin laced with fentanyl, which caused him to overdose,[110] by a victim against the online dating site where she met her assailant,[111] by victims and family members of victims of Hamas terrorist attacks,[112] the widows of personnel killed by ISIS,[113] the family of an

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infra § 37.05[6] (discussing the case in connection with social network liability).

[110]*See Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-99 (9th Cir. 2019) (affirming dismissal of claims against a social network for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability Act, Cal. Health & Safety Code §§ 11700, *et seq.*, as preempted by section 230(c)(1)).

[111]*See Beckman v. Match.com*, LLC, 668 F. App'x 759 (9th Cir. 2016) (affirming dismissal of claims for negligent misrepresentation, violation of the Federal Trade Commission Act (unfair trade practices) and negligence *per se* arising out of a brutal attack on the plaintiff by a man she met on Match.com, but remanding for further consideration plaintiff's potential failure to warn claim), *aff'g in part*, 2:13-CV-97 JCM NJK, 2013 WL 2355512 (D. Nev. May 29, 2013).

[112]*See Force v. Facebook, Inc.,* 934 F.3d 53, 65-71 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under the Anti-Terrorism Act and the Justice Against Sponsors of Terrorism Act ("JASTA"), 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA, because plaintiffs sought to hold Facebook liable as a publisher of content by Hamas posted to Facebook, and for allegedly not removing that content, and because Facebook's use of algorithms to promote, arrange, and distribute third party content did not change its status as a publisher or amount to development), *cert. denied*, 140 S. Ct. 2761 (2020).

[113]*See Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), with prejudice, holding that (1) liability for providing an account amounts to an allegation that Twitter failed to prevent ISIS from disseminating content through the Twitter platform; and (2) Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (affirming dismissal where the plaintiffs could not allege proximate causation); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016) (holding Twitter immune under the CDA from liability for a claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), for allegedly providing material support to the Islamic State of Iraq and Syria (ISIS), because ISIS uses Twitter to disseminate its official media publications, raise funds and recruit users).

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ISIS attack in Paris,[114] a policeman injured, and the father of a policeman killed, by a terrorist attack,[115] and, prior to the enactment of 47 U.S.C.A. § 230(e)(5) in 2018, by victims of sex traffickers against publishers of online classified ads that led to their victimization.[116]

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[114]*See Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), as barred by the CDA or for failure to state a claim, in a suit brought by family members of a victim of the November 2015 ISIS terrorist attack in Paris; rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, but holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws).

[115]*See Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888-92 (N.D. Cal. 2017) (dismissing with prejudice the claims of a police officer and a deceased officer's father, under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), alleging liability by Twitter, Google, and Facebook, for providing material support to Hamas, a Palestinian entity designated as a foreign terrorist organization, primarily in the form of access to defendants' online social media platforms, because plaintiffs had not plausibly alleged a causal connection between the shooting and defendants' alleged conduct, and because the Communications Decency Act immunized most if not all of the conduct at issue).

[116]*See Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by the CDA, in an opinion that was subsequently abrogated with respect to the federal trafficking statute, by the enactment of 47 U.S.C.A. § 230(e)(5)); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011). *But see J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc) (affirming that minor plaintiffs sufficiently stated Washington state law claims that were not preempted by the CDA where they alleged that the defendants developed Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message."). *Doe No. 1* and *M.A. v. Village Voice* may no longer be good law with respect to federal civil claims under 18 U.S.C.A. § 1595 (to the extent based on sex trafficking, under 18 U.S.C.A. § 1591) in light of the 2018 amendments to the CDA, which created a new set of exclusions, codified as subpart 230(e)(5), to overrule *Doe No. 1* and similar cases, although the exemption created by section 230(c)(2)(A) is still potentially applicable (and even section 230(c)(1) immunity may be available to the extent the conduct underlying a section 1595 civil claim does not also constitute a violation of section 1591). *See* 47 U.S.C.A.

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It has also been held to preempt claims brought by tort victims against the Internet marketplace or service where the plaintiff's assailant had allegedly purchased the gun used against the victim,[117] against a social network for failing to promptly remove a profile that allegedly led to vio-

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§ 230(e)(5); *infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions to the CDA set forth in section 230(e)(5)).

[117]*See Gibson v. Craigslist, Inc.,* No. 08 Civ. 7735 (RMB), 2009 WL 1704355, at *3-4 (S.D.N.Y. June 15, 2009) (granting defendant's motion to dismiss a suit brought by a shooting victim who alleged that the gun used to shoot him had been purchased from an advertisement that appeared on Craigslist); *Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168, at *4-7 (Mass. Super. Ct. Apr. 28, 2020) (dismissing claims against an online firearms marketplace for negligence, public nuisance, and aiding and abetting the sale of a firearm used to shoot a police officer); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of negligence, negligence *per se*, aiding and abetting, public nuisance, civil conspiracy, negligence infliction of emotional distress, wrongful death, and piercing the corporate vail, arising out of the use of a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people; "Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."), *cert. denied*, 140 S. Ct. 562 (2019).

In *Daniel v. Armslist, LLC*, plaintiff had argued that Armslist's design features made it easier for prohibited purchasers to illegally obtain firearms and that Armslist should have known, actually knew, or even intended that its website would facilitate illegal firearm sales to dangerous persons. In rejecting this argument, the Wisconsin Supreme Court observed that:

> One obvious problem with Daniel's argument is that § 230(c)(1) contains no good faith requirement. Therefore, the issue is not whether Armslist knew, or should have known, that its site would be used by third parties for illegal purposes. Instead, the issue is whether Armslist was an information content provider with respect to Linn's advertisement. Armslist.com's provision of an advertising forum and the related search functions are all "neutral tools" that can be used for lawful purposes. Sales of firearms by private sellers are lawful in Wisconsin. Further, private sellers in Wisconsin are not required to conduct background checks, and private sales are not subject to any mandatory waiting period. Accordingly, the option to search for offers from private sellers is a tool that may be used for lawful purposes. . . .
>
> The remainder of the design features referenced in Daniel's complaint—lack of a "flag" option for illegal activity, failing to require users to create an account, failure to create restrictions on who may post or view advertisements, and failing to provide sufficient legal guidance to sellers—are voluntary precautions that the CDA permits but does not require. . . . Whether or not Armslist knew illegal content was being posted on its site, it did not materially contribute to the content's illegality. . . .
>
> Daniel attempts to evade the CDA by asserting that creators of armslist.com intended for the website to make illegal firearm sales easier. This is an attempt to distinguish this case from the litany of cases dismissing suits against website operators who failed to screen unlawful content. As the First Circuit has

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lence,[118] and for failing to act to prevent statements made in a chatroom or transmission of a computer virus[119] or other security breaches.[120] The CDA was also held to preempt negligence claims brought against Grindr, a social media mobile dating app, by a member of that social network who was arrested for engaging in a sexual encounter with a minor who used the service to arrange the encounter.[121]

Claims arising out of a data security breach also may be immunized to the extent based on republication of third party content or the failure to prevent republication.[122] Likewise, suits challenging the integrity of data in a database may be precluded by the CDA if premised on user content (even in instances where the user manipulation of data in a database was unauthorized).[123]

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recognized, however, the allegation of intent is "a distinction without a difference" and does not affect CDA immunity. *Backpage.com*, 817 F.3d at 21.

926 N.W.2d at 722-24.

[118]*See Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (holding negligence and intentional assault claims against Facebook and its founder preempted by the CDA because neither defendant created or provided the Third Palestinian Intifada Facebook page at issue in the suit, which allegedly promoted religious hate and violence).

[119]*See Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.) (chatroom statements and the alleged transmission of a virus), *cert. denied*, 540 U.S. 877 (2003).

[120]*See AF Holdings, LLC v. Doe,* 5:12-CV-02048-EJD, 2012 WL 4747170 (N.D. Cal. Oct. 3, 2012) (holding that plaintiff was immune from liability under the CDA for negligence based on the theory that Botson had a duty to secure his Internet connection to protect against unlawful acts of third parties).

[121]*See Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319 (D.N.J. 2015).

[122]*See, e.g.*, *In re Zoom Video Communications Inc. Privacy Litigation*, 525 F. Supp. 3d 1017, 1028-35 (N.D. Cal. 2021) (dismissing as precluded by section 230(c)(1) in a putative class action suit, claims for failing to protect the security of Zoom against breaches referred to as "Zoombombing," which allegedly exposed users to harmful third party content, to the extent plaintiffs' claims challenged the harmfulness of third party content and derived from defendant's status as publisher or speaker). In so ruling, Judge Lucy Koh emphasized that "Section 230(c)'s text encourages and immunizes content moderation, not security failures." *Id.* at 1030. Thus, in that case, only aspects of plaintiffs' claims were found to be immunized.

Data breach case law is analyzed in section 27.07 in chapter 27.

[123]*See 924 Bel Air Road, LLC v. Zillow Group, Inc.*, Case No. 2:19-CV-01368-ODW (AFMx), 2020 WL 774354, at *2-4 (C.D. Cal. Feb. 18, 2020) (dismissing as preempted by the CDA, without leave to amend, plaintiff's negligence claim in a suit arising from an unknown third party "claiming"

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Section 230 has also been applied to product liability claims. For example, it has been held to preempt strict product liability and related claims based on the Internet sales by users of the eBay sales platform.[124]

The CDA also has been held to afford interactive computer service providers immunity from claims alleging that mobile app or website services offer software tools or products that are defective, because they fail to protect users from various harms. For example, in *Herrick v. Grindr, LLC*,[125] the CDA was held to preempt claims of products liability, of negli-

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the Zillow listing for a $100 Million property and creating a false sales record that caused the property to be removed from the 'elite status of a $100M plus property' list and allegedly shifted market perceptions about the property, over plaintiff's argument that its negligence claim was not premised on the unknown user's publication of false information but on Zillow's own allegedly "inadequate monitoring system" that allowed the user to post false content to the site, as merely another way of saying that Zillow should be held liable for republishing the user's content; "Ultimately, Bel Air's allegations boil down to a charge that Zillow must prevent users from falsely claiming a Residence Page or posting false content. Yet, reviewing each user's activity and postings to ensure their accuracy is precisely the kind of activity for which Congress intended section 230 to provide immunity."), *appeal dismissed,* No. 20-55283, 2020 WL 8910588 (9th Cir. Oct. 23, 2020); *see generally supra* chapter 5 (database protection, the use of data in connection with machine learning and AI, and data portability).

[124]*See, e.g.*, *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (dismissing with prejudice plaintiff's claims against eBay for negligence, intentional conduct, gross negligence, breach of the implied warranty of merchantability, failure to warn, breach of the duty of good faith and fair dealing, violation of the Mississippi Consumer Protection Act, violation of federal law, and punitive damages because the claims were based on publication of sales listings on eBay.com that were created by third parties); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (granting eBay's motion to dismiss claims for strict product liability, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose, negligence, negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 *et seq*. and various related regulations, and breach of express warranty based on an eBay seller's alleged sale of vacuum tubes that allegedly injured the plaintiff by causing mercury poisoning because "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA."); *Reyes v. LA Vaporworks*, No. BC618004, 2017 WL 1717406 (L.A. Cty. Sup. Ct. Feb. 16, 2017) (sustaining eBay's demurrer because eBay is an interactive computer service entitled to immunity under the CDA for product liability claims based on allegedly defective vaping products offered by users of its website).

[125]*Herrick v. Grindr, LLC*, 765 F. App'x 586 (2d Cir. 2019), *aff'g,* 306 F.

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gence, and intentional and negligent infliction of emotional distress, brought against Grindr by a former user, whose former boyfriend impersonated him on the app in a catfishing campaign. To try to circumvent CDA immunity, plaintiff alleged that the Grindr mobile app was a defectively designed and manufactured product because it lacked built-in safety features; that Grindr misled Herrick into believing it could interdict impersonating profiles or other unpermitted content; and that Grindr wrongfully refused to search for and remove the impersonating profiles. In an unreported decision, the Second Circuit rejected arguments that plaintiff's claims were outside the scope of the CDA based on an alleged duty to warn or product liability theories, holding in part that "the manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred by § 230."[126]

Although not a product liability case, the Ninth Circuit, in *Dyroff v. Ultimate Software Group, Inc.*,[127] similarly affirmed dismissal of a case that sought to hold a social network liable for the software tools it provided users. The court, in affirming dismissal of claims against The Experience Project website for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability Act, Cal. Health & Safety Code §§ 11700, *et seq.,* as preempted by section 230(c)(1), rejected the argument that Ultimate Software was responsible for developing the user content at issue by providing neutral tools that allegedly encouraged the plaintiff's son to seek out a drug dealer on the site and purchase fentanyl-laced heroin, which allegedly killed him. The court explained that although Ultimate Software used features and functions, including algorithms, to analyze user posts and recommend various groups to users, the plaintiff could not "plead around Section 230 immunity by framing these website features as content."[128]

The Second Circuit likewise has held that the use of algorithms to suggest content to users did not jeopardize a

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Supp. 3d 579, 588-93 (S.D.N.Y. 2018).

[126]*Herrick v. Grindr, LLC*, 765 F. App'x 586, 590 (2d Cir. 2019).

[127]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-1101 (9th Cir. 2019).

[128]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019).

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social network's status as a publisher, based on the original meaning of the term publisher and because arranging and distributing third-party information is a traditional publication function that inherently leads to connections and matches among speakers and viewers of content. The court likewise rejected the argument that the defendant was not acting as a publisher because its editorial decision-making was automated.[129]

In contrast to other circuits, courts in the Seventh Circuit may be less likely than others to hold that the CDA preempts claims based on a defendant's alleged failure to act, even where the claim is premised on third party content, at least where the connection between liability and publication is indirect.[130] In addition, the Ninth Circuit, in *Doe No. 14 v.*

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[129]*See Force v. Facebook, Inc.,* 934 F.3d 53, 65-68 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020).

[130]Judge Easterbook narrowly construed section 230(c)(1) in *Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010), in which he held that a suit by the City of Chicago asserting that a platform used by buyers and sellers to resell event tickets was responsible for collecting a special city amusement tax on ticket sales was not preempted by the CDA. Judge Easterbrook wrote that subsection (c)(1) "limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.' " *Id.*; *see also Lansing v. Southwest Airlines Co.*, 980 N.E. 2d 630, 638–39 (Ill. App. 2012) (applying Seventh Circuit law in ruling that plaintiff's negligent supervision claim was not preempted by the CDA because section 230(c)(1) "limits who may be called the publisher or speaker of information that appears online . . . [and therefore] could foreclose any liability that depends on deeming the ICS user or provider a publisher or speaker . . . [but] was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve use of the Internet."), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012); *infra* § 37.05[3][B] (analyzing *Lansing*).

Chicago v. StubHub may be narrowly viewed as a case where liability was not premised on republication of third party speech. *See, e.g., Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 n.4 (N.C. App. 2012) (distinguishing *Chicago v. StubHub* because "the issue before the Seventh Circuit in that case was the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content."). Yet, *Chicago v. StubHub* plainly was a case where liability for collecting taxes was premised on transactions between StubHub users, based on sales listings published on StubHub. Judge Easterbrook's view in *Chicago v. StubHub* that "subsection 230(c)(1) does not create an 'immunity' of any kind" plainly reflects a narrower interpretation of the scope of CDA preemption than has been ap-

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Internet Brands, Inc.,[131] held that a claim premised on an interactive computer service's failure to warn about a danger associated with the site, which the site operator learned about offline, falls outside the protections of the CDA. *Doe No. 14* was decided in 2014, withdrawn in 2015 in response to a motion for reconsideration supported by amicus filings, and reissued in 2016 with edits to make clear that the duty to warn found not preempted in *Doe No. 14* arose from information learned offline.[132] As a result of the clarification, the amended opinion reflects a very narrow exception.[133]

In another case, *HomeAway.com, Inc. v. City of Santa*

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plied in other circuits. On the other hand, in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), Judge Easterbrook held that the CDA barred Fair Housing Act liability for user posts, but the connection between publication and liability arguably was stronger.

The difference between *Craigslist* and *Chicago v. StubHub* therefore could be viewed as analogous to the difference between general and proximate causation. Where liability is directly premised on publication of user content, a claim will be deemed preempted in the Seventh Circuit. Where the connection between liability and publication is more attenuated, it may not be preempted in the Seventh Circuit, even if it would be elsewhere. *See infra* § 37.05[3][B] (analyzing this issue in greater detail); *see also infra* § 37.05[3][C] (analyzing *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*).

[131]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016).

[132]*See Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), *reh'g granted, op. withdrawn*, 778 F.3d 1095 (9th Cir. 2015), *replaced by*, 824 F.3d 846 (9th Cir. 2016).

[133]In *Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), the Ninth Circuit held that the CDA did not bar a claim by an aspiring model against the owners of Model Mayhem, a social networking site for people in the modeling industry, for its alleged negligent failure to warn her about two individuals who used the website as part of a scheme to lure her to a fake audition, where they proceeded to rape her. In that case, the site owner allegedly had actual knowledge of the threat posed by two individuals (Lavont Flanders and Emerson Callum) because Internet Brands had sued the former owners of Model Mayhem in 2010 for their failure to disclose the potential for civil suits arising from Flanders' and Callum's prior misconduct towards models who posted profiles on the site. As subsequently clarified in the amended 2016 opinion, the defendant's alleged knowledge, which formed the basis for plaintiff's duty to warn claim, "was obtained by Internet Brands from an outside source, not from monitoring postings on the Model Mayhem website." *Id.* at 849. Liability, the appellate panel emphasized on reconsideration, was not premised on Internet Brands learning of "predators' activity from any monitoring of postings on the website . . ." or from failing "to monitor postings at issue." *Id.* at 851.

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The Ninth Circuit panel held that the plaintiff did not seek to hold Internet Brands liable as a publisher or speaker, but rather for its own failure to warn her about how third parties targeted and lured victims through Model Mayhem. The court explained that "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content. Any obligation to warn could have been satisfied without changes to the content posted by the website's users." *Id.*

The appellate panel in *Doe No. 14* distinguished *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009), where the court had held that claims by users who had been victimized by people they met on MySpace were preempted by the CDA, because in that case the tort duty arose from a site's alleged failure to adequately regulate access to user content, as opposed to a duty to warn. *Doe No. 14*, 824 F.3d at 853. In *Doe II,* the California appellate court had emphasized that offline conduct was preempted because it arose from online content. *See Doe II v. MySpace Inc*., 175 Cal. App. 4th at 573–74. As amended in 2016, it is clear that the alleged duty sued upon in *Doe No. 14* arose offline and therefore the case is distinguishable from *Doe II* and others where liability was sought to be imposed on an intermediary, as publisher, for conduct arising from third party content online.

Judge Richard Clifton, writing for himself, Judge Mary Schroeder and Eastern District of New York Judge Brian M. Cogan (sitting by designation), conceded that posting or emailing a warning could be deemed an act of publishing information, but he explained that "section 230(c)(1) bars only liability that treats a website as a publisher or speaker of content provided by somebody else: in the words of the statute, 'information provided by another information content provider.' " *Id.* at 851, *quoting* 47 U.S.C.A. § 230(c)(1). By contrast, he argued, "[a]n alleged tort based on a duty that would require . . . a self-produced warning therefore falls outside the scope of section 230(c)(1)." 824 F.3d at 851.

Judge Clifton also conceded that in a sense Internet Brands acted as the "publisher or speaker" of user content by hosting the plaintiff's Model Mayhem profile and that this action could be described as the "but-for" cause of her injuries because "[w]ithout it Flanders and Callum would not have identified her and been able to lure her to their trap" but he explained that "[p]ublishing activity is a but-for cause of just about everything Model Mayhem is involved in" and "the CDA does not provide a general immunity against all claims derived from third-party content." *Id.* at 853. The Ninth Circuit panel also conceded that imposing tort liability on intermediaries could have a "chilling effect" on Internet speech, but reasoned that "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Id.* at 852-53.

Doe No. 14 purported to draw a distinction between negligence arising out of user content and negligence for failing to warn about offline misconduct, but, as argued in earlier editions of this treatise, this distinction, without more, would invite clever pleading of claims that courts

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outside the Ninth Circuit have found preempted. *See infra* § 37.05[3][B][ii] (collecting cases).

Even as clarified as involving a case where the duty to warn arose offline, it is likely that courts in other circuits would have decided *Doe No. 14* differently. Plaintiff's claim against the owner of Model Mayhem arose out of her Model Mayhem user profile, without which she would never have been contacted by Flanders and Callum. It also arguably arose out of the perpetrators' communications with the plaintiff over Model Mayhem, which likely is how Flanders and Callum contacted the plaintiff, although it does not appear that this argument was raised by the defendant in *Doe No. 14*. The misconduct occurred not merely by virtue of a third party but, as argued in earlier editions of this treatise, because of that third party's communications, much like in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied,* 555 U.S. 1031 (2008) and the other conduct cases discussed in this subsection and in subsection 37.05[3][B][ii]. Indeed, other circuits might not accept the *Doe No. 14* court's view of proximate vs. "but for" liability for publication. They might be concerned that any smart litigator could easily replead a case alleging a failure to adequately regulate conduct on a website as one based on a failure to warn and thus plead around the CDA under the *Doe No. 14* court's formulation.

Nevertheless, because, as clarified in the amended opinion, the duty to warn exception applied in *Doe No. 14* expressly because it arose offline, and not in Internet Brands' capacity as an online publisher, the facts alleged are narrow and are unlikely to occur frequently in future cases. *See generally infra* § 37.05[3][B][ii] (further analyzing the case).

In *Beckman v. Match.com, LLC*, 668 F. App'x 759 (9th Cir. 2016), an unreported memorandum opinion, Circuit Court Judges Paez, Murguia and Hurwitz remanded a case for further consideration based on *Doe No. 14*, where plaintiff's counsel represented at oral argument that if granted leave to amend, plaintiff could allege that Match.com had actual knowledge that plaintiff's attacker had assaulted other women who he had found using Match.com prior to his attack on the plaintiff, because *Doe No. 14* established that, "at the pleading stage, the CDA did not preclude a plaintiff from alleging a state law failure to warn claim against a website owner who had obtained information 'from an outside source about how third parties targeted and lured victims' through that website platform . . . [and] [i]mportantly, Doe's claim did not seek to impose liability for the website owner's role as a 'publisher or speaker' of third party content, for its failure to remove that content, or for its failure to monitor third-party content on its website." *Id.* at 760.

Agreeing with the analysis of *Doe No. 14* set forth in this text, the court, in *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591-92 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019), held that the duty to warn claim of a former user of the Grindr mobile app, whose former boyfriend created fake profiles that caused him to be approached at home and work by hundreds of Grindr users, was preempted by the CDA. Judge Valerie Caproni explained that "*Internet Brands* is best read as holding that the CDA does not immunize an ICS from a failure to warn claim when the alleged duty to warn arises from something other than user-generated content." 306 F. Supp. 3d at 592. She explained:

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Monica,[134] the Ninth Circuit held that HomeAway.com and Airbnb, which operated platforms that facilitated online bookings by guests for host accommodations, could be compelled to comply with a local Santa Monica city ordinance prohibiting short term rentals for less than 30 days, while processing transactions, to determine if user listings complied with the local ordinance, because the ordinance did not expressly require the platforms to monitor and remove listings that were not in compliance (even if that was the logical result of the ordinance), because the only obligation to monitor content would arise at the time of a booking transaction, which the court characterized as "content that, while *resulting from* the third-party listings, is distinct, internal and nonpublic."[135] These hyper-technical distinctions—between public and private, and external and internal content,

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The bad actors in *Internet Brands* did not post any content to the website, and they contacted Doe offline. To the extent any web content was involved, it was Doe's own profile, which she did not allege to be tortious. *Id.* at 851; *see also id.* at 852 ("[T]here [was] [ ] no allegation that [the defendant] transmitted any potentially harmful messages between [ ] Doe and the [two men].."). Finally, knowledge of the misuse of the site arose not from any content on the site but from an outside source. *Id.* at 849.

Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 592 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019). In affirming the district court on this point, the Second Circuit explained that "in *Internet Brands*, there was no allegation that the defendant's website transmitted potentially harmful content; the defendant was therefore not an 'intermediary' shielded from liability under § 230." 765 F. App'x at 591, *citing Doe No. 14 v. Internet Brands, Inc*., 824 F.3d 846, 852 (9th Cir. 2016). The Second Circuit panel held that Herrick's failure to warn claim was "inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content provided by his ex-boyfriend; accordingly, it is barred by § 230." *Herrick v. Grindr,* 765 F. App'x at 591. The court also found that plaintiff was unable to allege causation. *See id.*

In *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019), the appellate panel affirmed that a social network owed no duty of care to the plaintiff's son based on California law principles. Nevertheless, its analysis was steeped in CDA case law, in finding no duty based on the defendant's provision of neutral tools, and the panel cited to a D.C. Circuit CDA opinion in holding that the service owed no duty of care. *See id.* at 1101, *citing Klayman v. Zuckerberg,* 753 F.3d 1354, 1359-60 (D.C. Cir. 2014) ("State law cannot predicate liability for publishing decisions on the mere existence of the very relationship that Congress immunized from suit. In other words, simply invoking the label "special relationship" cannot transform an admittedly waived contract claim into a non-preempted tort action.").

[134] *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676 (9th Cir. 2019).

[135] *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676, 682 (9th

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and between a duty to monitor and remove third party content from a platform (which is precluded by the CDA) vs. a duty to not process a back-end transaction (which was deemed acceptable by the Ninth Circuit)—are hard to square with the broad sweep of the CDA and its plain terms.

A subsequent Ninth Circuit panel explained that CDA immunity was found lacking in *HomeAway* "because the Santa Monica ordinance did not 'proscribe, mandate, or even discuss the content of the [website] listings' and required only that the website's transactions involve licensed properties. . . . In other words, the vacation rental platforms did not face liability for the content of their listings; rather liability arose from facilitating unlicensed booking transactions."[136]

Cir. 2019). The panel explained that "[a]s with tax regulations or criminal statutes, the Ordinance can fairly charge parties with keeping abreast of the law without running afoul of the CDA." *Id.* at 683. Needless to say, federal criminal statutes are expressly excluded from the scope of the CDA by 47 U.S.C.A. § 230(e)(1) and state criminal laws are subject to CDA preemption.

[136] *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019), *quoting HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676, 683 (9th Cir. 2019); *see also Turo Inc. v. City of Los Angeles*, Case No. 2:18-CV-06055-CAS-GJSx, 2020 WL 3422262, at *6-9 (C.D. Cal. June 19, 2020) (applying *Dryoff* and *HomeAway* in denying Turo's motion to dismiss the defendant's counterclaim, holding section 230 inapplicable because the City sought to hold Turo liable for its role in facilitating online rental car transactions, not as the publisher or speaker of its users' listings), *rev'd on other grounds*, 847 F. App'x 442 (9th Cir. 2021) (reversing entry of a preliminary injunction entered against Turo on the City's counterclaim, based on the finding that the City had not met its burden to show Turo's operations impacted traffic at LAX, without addressing the CDA issue or the district court's denial of Turo's motion to dismiss); *Airbnb, Inc. v. City of Boston,* 386 F. Supp. 3d 113, 119-25 (D. Mass. 2019) (holding, in connection with a preliminary injunction motion, that Airbnb was likely to prevail on the merits of its claim that the provisions of an ordinance requiring booking agents to prevent, remove, or de-list any ineligible listings, and requiring monthly disclosure of the number of nights that a housing unit was occupied the preceding month, violated the CDA, but finding that it was not likely to prevail in showing that the CDA preempted provisions subjecting booking agents to fines for accepting fees for booking ineligible units, and requiring monthly disclosure of the locations of their listings within the city and whether the listings were for a room or whole unit), *appeal dismissed*, 2019 WL 6522166 (1st Cir. 2019); *La Park La Brea A LLC v. Airbnb, Inc*., 285 F. Supp. 3d 1097 (C.D. Cal. 2017) (finding Airbnb to be immune under the CDA in an action by the owner of apartment buildings challenging Airbnb's postings of short-term rentals by tenants whose leases contained anti-subleasing clauses because Airbnb's role in

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The Ninth Circuit also found the CDA inapplicable to a negligent design claim alleging that Snap should be held liable for an accident caused by a driver who allegedly was using the Snapchat Speed filter at the time of the accident, reversing the district court's order dismissing the claim under the CDA.[137] In that case, the parents of children killed in a car accident sought to hold Snap liable for its allegedly "unreasonable and negligent" design decisions. They alleged that "Snap created: (1) Snapchat; (2) Snapchat's Speed Filter; and (3) an incentive system within Snapchat that encouraged its users to pursue certain unknown achievements and rewards. The Speed Filter and the incentive system then supposedly worked in tandem to entice young Snapchat users to drive at speeds exceeding 100 MPH."[138] The appellate court held that plaintiff's suit was not intended to hold Snap

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publishing user content did not materially contribute to the alleged illegality of the conduct); *Massachusetts Port Authority v. Turo, Inc.*, 1984CV01773BLS1, 2020 WL 1028822, at *8 (Mass. Super. Ct. Jan. 24, 2020) (preliminarily enjoining Turo and RMG Motors, LLC from conducting any commercial activity at Boston Logan International Airport without written authorization from the Massachusetts Port Authority, including listing or permitting motor vehicles to be listed on Turo's website, or by means of any other Turo application, as available for pickup or drop-off at Logan Airport, citing *Dyroff* and *Homeaway*, on the grounds that "Turo actively participates in and substantially assists RMG and the John Doe Defendants' acts of trespass at Logan Airport in a variety of material ways, including by accepting and processing payment for their associated car rental transactions."), *aff'd*, 487 Mass. 235, 239-44, 166 N.E.3d 972, 978-81 (2021) (affirming the injunction as modified to make clear it did not require Turo to monitor and potentially remove third-party content from its platform, holding that "[b]ecause Massport's claims are not predicated on third-party content, and because they do not seek to treat Turo as the publisher or speaker of its hosts' content, we hold that Turo is not entitled to immunity . . . . Indeed, Turo's own content encouraging the use of Logan Airport as a desirable pick-up or drop-off location for its users is exactly the content Massport asserts is the basis for the claim of aiding and abetting.").

One district court sought to explain *HomeAway* as illustrative of how section 230(c)(1) does not immunize "content neutral" claims, but this view is inaccurate. *See In re Zoom Video Communications Inc. Privacy Litigation*, 525 F. Supp. 3d 1017, 1033-34 (N.D. Cal. 2021) ("Section 230(c)(1) allows content-neutral claims."). If a claim against an interactive computer service provider or user is premised on third party content, section 230(c)(1) applies. It is only when a claim is *unrelated* to holding a provider or user liable as a publisher or speaker of third party content that section 230(c)(1) should be considered inapplicable. *See* 47 U.S.C.A. § 230(c)(1).

[137] *See Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091-95 (9th Cir. 2021).

[138] *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091-92 (9th Cir. 2021).

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liable as a publisher or speaker and, further, that the case did not involve third party content. With respect to the first point, the Ninth Circuit explained:

> The Parents thus allege a cause of action for negligent design—a common products liability tort. This type of claim rests on the premise that manufacturers have a "duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." Lewis Bass, Prods. Liab.: Design & Mfg. Defects § 2.5 (2d ed., Sept. 2020 Update). Thus, a negligent design action asks whether a reasonable person would conclude that "the reasonably foreseeable harm" of a product, manufactured in accordance with its design, "outweigh[s] the utility of the product." *Merrill v. Navegar, Inc*., 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116, 125 (2001) (citation omitted); *see also Morden v. Cont'l AG*, 235 Wis. 2d 325, 611 N.W.2d 659, 674 (2000) (explaining that the relevant "duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers" of their products "and to act accordingly" (citation omitted)).
>
> The duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. *See* Dan B. Dobbs et al., Dobbs' Law of Torts § 478 (2d ed., June 2020 Update). Meanwhile, entities acting solely as publishers—i.e., those that "review[ ] material submitted for publication, perhaps edit[ ] it for style or technical fluency, and then decide[ ] whether to publish it," *Barnes*, 570 F.3d at 1102—generally have no similar duty. *See* Dobbs' Law of Torts § 478. . . .
>
> That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the Parents seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product. As in *Internet Brands*, Snap "acted as the 'publisher or speaker' of user content by" transmitting Landen's snap, "and that action could be described as a 'but-for' cause of [the boys'] injuries." 824 F.3d at 853. This is unsurprising: Snap "is an internet publishing business. Without publishing user content, it would not exist." *Id*. But though publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." *Id*. The duty to design a reasonably safe product is fully independent

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of Snap's role in monitoring or publishing third-party content.[139]

With respect to the second point, the Ninth Circuit in *Lemmon v. Snap, Inc.* rejected the argument that the case even involved third party content, writing that the case presented "a clear example of a claim that simply does not rest on third-party content. Snap indisputably designed Snapchat's reward system and Speed Filter and made those aspects of Snapchat available to users through the internet."[140] The court elaborated that "the Parents' negligent design claim faults Snap solely for Snapchat's architecture, contending that the app's Speed Filter and reward system worked together to encourage users to drive at dangerous speeds. Notably, the Parents do not fault Snap in the least for publishing Landen's snap. Indeed, their amended complaint fully disclaims such a reading of their claim: 'The danger is not the Snap [message using the Speed Filter] itself. Obviously, no one is harmed by the post. Rather, the danger is the speeding.' "[141]

The narrow exceptions created by the Ninth Circuit could well be viewed differently by circuits that take a more expansive view of the scope of CDA preemption under section 230(c)(1).

The Good Samaritan exemption has been held to immunize locations that post information about alleged spammers.[142] It

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[139]*Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092-93 (9th Cir. 2021) (footnotes omitted); *see also Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 816 S.E.2d 77, 79-81 (2018) (reversing dismissal of plaintiff's negligence claim arising out of car crash in which driver allegedly had been using Snapchat's "Speed Filter" sharing feature, because plaintiffs "seek to hold Snapchat liable for its own conduct, principally for the creation of the Speed Filter and its failure to warn users that the Speed Filter could encourage speeding and unsafe driving practices").

[140]*See Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021).

[141]*See Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021).

[142]In *Optinrealbig.com, LLC v. Ironport Systems, Inc.*, 323 F. Supp. 2d 1037 (N.D. Cal. 2004), Judge Armstrong of the Northern District of California denied a preliminary injunction sought by a bulk commercial email service to prevent a spam complaint business from transmitting reports of alleged spam to anyone other than its ISP and from removing the email addresses of complainants in its reports. In that case, defendant SpamCop forwarded complaints from registered users to all ISPs it believed may have been used to transmit spam. SpamCop removed email addresses from reports it retransmitted to service providers (to protect the privacy of

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also extends to consumer feedback and criticism[143] and gos-

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its registered users) but did not otherwise edit or alter the reports. Accordingly, the court found that it was exempt from state law liability for trade libel, intentional interference with contractual relations and unfair competition claims under the Good Samaritan exemption. As an alternative ruling, the court denied plaintiff's request for a preliminary injunction on the merits, finding in part that OptIn itself was responsible for damage to its reputation caused by the spam reports and that SpamCop could not be held accountable for what ISPs do with the information once it retransmits complaints to them. *See generally infra* § 29.08[2] (discussing the Good Samaritan exemption's application in spam-related cases).

[143]*See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (affirming dismissal of a claim against a consumer criticism site on a Rule 12 motion to dismiss because the necessary facts justifying dismissal were apparent on the face of the complaint); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016) (affirming dismissal of a defamation claim brought against Yelp for its consumer rating system, which assigned various stars to businesses based on user submissions, and its alleged dissemination and promotion of negative reviews via Google); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474-76 (E.D.N.Y. 2011) (holding preempted by the CDA plaintiff's claim that the defendant was liable as an information content provider for encouraging negative comments, inviting consumers to post public complaints on its website, displaying those negative posts as prominently as possible, and increasing the prominence of its webpages by various means, including using plaintiff's trademarks); *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs' extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014); *Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (holding that defendant's allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section 230 because "[i]ncreasing the visibility of a statement is not tantamount to altering its message" and, "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found."); *GW Equity LLC v. Xcentric Ventures LLC*, Civil Action No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009) (affirming the Magistrate Judge's recommendation to enter summary judgment for the defendant in a suit over postings on RipoffReport.com and BadBusinessBureau.com, where the plaintiff alleged that the defendants developed the offending content and objected that the Magistrate Judge had not considered the *Roommate.com* case); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (dismissing a claim alleging that RipoffReport.com and its owners were liable for actively soliciting defamatory material and for keeping an allegedly defamatory post on its site after the author asked that it be removed); *infra* § 37.05[3][D][ii] (analyzing CDA issues associated with gripe sites).

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sip[144] sites, but not where a site owner creates its own content or otherwise crosses the line and acts as an information content provider.[145]

On the other hand, the operator of a pay-for-priority Internet search engine was held not eligible for CDA immunity (in the face of claims under the federal Telemarketing and Consumer Fraud and Abuse Prevention Act[146] and for fraud under New Jersey law) by a trademark owner who

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[144]*See, e.g., Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating a jury verdict for the plaintiff and reversing the district court's order denying defendant's motion for judgment in a case brought against the website TheDirty.com).

[145]*See, e.g., Whitney Information Network, Inc. v. Xcentric Venture, LLC*, 199 F. App'x 738 (11th Cir. 2006) (vacating and remanding a lower court order dismissing the case for failing to meet the requirements of Florida's long arm statute where the plaintiff alleged that the defendants, operators of *badbusinessbureau.com*, rewrote consumer posts to add words such as "ripoff," "dishonest," and "scam," and knowingly fabricated entire consumer complaints which were then attributed to anonymous writers or people with phony names, taking them outside the scope of the CDA exemption and therefore subject to jurisdiction based on conduct directed to a Florida resident); *Certain Approval Programs, LLC v. XCentric Ventures LLC*, No. CV08–1608–PHX–NVW, 2009 WL 596582 (D. Ariz. Mar. 9, 2009) (granting leave to amend to allow plaintiff to allege that defendant "Ripoff Report" created or developed content and was therefore acting as an information content provider, rather than merely an interactive computer service provider); *Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008) (declining to dismiss claims against an Internet publisher who was alleged to have posted statements on its website by fictitious people, creating the false impression that the postings were from bona fide disgruntled patients of the plaintiffs' hair restoration clinic); *Energy Automation Systems, Inc. v. Xcentric Ventures, LLC*, No. 3:06-1079, 2007 WL 1557202 (M.D. Tenn. May 25, 2007) (denying defendant's motion to dismiss, which the court treated as a motion for summary judgment, and lifting a stay on discovery, where the plaintiff alleged that the defendants created and developed the allegedly defamatory content at issue and therefore that the protections afforded by the CDA did not apply); *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1148–49 (D. Ariz. 2005) (denying a motion to dismiss based on the CDA where the plaintiff alleged that the defendant had produced editorial comments, titles and other original content contained in allegedly defamatory postings); *MCW, Inc. v. Badbusinessbureau.com, LLC,* Civ. A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004) (denying defendants' motion to dismiss, holding that badbusinessbureau.com and ripoffreport.com and their owner could be liable as information content providers for the postings (titles, headlines and editorial messages) which plaintiff alleged they created as original material, developed and posted); *see generally infra* § 37.05[3][D][ii].

[146]15 U.S.C.A. § 6102(b).

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alleged that the defendant was liable for using its marks in the bidding process, and not solely for the third-party information displayed on search results pages.[147] In that case, the plaintiff had alleged that the search engine itself was responsible for the alleged misconduct, giving competitors' search results greater prominence without any indication that site ranking were based on paid advertising rather than actual relevance.[148]

In ruling on CDA defenses, some courts have conflated subparts (c)(1) and (c)(2)(A) or simply cited section 230(c) without specifically explaining the basis for a decision or the inter-relationship between the subparts, as addressed above in section 37.05[1][A]. Few have closely analyzed the structure of section 230 and what the different subparts provide.

The CDA will exempt an interactive computer service provider or user from liability if any one of the three safe harbors established by section 230(c)(1), section 230(c)(2)(A) or section 230(c)(2)(B) applies. A provider or user's inability to qualify for all of the exemptions will not defeat protection if the provider or user meets the criteria for any one. In *Donato v. Moldow*,[149] for example, the court rejected the plaintiff's argument that the defendant should be held liable for third-party posts, and not protected by the CDA, because he acted with malice and had admitted that he harbored a long-standing resentment against the plaintiff, thereby negating the good faith requirement of subpart 230(c)(2)(A). The court explained that subpart 230(c)(2)(A) "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 traditional publisher functions. If the conduct falls within the scope of the traditional publisher functions, it cannot constitute, within the context of § 230(c)(2)(A), bad faith."[150] While the court's analysis of what constitutes bad faith may be challenged, its recognition that subparts (c)(1)

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[147]*800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295–96 (D.N.J. 2006).

[148]Major search engines such as Google, Bing and Yahoo! clearly distinguish sponsored links from natural search results. *See generally supra* § 9.11[3] (analyzing sponsored links).

[149]*Donato v. Moldow*, 374 N.J. Super. 475, 490, 497–98, 865 A.2d 711 (App. Div. 2005).

[150]374 N.J. Super. at 500, 865 A.2d at 727.

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and (c)(2)(A) address potentially overlapping but fundamentally separate grounds for finding immunity is sound.

Section (c)(1) by its terms applies to defamation and any other claims that are premised on publisher liability or speech, so long as the interactive computer service provider or user is not an information content provider with respect to the specific material at issue. Section (c)(2)(A), by contrast, potentially may apply more broadly to a whole range of claims (including, but not limited to, defamation)—especially those where a duty otherwise could arise from screening or monitoring a site—so long as the party asserting the exemption took *any action*, voluntarily and in good faith, that would entitle it to benefit from the exemption. Subpart 230(c)(2)(B) in turn exempts liability for any action taken to enable or make available to information content providers or others the technical means to restrict strict access to the material described in section 230(c)(2)(A). Subpart (c)(2)(B) is more limited in scope—applying only where action is taken to enable or make available technical means to restrict access—whereas subpart (c)(2)(A) potentially immunizes a broad range of Internet activities. Both subparts of section 230(c)(2), by their terms, require *action*, although *any action* will suffice. To benefit from the broad exemption created by subpart (c)(2)(A), the action must be "voluntarily taken in good faith," whereas subpart (c)(2)(B) merely requires that the action be taken (whether or not it was undertaken voluntarily or in good faith). The scope of subparts (c)(1) and (c)(2)(A) and (c)(2)(B) are analyzed in, respectively, sections 37.05[3] and 37.05[4].

As noted earlier,[151] the Good Samaritan exemption was intended to overrule *Stratton Oakmont v. Prodigy Services, Inc.*,[152] discussed above in section 37.04[3], in which an interactive computer service was held to the standard of a publisher, rather than a distributor, for allegedly defamatory content posted on its service, because it had issued content guidelines, used software to delete certain offensive terms and monitored chat rooms to promote more civil, family-oriented discourse. The statute also was intended to encourage interactive computer services to do what Prodigy

[151] *See supra* § 37.05[1][A].

[152] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995).

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had done in that case and restrict access to or the availability of material deemed objectionable by a service or its users. The question left unexplained by the plain terms of the statute was just how far the exemption would reach in overruling *Stratton Oakmont* (in subpart (c)(1)) and encouraging actions voluntarily taken in good faith to restrict access to or the availability of material that the provider or user considers to objectionable (in subpart (c)(2)(A)).

The Committee Report accompanying the Telecommunications Act provides only limited guidance. Its discussion of the Good Samaritan exemption, in its entirety, reads as follows:

> This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.
>
> These protections apply to all interactive computer services, as defined in new subsection 230(e)(2),[153] including nonsubscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5),[154] including providers of proxy server software.
>
> The conferees do not intend, however, that these protections from civil liability apply to so-called "cancelbotting," in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.[155]

The Report states that the Good Samaritan exemption was intended to overrule *Stratton Oakmont v. Prodigy Services, Inc.* and any other similar decisions[156] that had treated

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[153]This provision now is codified at section 230(f)(2).

[154]This provision now is codified at section 230(f)(5).

[155]Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996).

[156]At the time of the bill's passage there were no other similar decisions that had treated providers and users as publishers and speakers of third party content because they restricted access to the material. The only other Internet defamation case widely known at the time was *Cubby,*

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online "providers and users as publishers and speakers of content that is not their own because they have restricted access to objectionable material."[157] The express legislative findings included in the statute itself[158] put in context Congress's concern in 1996 that the then-nascent growth of the Internet could be adversely affected by a liability standard that effectively shifted to site owners and service providers liability for user misconduct that they could not control. Indeed, *Stratton Oakmont* itself was a case where the defendant had been sued for one of its users engaging in the very kind of behavior that Prodigy had gone to great lengths to try to prevent.

The irony that Prodigy could be afforded *less* protection for taking voluntary measures in good faith to restrict the kind of coarse communications that underlay plaintiff's claim in *Stratton Oakmont* undoubtedly was not lost on Congress. The "Good Samaritan" exemption thus was intended to serve the dual objectives of overruling *Stratton Oakmont* to strengthen the development of the Internet by protecting interactive computer services and users and to encourage them to do the very sorts of things that Prodigy had done in policing its domain for adult material or content deemed

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Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), in which CompuServe was held to standard of a distributor, not a publisher, and did not restrict access to objectionable material. *See generally supra* § 37.04[2] (discussing *Cubby*). The only case that fits the description in the legislative history is *Stratton Oakmont* itself.

[157]Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996).

[158]The Congressional findings are as follows:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C.A. § 230(a).

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otherwise objectionable by a provider or its users. These twin purposes can be seen in the two major subparts of section 230(c) of the Good Samaritan exemption, which are discussed below (along with cases construing each provision) in sections 37.05[3] and 37.05[4].

37.05[2] Defining *Interactive Computer Service*

The Good Samaritan exemption applies to providers and users of *interactive computer services.* Both providers *and* users[1] may benefit from the exemption.

An interactive computer service is "*any* information service, system or access software provider[2] 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 . . . ."[3] By its terms, this definition is very broad. It "includes a wide range of cyberspace services, not only *internet service providers* . . . ."[4]

The definition is broad enough to also include providers

[Section 37.05[2]]

[1]*See, e.g., Directory Assistants, Inc. v. Supermedia, LLC*, 884 F. Supp. 2d 446, 450–51 (E.D. Va. 2012) (dismissing with prejudice claims against an individual user who forwarded by email articles posted online); *Novins v. Cannon*, Civ. No. 09–5354, 2010 WL 1688695 (D.N.J. Apr. 27, 2010); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006); *Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (suit based on forwarding an email message); *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005).

[2]An access software provider is defined as "a provider of software . . . or enabling tools that do any 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, or translate content." 47 U.S.C.A. § 230(f)(4).

[3]47 U.S.C.A. § 230(f)(2) (emphasis added).

[4]*Batzel v. Smith*, 333 F.3d 1018, 1030 n.15 (9th Cir. 2003); *see also Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (stating the same proposition); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 27-28 (2d Cir. 2015) (noting that the "[t]he statute defines 'interactive computer service' expansively, to include 'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server' " and that '[t]his wording has been construed broadly to effectuate the statute's speech-protective purpose . . . ."); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010) ("As the internet communities have developed, so has the case law. Although much of the initial CDA immunity was granted to internet service providers like AOL, . . . [the defendant] incor-

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and users of blogs, social networks, wiki, intranets, extranets and other networked computers, whether or not connected to the Internet. Indeed, almost any networked computer would qualify as an interactive computer service, as would an access software provider.

Although courts occasionally refer to passive hosts, there is no basis for reading the definition of an *interactive computer service* that narrowly.

Among other things, courts have found traditional ISPs,[5] website hosts,[6] owners and operators of websites (including consumer review sites),[7] Internet search engines and portals,[8] app store providers,[9] Internet dating services,[10] blogs and

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rectly asserts that the immunity ends with such providers.").

[5]*See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 (10th Cir. 2000); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (email provider); *Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (email provider).

[6]*See, e.g., Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (GoDaddy.com); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010).

[7]*See, e.g., Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (RagingBull.com site, which hosted financial message boards); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (Consumeraffairs.com, a website that allowed users to post product and business reviews); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) ("Yelp is plainly a provider of an 'interactive computer service' . . . ."); *Batzel v. Smith*, 333 F.3d 1018, 1021 (9th Cir. 2003) (non-profit website providing information on stolen art); *J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *4 (N.D. Cal. Aug. 20, 2020) (Craigslist); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1318-19 (M.D. Fla. 2015) (Pissedconsumer.com website, a commercial gripe site); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474 (E.D.N.Y. 2011) (PissedConsumer.com); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010) (university newspaper website).

[8]*See, e.g., Gonzalez v. Google LLC*, 2 F.4th 871, 891 (9th Cir. 2021) (Google); *Bennett v. Google, LLC*, 882 F.3d 1163, 1167 (D.C. Cir. 2018) (Google); *Mosha v. Yandex Inc.*, 18 Civ. 5444 (ER), 2019 WL 5595037, at *7 (S.D.N.Y. Oct. 30, 2019) (Yandex); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (Ask.com); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (Google), *aff'd mem.*, 242 F. App'x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 156 (2008).

[9]*See Coffee v. Google, LLC*, Case No. 20-cv-03901-BLF, 2021 WL 493387, at 5 (N.D. Cal. Feb. 10, 2021) (Google Play).

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electronic bulletin boards[11] (including gossip sites trading in "dirt"),[12] Facebook and other social networks,[13] Twitter (both

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App stores have also been held immune under the CDA in earlier cases where their status as interactive computer service providers was not disputed. *See, e.g.*, *Free Kick Master LLC v. Apple Inc*., 140 F. Supp. 3d 975, 982-83 (N.D. Cal. 2015) (dismissing plaintiff's common law trademark infringement claim against Google Play and the Amazon AppStore, arising out of free apps they made available, as preempted by the CDA, where plaintiff did not dispute that they were interactive computer service providers and did not allege that "either of them had any role whatsoever in the creation of the apps at issue, the choice of name for those apps, or any other action that would place either defendant in the role of speaker or author of the accused products."); *Evans v. Hewlett-Packard Co*., C 13-02477 WHA, 2013 WL 4426359, at *2-3 (N.D. Cal. Aug. 15, 2013) (dismissing state law civil claims brought against the operators of the HP App Catalogue, an app store for Palm devices, as preempted by the CDA, because, although "cleverly-worded," the complaint did "not allege that defendants created the app at issue here. Rather, it appears that the app was created entirely by third parties."); *see also Evans v. Hewlett-Packard Co*., No. C 13-02477, 2013 WL 5594717 (N.D. Cal. Oct. 10, 2013) (denying plaintiffs' motion to amend the complaint to "plead around the CDA").

[10]*See Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1120 (9th Cir. 2003).

[11]*See, e.g., Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005) (electronic bulletin board service).

[12]*See, e.g., Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (the website, *TheDirty.com*).

[13]*See, e.g., Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008) (MySpace); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (the Experience Project); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357-58 (D.C. Cir. 2014) ("Facebook qualifies as an interactive computer service because it is a service that provides information to 'multiple users' by giving them 'computer access . . . to a computer server,' 47 U.S.C. § 230(f)(2), namely the servers that host its social networking website. When Facebook users like Klayman browse the site and review the pages of other users, . . . they do so by gaining access to information stored on Facebook's servers."); *Jefferson v. Zukerberg*, Civil Action No. RDB-17-3299, 2018 WL 3241343, at *5 (D. Md. July 3, 2018) (Facebook); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015) (Facebook), *aff'd*, 697 F. App'x 526 (9th Cir. 2017) (affirming dismissal with prejudice where plaintiff sought to "hold Facebook liable as a publisher for hosting, and later blocking, SFJ's online content."); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 321 (D.N.J. 2015) (holding, over no objection from the plaintiff, that social media company Grindr, which offered a popular dating app, "is an interactive computer service provider within the meaning of the CDA because its website gives subscribers access to a common server for purposes of social networking."); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801–02 (N.D. Cal. 2011) (Facebook); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (MySpace); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96

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for its micro-blog and private Direct Message features),[14] Snapchat[15] and operators of other mobile apps,[16] online vendors,[17] online marketplaces for auction-style sales[18] or where

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Cal. Rptr. 3d 148 (2d Dist. 2009) (MySpace).

[14]*See Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *3 (C.D. Cal. Feb. 21, 2021) (holding Twitter to be an interactive computer service provider and dismissing non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website, after Twitter had removed the images in response to Morton's takedown notices); *Brikman v. Twitter, Inc.*, 19-cv-5143 (RPK) (CLP), 2020 WL 5594637, at *2 (E.D.N.Y. Sept. 17, 2020) ("Twitter is an online platform that allows multiple users to access and share the content hosted on its servers. As such, it is an interactive computer service under the CDA."); *Wilson v. Twitter*, No. 3:20-cv-00054, 2020 WL 3410349, at *11 (S.D.W. Va. May 1, 2020) (observing that "Twitter provides the 'prototypical service' entitling it to protections of [Section 230]"); *Brittain v. Twitter, Inc.*, No. 19-CV-00114-YGR, 2019 WL 2423375, at *2 (N.D. Cal. June 10, 2019) (holding Twitter to be an interactive computer service provider and dismissing with prejudice plaintiffs' claims for (1) violation of the First Amendment; (2) violation of federal election law; (3) breach of contract; (4) conversion, (5) negligent infliction of emotional distress; (6) tortious interference; and (7) promissory estoppel, in a suit alleging that Twitter improperly suspended four accounts linked to Craig Brittain and his U.S. Senate campaign); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016) (holding Twitter to be an interactive computer service provider, in a case where plaintiff did not dispute the characterization); *see also Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1127-29 (N.D. Cal. 2016) (dismissing plaintiffs' claims with prejudice, holding that Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (affirming dismissal where the plaintiffs could not allege proximate causation).

[15]*See Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021).

[16]*See Herrick v. Grindr, LLC*, 765 F. App'x 586, 589-90 (2d Cir. 2019), *aff'g*, 306 F. Supp. 3d 579, 588-89 (S.D.N.Y. 2018) (holding, over plaintiff's objection, that Grindr was an interactive computer service provider; "Although Herrick contends that Grindr is not an 'interactive computer service' (or an 'ICS'), the Court finds that there is no plausible basis to argue that it is not. . . . Herrick has not identified any legally significant distinction between a social networking platform accessed through a website, such as Facebook, and a social-networking platform accessed through a smart phone app, such as Grindr. In either case, the platform connects users to a central server and to each other."); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 323 (D.N.J. 2015) (holding that Grindr was an ICS because "its website gives subscribers access to a common server for purposes of social networking.").

[17]*See, e.g., Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31

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sellers set prices[19] or offer loans,[20] online book vendors,[21] a domain name registrar,[22] an online videoconferencing platform,[23] the owner of corporate networks, whose networks were used by individuals to post allegedly defamatory state-

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P.3d 37, 40–41 (Div. 1 2001) (online book seller).

[18]*Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n.7, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (writing that eBay "enables users to conduct sales transactions, as well as provide information (feedback) about other users of the service.").

[19]*See Hill v. StubHub, Inc.*, 727 S.E.2d 550, 557 (N.C. App. 2012) (holding StubHub to operate an interactive computer service).

[20]*See Clarks v. Private Money Goldmine*, Case No.: GJH-19-1014, 2020 WL 949946, at *7 (D. Md. Feb. 26, 2020) (holding that REI Network, LP, which operated www.privatemoneygoldmine.com, an online subscription service that connected prospective private money borrowers and lenders, FM 41, Inc., a general partner of REI, and John Douglas Smith, FM 41's president, qualified as interactive computer service providers, and dismissing claims against them for fraud, breach of contract, and unjust enrichment).

[21]*See Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (holding Amazon.com and BarnesandNoble.com, LLC, among others, entitled to immunity under the CDA), *appeal dismissed*, Appeal No. 11–7077, 2012 WL 3068437 (D.C. Cir. 2012); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 461, 31 P.3d 37 (Div. 1 2001) (noting that Amazon.com "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.").

[22]*See Smith v. Intercosmos Media Group, Inc.,* No. Civ. A. 02–1964, 2002 WL 31844907, at *3 (E.D. La. Dec. 27, 2002) (holding that Intercosmos, a domain name registrar and operator of directNIC.com, was immune from liability under the CDA for Smith's claim that Intercosmos was negligent in: (1) unblocking access to the websites through domains that contained false and fraudulent registration information; (2) failing to revoke registrations that contain false and fraudulent registration information when it is possible to do so; and (3) maintaining defamatory content on its own servers).

[23]*See In re Zoom Video Communications Inc. Privacy Litigation*, 525 F. Supp. 3d 1017, 1029-30 (N.D. Cal. 2021) (holding that Zoom was an interactive computer service provider under 47 U.S.C.A. § 230(f)(2) because it was (a) an access service provider that (b) provided or enabled computer access by multiple users to a computer server, and rejecting arguments that Zoom was ineligible because calls allegedly were intended to involve only invited participants; "it is irrelevant whether a message is directed at one recipient (like in Direct Messaging); a small group (like in an AOL chat room); or the public (like in messaging boards). The relevant question is whether an 'interactive computer service' transmitted that message.").

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ments on third party sites,[24] a for-profit genealogy company that makes databases of publicly available information online,[25] the operator of an online database sued over the integrity of user submitted data,[26] and the operator of a Kinko's copy shop that allowed customers to pay for hourly access to computers linked to the Internet[27] to constitute *interactive computer service* providers. In addition, a distributor of Internet security software that filtered adware and malware was held to be an *access software provider*, which by definition qualifies as an interactive computer service.[28]

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[24]*See Miller v. Federal Express Corp.*, 6 N.E.3d 1006, 1017 (Ind. Ct. App. 2014) (affirming summary judgment for the defendants in a suit for defamation and intentional infliction of emotional distress based on posts made to a newspaper website by employees of the two corporate defendants, whose posts were made using company computers, based on the finding that the companies qualified as interactive computer service providers and that appellants' claims were preempted by the CDA).

[25]*See Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (holding Ancestry.com to be an interactive computer service provider of yearbook records, in an opinion holding it entitled to CDA immunity for California right of publicity, intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices claims, arising out of defendant's use of their yearbook photos and related information in its subscription database).

[26]*See 924 Bel Air Road, LLC v. Zillow Group, Inc.*, Case No. 2:19-CV-01368-ODW (AFMx), 2020 WL 774354, at *2-4 (C.D. Cal. Feb. 18, 2020) (dismissing as preempted by the CDA, without leave to amend, plaintiff's negligence claim in a suit arising from an unknown third party "claiming" the Zillow listing for a $100 Million property and creating a false sales record that caused the property to be removed from the 'elite status of a $100M plus property' list and allegedly shifted market perceptions about the property, over plaintiff's argument that its negligence claim was not premised on the unknown user's publication of false information but on Zillow's own allegedly "inadequate monitoring system" that allowed the user to post false content to the site, as merely another way of saying that Zillow should be held liable for republishing the user's content; "Ultimately, Bel Air's allegations boil down to a charge that Zillow must prevent users from falsely claiming a Residence Page or posting false content. Yet, reviewing each user's activity and postings to ensure their accuracy is precisely the kind of activity for which Congress intended section 230 to provide immunity."), *appeal dismissed,* No. 20-55283, 2020 WL 8910588 (9th Cir. Oct. 23, 2020).

[27]*See PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069 (D.S.D. 2001).

[28]*See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173–74 (9th Cir. 2009). An interactive computer service is defined under the Act as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, includ-

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Libraries and educational institutions are expressly enumerated as examples of interactive computer services.[29] Courts accordingly have held that both Harvard University and MIT qualify as ICS providers to the extent their networks serve as "platforms on which third parties post content" that they "do not create, produce or substantively alter . . . ."[30]

Employer owned networks, including intranets and extranets, also qualify. The Committee Report accompanying the Act explains that the Good Samaritan "protections apply to all interactive computer services, as defined in new subsection 230(e)(2),[31] including non-subscriber systems such as those operated by many businesses for employee use."[32] At least two state court cases have also held an employer network protected by the CDA,[33] although strangely the court in the first case did not reference the Committee Report in

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ing specifically a service or system that provides access to the Internet . . . ." 47 U.S.C.A. § 230(f)(2) (emphasis added).

[29]47 U.S.C.A. § 230(f)(2) (defining the term *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*") (emphasis added).

[30]*See National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 67 (D. Mass. 2019); *see also National Association of the Deaf v. Massachusetts Institute of Technology,* Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, in plaintiffs' parallel lawsuit against MIT). Notwithstanding this definition, editing and other traditional functions of a publisher fall within the immunity created by section 230, as underscored by numerous cases discussed in sections 37.05[1] and 37.05[3].

[31]As a result of a 1998 amendment to the statute, the definition of interactive computer service, which originally was codified at 47 U.S.C.A. § 230(e)(2), today is found in section 230(f)(2).

[32]Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 208.

[33]*See Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 805–06, 52 Cal. Rptr. 3d 376, 388–90 (6th Dist. 2006) (holding an employer immune under section 230 from an action for intentional and negligent infliction of emotional distress brought against the employer of the person who used the employer's computer system to transmit Internet threats); *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 637 (Ill. App.) (ruling that plaintiff's negligent supervision claim was not preempted by the CDA but *citing Delfino* and the Conference Report in holding that "under the plain language of the statute and its broad definition of an ICS, an employer like the defendant qualifies as a provider or user of an ICS

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support of its holding.[34] Of course, where employees engage in actionable misconduct at the behest of their employer or within the scope of their employment, the employer likely would not be entitled to CDA immunity.[35]

In another case brought in federal court, third party employers were held to qualify as interactive computer services in suits brought against the companies for Internet posts by their employees.[36]

The CDA also has been held applicable to insulate e-commerce sales platforms, including eBay,[37] Amazon.com,[38]

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because defendant uses an information system or service that multiple users, like defendant's employees, use to access the Internet."), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012); *see also Davis v. Motiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. Apr. 2, 2015) (holding, in an unreported opinion, that the CDA barred the plaintiff's negligent entrustment, negligent supervision, and negligent undertaking claims against an employer arising out of its alleged failure to prevent one of its employees from using its technology to post sexual advertisements; the plaintiff had alleged that the employer had actual or constructive knowledge of its employee's activity but the court ruled that subpart 230(c)(2) of the CDA immunized the employer from liability for its good faith efforts to restrict access to certain materials through its monitoring and logging policies).

[34]*See Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 805–06, 52 Cal. Rptr. 3d 376, 388–90 (6th Dist. 2006).

[35]*See, e.g.*, *Huon v. Denton*, 841 F.3d 733, 741-43 (7th Cir. 2016) (holding that the plaintiff stated a claim that was not preempted by the CDA by alleging that some of the allegedly defamatory comments posted on Gawker's website had been authored by Gawker employees, allegedly to generate revenue).

[36]*See Miller v. Federal Express Corp.*, 6 N.E.3d 1006, 1017 (Ind. Ct. App. 2014) (affirming summary judgment for the defendants in a suit for defamation and intentional infliction of emotional distress based on posts made to a newspaper website by employees of the two corporate defendants, whose posts were made using company computers, based on the finding that the companies qualified as interactive computer service providers and that appellants' claims were preempted by the CDA).

[37]*See, e.g., Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (dismissing with prejudice plaintiff's claims against eBay for negligence, intentional conduct, gross negligence, breach of the implied warranty of merchantability, failure to warn, breach of the duty of good faith and fair dealing, violation of the Mississippi Consumer Protection Act, violation of federal law, and punitive damages because the claims were based on publication of sales listings on eBay.com that were created by third parties); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (granting eBay's motion to dismiss claims for strict product liability, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular

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and StubHub,[39] from liability for an array of claims arising out of the conduct or content of users who act as sellers. Some courts, however, have held that Amazon (as well as Walmart.com[40]) is not a *seller* or *supplier*, under various state laws, merely for providing a marketplace for users to buy and sell goods and services without even reaching the issue of the applicability of the CDA (or after finding it inap-

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purpose, negligence, negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 *et seq*. and various related regulations, and breach of express warranty based on an eBay seller's alleged sale of vacuum tubes that allegedly injured the plaintiff by causing mercury poisoning because "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA."); *Gentry v. eBay, Inc*., 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (dismissing claims on demurrer against eBay for, among others, negligence, based on the CDA); *Reyes v. LA Vaporworks*, No. BC618004, 2017 WL 1717406 (L.A. Cty. Sup. Ct. Feb. 16, 2017) (sustaining eBay's demurrer because eBay is an interactive computer service entitled to immunity under the CDA for product liability claims based on allegedly defective vaping products offered by users of its website).

[38]*See, e.g.*, *Brodie v. Green Spot Foods, LLC*, 503 F. Supp. 3d 1, 6 (S.D.N.Y. 2020) (dismissing plaintiff's claim against Amazon.com for deceptive practices and false advertising under N.Y. Gen. Bus. Law §§ 349 and 350 as barred by the CDA, in case where plaintiff allegedly suffered injuries after consuming food featured as an "Amazon's Choice" product, where the advertisements at issue were provided by Green Spot Foods); *Brodie v. Green Spot Foods, LLC*, 503 F. Supp. 3d 1, 6 (S.D.N.Y. 2020) (dismissing plaintiff's claim against Amazon.com for deceptive practices and false advertising under N.Y. Gen. Bus. Law §§ 349 and 350 as barred by the CDA, in case where plaintiff allegedly suffered injuries after consuming food featured as an "Amazon's Choice" product, where the advertisements at issue were provided by Green Spot Foods); *Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (holding Amazon.com and BarnesandNoble.com, LLC, among others, entitled to immunity under the CDA), *appeal dismissed*, Appeal No. 11–7077, 2012 WL 3068437 (D.C. Cir. 2012); *Corbis Corp. v. Amazon.com, Inc*., 351 F. Supp. 2d 1090, 1117–18 (W.D. Wash. 2004) (holding Amazon immune from liability under a Washington state consumer protection statute for images uploaded by a vendor, based on the CDA); *Schneider v. Amazon.com, Inc*., 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001) (granting summary judgment for the defendant on claims for negligent misrepresentation, tortious interference and breach of contract, based on the CDA).

[39]*See, e.g., Hill v. StubHub, Inc*., 727 S.E.2d 550, 557 (N.C. App. 2012) (holding StubHub to operate an interactive computer service).

[40]*See Indiana Farm Bureau Insurance v. Shenzhen Anet Technology Co.*, Case No. 4:19-cv-00168-TWP-DML, 2020 WL 7711346, at *6-7 (S.D. Ill. Dec. 29, 2020) (granting summary judgment for Walmart.com).

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plicable in particular cases).[41]

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[41]*See, e.g., Erie Insurance Co. v. Amazon.com, Inc.,* 925 F.3d 135, 141-44 (4th Cir. 2019) (holding that, where Amazon did not obtain title to the headlamp shipped to its warehouse by Dream Light, and Dream Light (the seller) set the price, designed the product description, paid Amazon for fulfillment services, and ultimately received the purchase price paid by the seller, Amazon was not "a seller — one who transfers ownership of property for a price — and therefore does not have the liability under Maryland law that sellers of goods have. To be sure, when Amazon sells its own goods on its website, it has the responsibility of a 'seller,' just as any other retailer, such as Home Depot, would have. But when it provides a website for use by other sellers of products and facilitates those sales under its fulfillment program, it is not a seller, and it does not have the liability of a seller."); *Amazon.com, Inc. v. McMillan*, 2 F.4th 525 (5th Cir. 2021) (reversing the district court and remanding with instructions to grant summary judgment in favor of Amazon.com in full, holding that Amazon was not a "seller" under Texas product liability law because sellers using its marketplace don't relinquish title to their products; relying on *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 103-04 (Tex. 2021) (holding, in response to a certified question, that "potentially liable sellers are limited to those who relinquished title to the product at some point in the distribution chain.")); *Fox v. Amazon.com, Inc.,* 930 F.3d 415, 422-25 (6th Cir. 2019) (holding that Amazon was not a seller within the meaning of the Tennessee Products Liability Act—which the court defined as "any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain"—where Amazon.com "did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace."); *State Farm Fire and Casualty Co. v. Amazon Services, Inc.*, 835 F. App'x 213 (9th Cir. 2020) (affirming summary judgment in favor of online retailer, reasoning that it could not be held liable for damages caused by explosion of batteries, because it was not "seller" of the hoverboards in which they had been purchased on its site); *Garber v. Amazon.com, Inc.,* 380 F. Supp. 3d 766, 776-78 (N.D. Ill. 2019) (holding that Amazon was not a "seller" of defective hoverboards under Illinois law, where Shenzhen Gangshen Technology Company, not Amazon, sourced the hoverboard and set the price, and Amazon did not design, manufacture, inspect, maintain, repair, install, or modify the hoverboard, and never possessed it); *Allstate New Jersey Insurance Co. v. Amazon.com, Inc.*, Civil Action No. 17-2738 (FLW) (LHG), 2018 WL 3546197 (D.N.J. July 24, 2018) (holding, under New Jersey law, that while Amazon, even when fulfilling an order, "may have technically been a part of the chain of distribution, . . . it never exercised control over the product sufficient to make it a 'product seller' under the PLA"); *Eberhart v. Amazon.com, Inc.,* 325 F. Supp. 3d 393, 398-400 (S.D.N.Y. 2018) (holding that (a) Amazon was not liable in negligence as a seller or distributor of an allegedly defective coffee maker bought from a seller on its online marketplace, and (b) Amazon was a provider of services, and not a distributor, under New York law, for (1) maintaining an online marketplace, (2) warehousing and shipping goods, and (3) processing payments, and therefore was entitled to summary judgment on the

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In *FTC v. Accusearch, Inc.*,[42] the Federal Trade Commission argued that the term *interactive computer service* necessarily is limited to bulletin boards and other *interactive* sites and excludes websites that merely permit users to conduct the same type of retail commerce that they could in a store on *terra firma* (and by extension to sites that merely republished medical or other journals created by third parties). Al-

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plaintiff's claim for strict liability); *McDonald v. LG Electronics USA, Inc*., 219 F. Supp. 3d 533, 541–42 (D. Md. 2016) (holding that, under Maryland products liability law, Amazon was not the seller of batteries sold by a third party on Amazon's website); *see also Carpenter v. Amazon.com, Inc.,* No. 17-03221-JST, 2019 WL 1259158 (N.D. Cal. Mar. 19, 2019) (granting summary judgment for Amazon.com, on plaintiff's claims under California law for (1) fraudulent concealment, (2) strict liability based on a manufacturing defect, (3) strict liability based on a design defect, (4) strict liability based on a failure to warn, (5) negligence, and (6) breach of implied warranty, where plaintiffs did not dispute that non-party Paradise 00 was the seller and fulfiller of the hoverboard at issue in the case; and therefore finding it unnecessary to reach the question of whether these claims were preempted by the CDA); *Stiner v. Amazon.com, Inc*, 162 Ohio St. 3d 128, 131-35, 164 N.E.3d 394, 397-401 (2020) (finding no strict liability under Ohio law because Amazon.com was not a supplier within the meaning of the Products Liability Act). *But see State Farm & Casualty Co. v. Amazon.com, Inc.,* 390 F. Supp. 3d 964 (W.D. Wisc. 2019) (holding that Amazon was a seller within the meaning of Wisconsin's strict product liability statute and was not entitled to CDA immunity, in a suit brought by a homeowner's insurer alleging that the insured's home flooded due to a defect in a bathtub faucet adapter purchased from a third-party seller on Amazon's online marketplace); *Loomis v. Amazon.com, LLC*, 63 Cal. App. 5th 466, 277 Cal. Rptr. 3d 769 (2d Dist. 2021) (applying Bolger in reversing summary judgment in a case seeking to impose strict liability on a Amazon.com for the sale of an allegedly defective new hoverboard by a commercial vendor, TurnUpUp, which was alleged to have sold $736,366.68 in hoverboards through the platform); *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 267 Cal. Rptr. 3d 601 (4th Dist. 2020) (imposing strict product liability on a platform).

A widely publicized opinion holding Amazon.com liable for strict product liability and negligence claims under Pennsylvania law was vacated pending *en banc* review. *See Oberdorf v. Amazon.com, Inc.,* 930 F.3d 136 (3d Cir. 2019) (reversing in part the lower court's entry of summary judgment in favor of Amazon.com and holding the CDA inapplicable to the extent Amazon.com was an actor in the sales process, but applicable to the extent that the claims alleged that Amazon.com failed to provide or to edit adequate warnings in the product listings), *vacated*, 936 F.3d 182 (3d Cir. 2019) (vacating the opinion and granting *en banc* review); *see also Oberdorf v. Amazon.com, Inc.*, 818 F. App'x 138 (3d Cir. 2020) (certifying the question— whether Amazon.com could be strictly liable for a defective product purchased on its platform from a third-party vendor—to the Pennsylvania Supreme Court).

[42] *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

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though the Tenth Circuit panel in *Accusearch* found it unnecessary to reach this argument, it rightly expressed skepticism that the term should be so narrowly construed, writing that "Section 230(f)(2) does not say that an interactive computer service must facilitate action among third parties; rather, it says that an interactive computer service is one that 'provides or enables computer access by multiple users *to a computer server*.' "[43]

In a subsequent case brought by the FTC, the Second Circuit expressed skepticism, without deciding, whether the operator of an affiliate marketing network could qualify as an *interactive computer service provider*, but made clear that the "[t]he definition is indeed broad . . . ."[44]

In addition to exempting providers of interactive computer services, the CDA also insulates *users*.[45]

In at least one reported case, the owner of an interactive computer service was also held to be entitled to CDA immunity to the extent he had been sued in his capacity as a

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[43]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009), *citing* 47 U.S.C.A. § 230(f)(2) (emphasis added by the court).

[44]*See FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016). In *LeadClick*, the Second Circuit expressed skepticism that the operator of an affiliate marketing network could qualify as an interactive computer service provider where it routed customers, for a split second, through its HitPath server, before directing them to LeanSpa's website. The Second Circuit noted that this routing, which is common in the affiliate marketing industry to account for leads (for which affiliates would be entitled to compensation), "was invisible to consumers and did not benefit them in any way." *Id.* at 176. Judge Denny Chin, on behalf of himself and Judges Peter W. Hall and Gerard E. Lynch, concluded that it was unnecessary to resolve the issue based on the court's finding that LeadClick was ineligible for CDA protection because of its participation in the development of the deceptive content at issue in that case. Had it done so, the better view would be that LeadClick acted as an interactive computer service provider to the extent it re-routed consumer traffic provided by affiliates. Since liability was not premised on LeadClick's retransmission of deceptive content, but on its own alleged role in orchestrating a scheme that the court found was likely to mislead reasonable consumers, where LeadClick was aware that the majority of traffic from its affiliate network came from fake news sites that made unfounded claims about LeanSpa products, and where it actively encouraged and helped develop this content, whether or not LeadClick was an interactive computer service provider was not material.

[45]Users were held exempt from liability in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006) and *Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005). *See generally infra* § 37.05[2].

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provider.[46]

The immunity afforded by section 230 applies to users and providers of interactive computer services, which as noted earlier in this sub-section may include both entities and individuals that republish third party content within the meaning of section 230(c)(1)[47] or restrict access to objectionable content in good faith, within the meaning of section 230(c)(2).[48]

At least two district courts have held that owners or officers of entities that are interactive computer service providers also may be entitled to section 230(c)(1) immunity.[49]

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[46]*See Klayman v. Zuckerberg*, 753 F.3d 1354, 1357–58 (D.C. Cir. 2014) (holding Mark Zuckerberg entitled to protection as a "provider" of Facebook's interactive computer service, in addition to Facebook, where the plaintiff had sought to hold him accountable for his role in making the service available); *see also Seldon v. Magedson,* No. 11 Civ. 6218 (PAC)(MHD), 2012 WL 4475274, at *16 (S.D.N.Y. July 10, 2012) (holding that the individual operator of an interactive computer service was considered to be a provider of interactive computer services and thus granted section 230 immunity).

[47]*See generally infra* § 37.05[3] (analyzing the scope of section 230(c)(1) preemption).

[48]*See generally infra* § 37.05[4] (analyzing the scope of section 230(c)(2) preemption).

[49]*See, e.g., Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474 (E.D.N.Y. 2011) (holding officers of the website PissedConsumer.com, which was found to be an interactive computer service, were themselves entitled to the same CDA immunity as "providers" of an interactive computer services, within the meaning of section 230(c)); *Whitney Information Network Inc. v. Xcentric Ventures, LLC,* No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *8 (M.D. Fla. Feb. 15, 2008) (granting summary judgment on plaintiff's defamation claim based on content posted on RipOffReport.com). *Cf. MCW, Inc. v. Badbusinessbureau.com, LLC,* Civ. A.3:02-CV-2727-G, 2004 WL 833595, at *9 (N.D. Tex. Apr. 19, 2004) (holding that an individual defendant was not entitled to CDA immunity where, among other things, he was consistently portrayed as an individual who neither owned nor operated the defendant website).

The court's analysis in *Whitney Information Network Inc.*, an unreported decision, is not rock solid. In that case, immunity under section 230(c)(1) was premised on the individual owner of *RipOffReport.com* (Ed Magedson) being either a provider or a user of the corporate interactive computer service defendant, but the scope of section 230 plainly was not intended to reach to all users (or indeed those directly liable as information content providers also would be immunized). In *MCW,* an earlier case, the same owner of the same corporate defendant was held to not be entitled to CDA immunity based on a failure of proof that was corrected subsequently in *Whitney Information Network Inc.*

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CDA immunity for the conduct by moderators of blogs and discussion forums is separately considered in section 37.05[3][D][iv].

37.05[3] Subpart 230(c)(1): Publisher or Speaker Liability

37.05[3][A] In General

Section 230(c)(1) does not immunize interactive computer service providers or users *for their own defamatory communications* (or other misconduct). It merely exempts them from liability for "information provided by another content provider."[1] "[T]he original culpable party" remains liable.[2]

Section 230(c)(1) exempts interactive computer service providers and users from third-party liability premised on their status as a publisher or speaker if, and only if, the material at issue constitutes "information provided by another information content provider."[3] Increasingly, circuit courts and others have characterized this provision in terms of a three part test: a defendant is exempt from liability under section 230(c)(1) if: (a) the defendant is a provider or user of an interactive computer service, as defined in section 230(f)(2); (b) the claim is based on information provided by another content provider (other than the defendant); and (c) the asserted claim would treat the defendant as the "publisher or speaker" of the information.[4] This test is generally accurate as a statement of the elements of section 230(c)(1),

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[Section 37.05[3][A]]

[1]47 U.S.C.A. § 230(c)(1).

[2]*Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[3]47 U.S.C.A. § 230(c)(1).

[4]*See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Force v. Facebook, Inc.,* 934 F.3d 53, 63-64 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *Herrick v. Grindr, LLC*, 765 F. App'x 586, 589-90 (2d Cir. 2019); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 409 (6th Cir. 2014); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-99 (9th Cir. 2019); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009); *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263, 1267-68 (D.C. Cir. 2019) (applying *Klayman*); *Bennett v. Google, LLC*, 882 F.3d 1163, 1166-67 (D.C. Cir. 2018) (applying *Klayman*); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544,

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provided the claim at issue is one that falls within the scope of section 230 (as determined by section 230(e)).[5] Thus, it is not a complete test for determining whether a claim is preempted by section 230(c)(1).[6]

The scope of the statute and its subject matter exclusions must also be considered. A claim seemingly preempted by section 230(c)(1) may be excluded from protection by section 230(e) if it pertains to intellectual property or involves a federal criminal statute or the federal Electronic Communications Privacy Act or similar state laws. Conversely, a claim not preempted by section 230(c)(1) may nonetheless be preempted by section 230(c)(2).[7]

Section 230's coverage and exclusions are analyzed in sections 37.05[1] and 37.05[5]. Although infrequently an issue, what constitutes an interactive computer service is considered in section 37.05[2].

As analyzed in the following subsections (sections 37.05[3][B][ii], 37.05[3][B][iii], 37.05[3][C] and 37.05[3][D]), the Fourth and Sixth Circuits arguably provide the greatest protection for interactive computer service providers and users under section 230(c)(1). The Ninth and Tenth Circuits have broadly construed *development,* which necessarily narrows the scope of CDA immunity by expanding the circum-

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548 (E.D. Va. 2008), *aff'd*, 591 F.3d 250 (4th Cir. 2009); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002); *Milgrim v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 317, 16 A.3d 1113, 1120–21 (2010); *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 556 (N.C. App. 2012); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37, 40 (Div. 1 2001).

A slightly different formulation was suggested in an earlier California trial court opinion. *See Stoner v. eBay, Inc.*, 56 U.S.P.Q.2d 1852, 2000 WL 1705637 (Cal. Super. Ct. Trial Div. 2000). In that case, San Francisco Superior Court Judge Stuart Pollack ruled that eBay, Inc., as the party asserting the exemption, was required to prove that: (a) the defendant is an interactive computer service provider; (b) the defendant is not an information content provider with respect to the material at issue or the disputed activity; and (c) the plaintiff's claim is based on content that originated with a third party.

[5]*See* 47 U.S.C.A. § 230(e) (effects on other laws); *see generally supra* § 37.05[1][C] (discussing the subject matter scope of preemption); *infra* § 37.05[5] (analyzing exclusions).

[6]As a general proposition, courts should avoid multi-part tests or other mechanical approaches to the broadly worded provisions of section 230, which could increase the chances of reaching an incorrect conclusion, especially in a close case.

[7]Section 230(c)(2) is separately analyzed in section 37.05[4].

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stances under which CDA immunity may not apply, but even in the Ninth Circuit Chief Judge Kozinski made clear there is a high bar set to find *development* and questionable cases must be resolved in favor of immunity. The Seventh Circuit does not view the CDA as affording immunity and may view narrowly what constitutes liability imposed for publishing or speaking, but where applicable broadly applies protection to interactive computer service providers and users.

The following subsections address the scope of preemption under section 230(c)(1) and the exclusion from section 230(c)(1)'s coverage for information provided by another information content provider.

37.05[3][B] *Zeran v. America Online* and the Development of Case Law on Preemption of Defamation and Other Claims

37.05[3][B][i] *Zeran v. America Online, Inc.* and Preemption of Publisher Liability

The Good Samaritan exemption overruled *Stratton Oakmont* (in subpart (c)(1)) and went further in sub-part (c)(2)(A) in affirmatively encouraging the kind of screening and monitoring for adult material that had been undertaken by Prodigy in that case.[1] Congress, however, did not explicitly state what legal standard would replace the one it overruled.

In *Zeran v. America Online, Inc.*,[2] which generated both the first district court opinion and then the first circuit court opinion to construe the scope of section 230(c), the Fourth Circuit agreed with the district court in holding that section 230(c)(1)—in eliminating liability for *publishers* or *speakers*—not only reversed *Stratton-Oakmont*, and foreclosed online republication liability, but preempted any claims based on distributor liability (liability where a defendant knows or should have known that material was defamatory) under the common law standard applied in *Cubby, Inc. v.*

[Section 37.05[3][B][i]]

[1]*See supra* §§ 37.05[1] (scope of the exemption in general), 37.04[3] (discussing *Stratton Oakmont* and the family friendly measures Prodigy implemented in that case, which led to liability).

[2]*Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

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CompuServe, Inc.[3]

In *Zeran,* a pseudonymous AOL subscriber had posted plaintiff Kenneth M. Zeran's name and home phone number on purported advertisements for highly offensive and vulgar T-shirts celebrating the 1995 bombing of the Oklahoma City federal building and praising accused bomber Timothy McVeigh.[4] Zeran contacted AOL to take down the message, but each time it was removed similar messages were reposted. To make matters worse, a radio disc jockey in Oklahoma City received a copy of the bogus posting and read it on the air, urging his listeners to call "Ken" to complain. Zeran claimed to have received angry and offensive telephone calls as a result of the postings at the rate of about one every two minutes.

In affirming the district court's judgment for AOL on Zeran's claims, the Fourth Circuit explained, "[b]y 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."[5] The court also held that to effectuate Congressional policy, the scope of immunity under section 230 should be broadly construed.[6]

In so ruling, the Fourth Circuit rejected Zeran's argument that AOL could be held liable because it had received notice of the allegedly defamatory postings. The Fourth Circuit also ruled that AOL was exempt from liability for allegedly delaying in removing the offending messages, failing to issue retractions, and failing to screen for similar postings.[7] The court elaborated that section 230 "precludes courts from

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[3]*Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *supra* § 37.04[2].

[4]The first advertisement was posted by "Ken ZZ03" and, under the heading "Naughty Oklahoma T-Shirts," invited AOL subscribers to call Ken—the plaintiff's first name—at plaintiff's actual phone number, to purchase shirts with slogans such as "Putting the Kids to Bed . . . Oklahoma 1995" and "McVeigh for President 1996."

[5]*Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[6]*Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *see also*, *e.g.*, *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–419 (1st Cir. 2007) (quoting *Zeran* for the same proposition).

[7]*Zeran v. America Online, Inc.*, 129 F.3d 327, 328–34 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

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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."[8]

Judge Wilkinson, writing for the panel, argued that "[i]f computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message." This liability standard would impose an incentive for interactive service providers to censor speech:

> Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory characters, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. *Cf. Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. *See Philadel-*

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[8] *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *see also, e.g.*, *Green v. America Online (AOL)*, 318 F.3d 465, 470-71 (3d Cir.) (following *Zeran* in holding that section 230 "bars 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"), *cert. denied*, 540 U.S. 877 (2003); *Westlake Legal Grp. v. Yelp, Inc.*, 599 F. App'x 481, 485 (4th Cir. 2015) (holding that a customer review site on which a third party allegedly posted defamatory remarks about the plaintiff was immunized by the CDA because operating an automated system that filters reviews is a traditional editorial function that did not render Yelp an information content provider); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (holding that traditional editorial functions are immunized under the CDA); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (holding that, in enacting the CDA, Congress sought to protect the exercise of a publisher's "editorial and self-regulatory functions."); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 289, 929 N.Y.S.2d 19, 25, 952 N.E.2d 1011, 1017 (2011) (holding that the CDA insulates traditional editorial functions), *citing Zeran*, 129 F.3d at 330.

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> *phia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, . . . (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.[9]

Zeran and subsequent cases have broadly construed subpart (c)(1) of the Good Samaritan exemption to eliminate virtually any third party liability for content originating with someone else (even where a defendant is put on notice of the allegedly unlawful nature of a post),[10] both in defamation suits and, as discussed above in section 37.05[1], other cases where liability is premised on an interactive computer service provider or user acting as a publisher or speaker, including claims for a broad range of torts, state common law and statutory claims and even federal statutes.[11]

In view of the broad interpretation given to *publisher* and *speaker*, the question most frequently litigated in section 230(c)(1) cases is whether the defendant acted as an *information content provider*, or *developed* the content at issue, and therefore is not entitled to the Good Samaritan exemption.[12] Depending on the nature of the content or functions performed, a defendant, at least in the Ninth and Tenth Circuits,[13] potentially may be treated as an interactive computer service for some purposes (or with respect to certain

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[9] Judge Wilkinson further wrote:

> In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2) (emphasis added).

Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[10] *See, e.g.*, *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006).

[11] *See supra* § 37.05[1][C] (enumerating claims); *infra* § 37.05[5] (analyzing exceptions to Good Samaritan exemptions).

[12] *See infra* §§ 37.05[3][C], 37.05[3][D].

[13] *See Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008) (*en banc*) (finding Roommate.com entitled to CDA immunity for some aspects of the Rommate.com website, but not for oth-

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content) and an information content provider for others. This issue is analyzed in sections 37.05[3][C] and 37.05[3][D].

Except where limited because an interactive computer service provider or user is also deemed an information content provider, the scope of preemption under section 230(c)(1) is very broad and even covers third party misconduct or a provider's own failure to act, provided that liability for the act or omissions is premised on information originating with another information content provider.[14] On the other hand, courts in the Seventh Circuit do not treat section 230(c)(1) as creating an immunity from liability and therefore, in some cases, may apply section 230(c)(1) more narrowly.[15]

37.05[3][B][ii] Third Party Conduct as Content and Alleged Failures to Act or Warn

As analyzed more extensively in section 37.05[1][C], section 230(c)(1) has been broadly construed to preempt claims based on content that originates with another information content provider, including potentially claims based on third party *conduct,* which online usually takes the form of content, provided that the interactive computer service provider's alleged liability is premised on third party content, and for failing to act to prevent harm where the service provider's liability is premised on publication of third party

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ers; "A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content."); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009); *see also Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 n.4 (10th Cir. 2000) (noting that "Defendant conceded that in an appropriate situation, an interactive computer service could also act as an information content provider by participating in the creation or development of information, and thus not qualify for § 230 immunity."); *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 307 F. Supp. 3d 952, 965 (D. Minn. 2018) (dismissing plaintiff's defamation claim against a Senior Moderator of the Allnurses.com website, to the extent based on third party claims she moderated, but not for her own posts), *aff'd on other grounds*, 971 F.3d 747, 752 n.4 (8th Cir. 2020) (noting that the plaintiffs did not challenge, on appeal, the lower court's ruling dismissing the defamation claim).

[14]*See infra* § 37.05[3][B][ii].

[15]*See infra* § 37.05[3][B][iii].

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content. Conduct and failure to act cases have been deemed preempted by section 230(c)(1) where courts characterize a claim as amounting to an attempt to hold a provider liable as a publisher or speaker of material originating with another information content provider.

For example, in *Green v. America Online*,[1] the court rejected arguments that plaintiff's claim over allegedly defamatory material posted about him in a chat room and a computer virus sent to him from a third party were not preempted by section 230(c)(1) because they involved AOL's own misconduct, as opposed to content posted by third parties for which the plaintiff sought to hold AOL liable as the publisher or speaker.[2]

Similarly, in *Doe v. MySpace, Inc.*,[3] the court rejected the assertion that MySpace could be held liable for failing to implement measures that would have prevented a minor from being contacted by a predator. The Fifth Circuit panel wrote that these "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."[4] Likewise, in *Doe v. America Online, Inc.*,[5] the Florida Supreme Court held that section 230(c)(1) immunized AOL from claims that the company should have been held liable for a pedophile's sales and marketing of photos and videotapes that depicted the minor plaintiff in an AOL chatroom, where AOL neither

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[Section 37.05[3][B][ii]]

[1]*Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003).

[2]The plaintiff had argued that AOL had waived its immunity by its terms of membership contract and because AOL's Community Guidelines outlined standards for online speech and conduct and contained promises that AOL would protect him from other subscribers. The court treated these allegations as a claim that AOL was negligent in promulgating harmful content and in failing to address harmful content on its network, which it held was preempted.

[3]*Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008).

[4]*Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008); *see also Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (holding MySpace exempt from claims based on minors who allegedly were abused by people they met on MySpace).

[5]*Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001).

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warned the pedophile to stop nor suspended his service. Similarly, in *Saponaro v. Grindr, LLC*,[6] the court held that a Grindr user's claims against the social network for negligence and negligent infliction of emotional distress arising out of his arrest for engaging in a sexual encounter with a minor who used the service to arrange the encounter were preempted by the CDA. And in *Herrick v. Grindr, LLC*,[7] the court dismissed claims against the owners of the mobile dating app, Grindr, for product liability, negligent design, failure to warn, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, based on the CDA, in a suit brought by a former user, whose former boyfriend had created fake profiles of him on the app, which had caused hundreds of app users to visit the plaintiff's home and work looking for sex. Other opinions likewise found that the CDA preempted negligence claims based on the failure to warn.[8]

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[6]*Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319 (D.N.J. 2015).

[7]*Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588-93 (S.D.N.Y. 2018), *aff'd,* 765 F. App'x 586 (2d Cir. 2019).

[8]*See, e.g.*, *Herrick v. Grindr, LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (rejecting arguments that plaintiff's claims were outside the scope of the CDA based on an alleged duty to warn about risks associated with use of the defendant's mobile app); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020) (denying leave to amend to add negligence and strict liability claims arising out of a mobile messaging service's failure to warn or implement sufficient policies to protect underage users from sexual exploitation because "Plaintiff's failure to warn claims are inextricably linked to the harmful content solicited and posted by Kik's users. This is precisely the type of claim for which Congress has determined that interactive computer website providers should be immune."); *McMillan v. Amazon.com, Inc.*, 433 F. Supp. 3d 1034, 1045 (S.D. Tex. 2020) (granting in part defendant's motion for summary judgment, holding that the CDA barred plaintiff's claims against Amazon.com "[i]nsofar as Plaintiff's claims might relate to Amazon's editorial control over the product detail page and failure to provide adequate warning on the page . . . ."), *rev'd on other grounds*, 2 F.4th 525 (5th Cir. 2021) (reversing the district court's denial of summary judgment with instructions to grant Amazon's motion for summary judgment in full on remand because it was not a "seller" for purposes of Texas product liability law); *McDonald v. LG Electronics USA, Inc*., 219 F. Supp. 3d 533, 536-40 (D. Md. 2016) (holding that Amazon.com had immunity under the CDA for its alleged negligent failure to warn, but did not enjoy CDA immunity for negligence and breach of implied warranty claims, in a suit arising out of injuries allegedly sustained when a battery purchased from a third party seller on the Amazon.com platform allegedly exploded and caught fire); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss.

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As addressed more extensively in section 37.05[1][C], courts also have held interactive service providers immune from liability under section 230(c)(1) in a range of other cases involving third party misconduct or a provider's own failure to act, provided that liability for the underlying act or omissions is premised on information originating with another information content provider.[9]

2014) (dismissing with prejudice plaintiff's duty to warn claim against eBay, because the claim was based on publication of sales listings on eBay.com that were created by third parties).

[9]*See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by section 230(c)(1), in an opinion that was subsequently abrogated with respect to the federal trafficking statute, by the enactment of 47 U.S.C.A. § 230(e)(5)); *Force v. Facebook, Inc.,* 934 F.3d 53, 65-71 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA, because plaintiffs sought to hold Facebook liable as a publisher of content by Hamas posted to Facebook, and for allegedly not removing that content, and where Facebook's use of algorithms to promote, arrange, and distribute third party content did not change its status as a publisher or amount to development), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-1101 (9th Cir. 2019) (affirming dismissal of claims against The Experience Project website for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability Act, Cal. Health & Safety Code §§ 11700, *et seq.,* as preempted by section 230(c)(1), in a suit brought by the mother of a man who participated in an anonymous heroin-related forum, where the deceased user solicited and found someone on the forum to sell him heroin, which turned out to have been laced with fentanyl, which caused his death, because Ultimate Software, through its Experience Project, acted as a publisher in recommending user groups and sending email notifications of posts, and did not become a developer of content (or owe a duty of

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care to the decedent, or collude with the drug dealer) by providing neutral tools that a user could exploit to create a profile or perform a search); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888-92 (N.D. Cal. 2017) (dismissing with prejudice the claims of a police officer and a deceased officer's father, under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), alleging liability by Twitter, Google, and Facebook, for providing material support to Hamas, a Palestinian entity designated as a foreign terrorist organization, primarily in the form of access to defendants' online social media platforms, because plaintiffs had not plausibly alleged a causal connection between the shooting and defendants' alleged conduct, and because the Communications Decency Act immunized most if not all of the conduct at issue); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), with prejudice, holding that (1) liability for providing an account amounts to an allegation that Twitter failed to prevent ISIS from disseminating content through the Twitter platform; and (2) Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016) (dismissing plaintiffs' claim with leave to amend, holding Twitter immune under the CDA from liability for a claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), for allegedly providing material support to the Islamic State of Iraq and Syria (ISIS), because ISIS uses Twitter to disseminate its official media publications, raise funds and recruit users); *Backpage.com, LLC v. Hoffman*, 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA, in a case pre-dating the enactment of section 230(e)(5)), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA, in a case pre-dating the enactment of section 230(e)(5)); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230, in a case pre-dating the enactment of section 230(e)(5)); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding claims by the victim of sex trafficking against a provider of sexually oriented classified ads preempted by the CDA in an opinion that was subsequently abrogated with respect to the federal trafficking statute, by the enactment of 47 U.S.C.A. § 230(e)(5)); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (granting eBay's motion to dismiss claims for strict product liability, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose, negligence, negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15

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U.S.C.A. §§ 2601 *et seq*. and various related regulations, and breach of express warranty based on an eBay seller's alleged sale of vacuum tubes that allegedly injured the plaintiff by causing mercury poisoning because "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA."); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (granting defendant's motion for judgment on the pleadings because the CDA preempted claims alleging that Craigslist facilitated prostitution through illegal ads posted by users on the website and constituted a public nuisance); *Gibson v. Craigslist, Inc.,* No. 08 Civ. 7735(RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (granting Craigslist's motion to dismiss a complaint arising out of a handgun sales ad posted on www.craigslist.org); *Murawski v. Pataki*, 514 F. Supp. 2d 577 (S.D.N.Y. 2007) (granting defendant's motion to dismiss a complaint against Ask.com for failing to remove a link to third-party content as preempted by the CDA); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 724–28 (N.D. Ohio 2007) (holding preempted claims by a member of an adult dating service who had argued that the service should be held liable for allowing a minor who pretended to be 18 years old to join, causing him to be arrested and suffer other injuries after meeting her online and engaging in consensual sexual relations with her believing that she was actually 18 years old), *aff'd on other grounds,* 551 F.3d 412, 416 (6th Cir. 2008); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 WL 1704355, at *3-4 (S.D.N.Y. June 15, 2009) (granting defendant's motion to dismiss a suit brought by a shooting victim who alleged that the gun used to shoot him had been purchased from an advertisement that appeared on Craigslist); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446 (E.D.N.Y. 2004) (granting the defendant's motion to dismiss claims for failing to remove "objectionable" statements from online discussion groups); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 823, 121 Cal. Rptr. 2d 703, 708 (4th Dist. 2002) (holding that a claim alleging that eBay failed to provide certificates of authenticity to purchasers of sports memorabilia was preempted by the CDA); *Reyes v. LA Vaporworks*, No. BC618004, 2017 WL 1717406 (L.A. Cty. Sup. Ct. Feb. 16, 2017) (sustaining eBay's demurrer to plaintiff's product liability claim, based on allegedly defective vaping products offered by users of eBay's website, as preempted by the CDA); *Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168, at *4-7 (Mass. Super. Ct. Apr. 28, 2020) (dismissing claims against an online firearms marketplace for negligence, public nuisance, and aiding and abetting the sale of a firearm allegedly used to shoot a police officer); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 717-27 (Wisc.) (affirming dismissal of negligence, negligence *per se*, aiding and abetting, public nuisance, civil conspiracy, negligence infliction of emotional distress, wrongful death, and piercing the corporate vail, arising out of the use of a handgun bought and sold by users of defendant's online firearms marketplace in a mass shooting that killed four people, as barred by section 230(c)(1)."), *cert. denied*, 140 S. Ct. 562 (2019); *see generally supra* § 37.05[1][C] (discussing CDA preemption of claims for content couched in terms of misconduct). *But see Chicago v. StubHub, Inc.*, 624 F.3d 363 (7th Cir. 2010) (holding the CDA inapplicable in a case brought to force StubHub to collect taxes for user transactions that occurred on its website); *Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d

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In a departure, the Ninth Circuit, in *Doe No. 14 v. Internet Brands, Inc.*,[10] held that a claim premised on an interactive computer service's alleged failure to warn about a danger associated with its site or service (as opposed to a tort arising from an alleged failure to adequately regulate access to user content) fell outside the protections of the CDA, where the information that formed the basis for plaintiff's claim was allegedly acquired by the defendant offline. The court ruled that the CDA did not bar a claim by an aspiring model against the owners of Model Mayhem, a social networking site for people in the modeling industry, for its alleged negligent failure to warn her about two individuals who used the website as part of a scheme to lure her to a fake audition, where they proceeded to rape her.

In that case, the site owner allegedly had actual knowledge of the threat posed by two individuals (Lavont Flanders and Emerson Callum) because Internet Brands had sued the former owners of Model Mayhem in 2010 for their failure to disclose the potential for civil suits arising from Flanders' and Callum's prior misconduct towards models who posted profiles on the site. As subsequently clarified in an amended opinion, the defendant's alleged knowledge, which formed the basis for plaintiff's duty to warn claim, "was obtained by Internet Brands from an outside source, not from monitoring postings on the Model Mayhem website."[11]

The Ninth Circuit panel reasoned that the plaintiff did not

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846 (9th Cir. 2016) (holding that the CDA did not bar a claim against the social networking site for models, Model Mayhem, based on the site's failure to warn the plaintiff, a user of the site, of prior attacks on users by the two men who contacted her for an audition and then raped her, which was information that the site owners learned offline—not from anything posted on the site); *J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc) (affirming that minor plaintiffs sufficiently stated Washington state law claims that were not preempted by the CDA where they alleged that the defendants developed Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message."). *Doe No. 14* is analyzed later in this subsection 37.05[3][B][ii].

[10] *Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016).

[11] *Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 849 (9th Cir. 2016). *Doe No. 14* was decided in 2014, withdrawn in 2015 in response to a motion for reconsideration supported by amicus filings, and reissued in 2016 with edits to make clear that the duty to warn found not preempted in *Doe No. 14* arose from information learned offline. *See Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), *reh'g granted, op.*

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seek to hold Internet Brands liable as a publisher or speaker, but rather for its own failure to warn her about how third parties targeted and lured victims through Model Mayhem, based on information acquired offline. The court explained that "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content. Any obligation to warn could have been satisfied without changes to the content posted by the website's users."[12]

The appellate panel in *Doe No. 14* sought to distinguish *Doe II v. MySpace Inc.*,[13] where the court had held that claims by users who had been victimized by people they met on MySpace were preempted by the CDA, because in that case the tort duty arose from a site's alleged failure to adequately regulate access to user content, as opposed to a duty to warn.[14] The fine distinction drawn by the Ninth Circuit panel in *Doe No. 14* is in many respects a distinction without a difference. In *Doe II,* the California appellate court had emphasized that offline conduct was preempted because it arose from online content.[15] But the plaintiff in *Doe II* could just as easily have recast its negligence claim from one based on the social network's alleged acts or omissions in operating its network, to a failure to warn users about those alleged deficiencies. A failure to warn, after all, is merely the mirror opposite of a negligent failure to act.

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withdrawn, 778 F.3d 1095 (9th Cir. 2015), *replaced by*, 824 F.3d 846 (9th Cir. 2016). As further clarified in the amended opinion, liability was not premised on Internet Brands learning of "predators' activity from any monitoring of postings on the website . . ." or from failing "to monitor postings at issue." 824 F.3d at 851.

[12]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016).

[13]*Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009).

[14]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016).

[15]*Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 573–74, 96 Cal. Rptr. 3d 148 (2d Dist. 2009). In its initial Ninth Circuit brief as appellee, the defendant had also cited to the Fifth Circuit's decision in *Doe v. MySpace Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied,* 555 U.S. 1031 (2008), but the Ninth Circuit panel in *Doe No. 14* did not address that case in its opinion. The appellee did not cite any of the many other cases noted in this subsection and in this chapter that take a broader view of the CDA than the Ninth Circuit panel in *Doe No. 14.* In fairness, however, the defendant had prevailed in the trial court below and likely had not anticipated the panel's analysis in light of the weight of authority supporting affirmance.

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On reconsideration, the panel did not address this point expressly, but did so implicitly in clarifying that its decision rested on the fact that Internet Brands was alleged to have learned of the danger that it failed to warn about offline. Indeed, as amended, *Doe No. 14* should not support a duty to warn claim where the knowledge that forms the basis for a duty to warn was acquired partially online and offline, as underscored by the *Doe No. 14* panel's caveat that plaintiff in *Doe No. 14* had not alleged that defendant's knowledge or duty to warn had been gleaned "from any monitoring of postings on the website . . ." or from failing "to monitor postings at issue."[16]

Nevertheless, courts in other circuits likely would have found the duty to warn preempted because the offline misconduct that led to the lawsuit arose from online content (the plaintiff's profile and third parties communicating with her as a result of the profile)—as underscored by the cases cited in this subsection and in section 37.05[1][C]. Indeed, the Ninth Circuit panel in *Doe No. 14* itself conceded that Internet Brands acted as the "publisher or speaker" of user content by hosting the plaintiff's Model Mayhem profile and that this action could be described as the "but-for" cause of her injuries because "[w]ithout it Flanders and Callum would not have identified her and been able to lure her to their trap."[17] The appellate panel nonetheless expressly rejected a "but for" test for evaluating CDA preemption, explaining that "[p]ublishing activity is a but-for cause of just about everything Model Mayhem is involved in" and "the CDA

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[16]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016). In *Beckman v. Match.com, LLC*, 668 F. App'x 759 (9th Cir. 2016), an unreported memorandum opinion, Circuit Court Judges Paez, Murguia and Hurwitz remanded a case for further consideration based on *Doe No. 14*, where plaintiff's counsel represented at oral argument that if granted leave to amend, plaintiff could allege that Match.com had actual knowledge that plaintiff's attacker had assaulted other women who he had found using Match.com prior to his attack on the plaintiff, because *Doe No. 14* established that, "at the pleading stage, the CDA did not preclude a plaintiff from alleging a state law failure to warn claim against a website owner who had obtained information 'from an outside source about how third parties targeted and lured victims' through that website platform . . . [and] [i]mportantly, Doe's claim did not seek to impose liability for the website owner's role as a 'publisher or speaker' of third party content, for its failure to remove that content, or for its failure to monitor third-party content on its website." *Id.* at 760.

[17]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016).

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does not provide a general immunity against all claims derived from third-party content."[18] Because plaintiff's "duty to warn" claim was premised on information that Internet Brands was alleged to have obtained offline, the *Doe No. 14* panel held the CDA was inapplicable.

Ultimately, *Doe No. 14*—as clarified on reconsideration that the duty to warn in that case was not preempted because it was based on information obtained offline, not online, and not partially online and offline—creates a very narrow exception that is not likely to arise frequently in

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[18]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016); *see also Force v. Facebook, Inc.,* 934 F.3d 53, 82 (2d Cir. 2019) ("The CDA does not mandate 'a "but-for" test that would provide immunity . . . solely because a cause of action would not otherwise have accrued but for the third-party content.' ") (quoting *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019)), *cert. denied*, 140 S. Ct. 2761 (2020); *see also Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092-93 (9th Cir. 2021) (reiterating that CDA analysis in the Ninth Circuit is not premised on a "but-for" test; "That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the Parents seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product. As in Internet Brands, Snap 'acted as the "publisher or speaker" of user content by' transmitting Landen's snap, 'and that action could be described as a "but-for" cause of [the boys'] injuries.' 824 F.3d at 853. This is unsurprising: Snap 'is an internet publishing business. Without publishing user content, it would not exist.' *Id*. But though publishing content is 'a but-for cause of just about everything' Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a 'publisher or speaker.' ").

It is hard to see how *Doe No. 14* did not involve traditional editorial functions—to publish or not publish material or issue a retraction (or in this case, to publish a warning, which is like a retraction). Judge Richard Clifton, writing for himself, Judge Mary Schroeder and Eastern District of New York Judge Brian M. Cogan (sitting by designation), conceded that posting or emailing a warning could be deemed an act of publishing information, but he explained that "section 230(c)(1) bars only liability that treats a website as a publisher or speaker of content provided by somebody else: in the words of the statute, 'information provided by another information content provider.' " *Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) (quoting the statute). By contrast, he argued, "[a]n alleged tort based on a duty that would require . . . a self-produced warning therefore falls outside the scope of section 230(c)(1)." *Id.*

The panel acknowledged that imposing tort liability on intermediaries could have a "chilling effect" on Internet speech, but reasoned that "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Id.* at 852-53.

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litigation.

The Second Circuit emphasized this point as well in rejecting the argument that a mobile dating app provider could be held liable for product liability and other claims based on a duty to warn in *Herrick v. Grindr, LLC*,[19] explaining that "in *Internet Brands*, there was no allegation that the defendant's website transmitted potentially harmful content; the defendant was therefore not an 'intermediary' shielded from liability under § 230."[20]

The narrow scope of *Doe No. 14* was underscored in a later Ninth Circuit case, *Dyroff v. Ultimate Software Group, Inc.*,[21] in which the Ninth Circuit affirmed dismissal of plaintiff's claims premised on a social network owing a duty of care to a user who allegedly died from an overdose of heroin laced with fentanyl, which he had obtained from someone he met on the social network, where the deceased user had joined a group focused on heroin and posted a notice asking if anyone could help "hook him up." The Ninth Circuit held that Ultimate Software Group, the operator of the Experience Project, owed the deceased user no duty of care because the features of its social network challenged by the plaintiff amounted to content-neutral functions that did not create a risk of harm. The court emphasized that Ultimate Software

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[19]*Herrick v. Grindr, LLC*, 765 F. App'x 586 (2d Cir. 2019).

[20]*Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019), *citing Doe No. 14 v. Internet Brands, Inc*., 824 F.3d 846, 852 (9th Cir. 2016). In *Herrick,* the Second Circuit held that Herrick's failure to warn claim was "inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content provided by his ex-boyfriend; accordingly, it is barred by § 230." *Herrick v. Grindr,* 765 F. App'x at 591.

Beyond the CDA, the Second Circuit's opinion in *Herrick v. Grindr* underscores the potential weakness of duty to warn cases premised on software, website or mobile app tools. The panel, ruling in the alternative, held that the plaintiff could not allege causation. It explained:

> [I[nsofar as Herrick faults Grindr for failing to generate its own warning that its software could be used to impersonate and harass others, the claim fails for lack of causation. *See Estrada v. Berkel, Inc*., 14 A.D.3d 529, 530, 789 N.Y.S.2d 172 (2005) (observing that causation is element of failure to warn claim). Since, as the Amended Complaint admits, Herrick deactivated his Grindr account in 2015 (over one year before any impersonation or harassment), any purported failure to warn Herrick when he first downloaded Grindr in 2011 is unrelated to his ex-boyfriend's subsequent use of the app. In sum, there is no basis to infer from the Amended Complaint that Grindr's failure to warn caused Herrick's injury.

Herrick v. Grindr, 765 F. App'x at 591.

[21]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1100-01 (9th Cir. 2019).

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did not create any of the content on Experience Project and merely published user posts without materially contributing to those posts. Plaintiff had alleged that Ultimate Software acted as a publisher by using algorithms that analyzed user posts and recommended user groups that a user might be interested in joining, and automatically notifying users by email when they received messages. The appellate court rejected the argument that the provision of neutral tools was equivalent to content, and in rejecting the argument that the social media provider had a duty to warn, explained that "Ultimate Software did not make Plaintiff's son, Greer, worse off because the functions Plaintiff references—recommendations and notifications—were used regardless of the groups in which a user participated. No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content."[22] Although the appellate panel rested on the premise that the social network owed no duty of care to the plaintiff's son, its analysis is steeped in CDA case law on the use of neutral tools, and the panel cited to a D.C. Circuit CDA opinion in holding that the service owed no duty of care.[23]

Doe No. 14 is also discussed in section 37.05[1][C] and briefly in section 37.05[6].

Duty to warn claims premised on information obtained online from another information content provider would be

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[22]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019). The panel also noted that California law distinguishes between *misfeasance* and *nonfeasance,* emphasizing that what was alleged in *Dyroff* was nonfeasance. It explained:

> Misfeasance is when a defendant makes the plaintiff's position worse while nonfeasance is when a defendant does not help a plaintiff. *Lugtu v. Cal. Highway Patrol,* 26 Cal. 4th 703, 716, 110 Cal. Rptr. 2d 528, 28 P.3d 249 (2001). Misfeasance, unlike nonfeasance, creates an ordinary duty of care where none may have existed before. *See id.*

Dyroff, 934 F.3d 1093 at 1100-01.

[23]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019), *citing Klayman v. Zuckerberg,* 753 F.3d 1354, 1359-60 (D.C. Cir. 2014) ("State law cannot predicate liability for publishing decisions on the mere existence of the very relationship that Congress immunized from suit. In other words, simply invoking the label "special relationship" cannot transform an admittedly waived contract claim into a non-preempted tort action.").

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precluded by the CDA,[24] even under the Ninth Circuit's holding in *Doe No. 14*.

37.05[3][B][iii] Seventh Circuit CDA Analysis

The Seventh Circuit arguably takes a narrower approach than other courts in applying section 230(c)(1), although the difference in emphasis may not affect the outcome of most cases. As of late 2012, all Seventh Circuit opinions analyzing the CDA were written by Judge Easterbrook.[1] In contrast to rulings from some other circuits,[2] Justice Easterbrook has

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[24]*See, e.g.*, *Herrick v. Grindr, LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (rejecting arguments that plaintiff's claims were outside the scope of the CDA based on an alleged duty to warn about risks associated with use of the defendant's mobile app); *McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533, 536-40 (D. Md. 2016) (holding that Amazon.com had immunity under the CDA for its alleged negligent failure to warn, but did not enjoy CDA immunity for negligence and breach of implied warranty claims, in a suit arising out of injuries allegedly sustained when a battery purchased from a third party seller on the Amazon.com platform allegedly exploded and caught fire); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (dismissing with prejudice plaintiff's duty to warn claim against eBay, because the claim was based on publication of sales listings on eBay.com that were created by third parties); *see also Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 153 (3d Cir. 2019) (holding that the CDA barred plaintiff's claims to the extent that plaintiff alleged that Amazon failed to provide or to edit adequate warnings regarding the use of a dog collar purchased by the plaintiff from a seller on Amazon.com's marketplace, because the activity fell within a publisher's editorial function), *vacated on other grounds,* 936 F.3d 182 (3d Cir. 2019) (granting *en banc* review).

[Section 37.05[3][B][iii]]

[1]*See Chicago v. StubHub, Inc.*, 624 F.3d 363 (7th Cir. 2010) (holding the CDA inapplicable in a case brought to force StubHub to collect taxes for user transactions that occurred on its website); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (holding a claim under the Fair Housing Act preempted by section 230(c)(1)); *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (affirming dismissal of a claim by college athletes who were secretly video-recorded in locker rooms, bathrooms and showers, against the companies that provided Internet access and web hosting services to sites that sold copies of these videos; discussing the CDA extensively in *dicta*).

[2]*See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 n.4 (4th Cir. 2009); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (characterizing the CDA as a "grant of immunity [that] applies only if the interactive computer service provider is not also an 'information content

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rejected the argument that the CDA creates an *immunity* from liability.[3]

In *Chicago v. StubHub, Inc.*,[4] Judge Easterbook narrowly construed section 230(c)(1), holding that a suit by the City of Chicago asserting that a platform used by buyers and sellers to resell event tickets was responsible for collecting a special city amusement tax on ticket sales was not preempted by the CDA. In rejecting StubHub's characterization of the CDA as creating an immunity from liability, Judge Easterbrook explained that section 230(c)(1) "limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement.[5] But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.' "[6]

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provider' . . . ."); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006).

[3]*See Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("subsection (c)(1) does not create an 'immunity' of any kind."); *see also Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669–71 (7th Cir. 2008); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

[4]*Chicago v. StubHub, Inc.*, 624 F.3d 363 (7th Cir. 2010).

[5]Federal copyright claims (and in a number of courts outside the Ninth Circuit, common law claims), and obscenity prosecutions, to the extent based on federal law, are excluded from the scope of CDA immunity. *See* 47 U.S.C.A. §§ 230(e)(2) (intellectual property law), 230(e)(1) (obscenity and federal criminal laws); *infra* § 37.05[5] (analyzing exclusions to CDA immunity).

[6]*Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010); *see also Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 638–39 (Ill. App.) (applying Seventh Circuit law in ruling that plaintiff's negligent supervision claim was not preempted by the CDA because section 230(c)(1) "limits who may be called the publisher or speaker of information that appears online . . . [and therefore] could foreclose any liability that depends on deeming the ICS user or provider a publisher or speaker . . . [but] was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve use of the Internet."), *appeal denied*, 979 N.E. 2d 878 (Ill. 2012).

In *Lansing,* the court evaluated a negligent supervision claim brought against a company whose employee allegedly harassed the plaintiff by phone, email and text messages. The district court had allowed the plaintiff to proceed to trial based only on evidence of harassing phone calls. The intermediate appellate court reversed, however, holding that liability in the case was premised on the defendant's own failure to supervise, not the employee's specific electronic messages. The court explained that "[t]he CDA does not bar plaintiff's cause of action simply because defendant's employee used the Internet access provided by

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Chicago v. StubHub was distinguished in a subsequent case brought against StubHub in a different venue as a case where the plaintiff's claim was not premised on republication of third party speech.[7] In *Hill v. StubHub, Inc.*,[8] an appellate court in North Carolina held that StubHub was immune from liability under the CDA in a suit alleging violation of a North Carolina ticket scalping statute because liability was premised on the prices charged by StubHub users, not StubHub itself.

While *Chicago v. StubHub* may be distinguished on the grounds suggested in *Hill v. StubHub* by courts outside the Seventh Circuit, this distinction does not fully explain *Chicago v. StubHub*. In *Chicago v. StubHub*, the City of Chicago sought to impose tax liability on StubHub for user transac-

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defendant as one vehicle to harass and threaten plaintiff." *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 639 (Ill. App.), appeal denied, 979 N.E. 2d 878 (Ill. 2012). In so ruling, the court made clear it was applying Seventh Circuit law and disagreed with cases that applied "blanket immunity to an ICS user or provider from any cause of action involving content posted on or transmitted over the Internet by a third party." *Id.* at 640.

Lansing is perhaps best understood as a case based on an employment relationship that existed in the physical world. If the case for negligent supervision was based entirely on conduct occurring online, a negligent supervision claim would be preempted, at least outside the Seventh Circuit. *See, e.g., Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir.) ("Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role. Section 230 'specifically proscribes liability' in such circumstances."), *cert. denied*, 540 U.S. 877 (2003); *Doe v. MySpace Inc.*, 528 F.3d 413, 420 (5th Cir.) (rejecting the assertion that MySpace could be held liable for failing to implement measures that would have prevented a minor from being contacted by a predator, and stating that these "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."), *cert. denied*, 555 U.S. 1031 (2008); *see generally supra* § 37.01 (collecting cases).

Courts outside the Seventh Circuit nevertheless likely would have found Lansing's claims at least partially preempted—to the extent based on email communications—consistent with the district court's ruling in that case.

[7]*See Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 n.4 (N.C. App. 2012) (distinguishing *Chicago v. StubHub* because "the issue before the Seventh Circuit in that case was the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content.").

[8]727 S.E.2d 550 (N.C. App. 2012).

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tions arising from user sales listings published by StubHub. One could argue that Chicago sought to impose a tax based on StubHub's operation of a marketplace, rather than on the sales listings themselves, although courts in other jurisdictions may well have found Chicago's claims preempted on these facts. Alternatively, it may be that the connection between liability for failing to act and publication may need to be more direct in the Seventh Circuit for CDA immunity to apply.

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,[9] Judge Easterbrook held that the CDA barred a claim against an interactive computer service provider for Fair Housing Act liability for user posts, but the connection between publication and alleged liability arguably was stronger.[10] The difference between *Craigslist* and *Chicago v. StubHub* could be viewed as analogous to the difference between general and proximate causation. Where liability is directly premised on publication of user content, a claim will be deemed preempted in the Seventh Circuit. Where the connection between liability and publication is more attenuated—such as in *Chicago v. StubHub,* where the city sought to collect tax for StubHub's own online activities, even though no tax would have been owing but for StubHub's publication of listings by users—a claim may not be preempted in the Seventh Circuit, even if it would be elsewhere. Judge Easterbrook's view in *Chicago v. StubHub* that "subsection 230(c)(1) does not create an 'immunity' of any kind" plainly reflects a narrower interpretation of the scope of CDA preemption, albeit not necessarily one that may affect the outcome in most cases. Ultimately, *Chicago v. StubHub* is a case that Judge Easterbrook viewed as involving an online ticket vendor—not a marketplace where third parties bought and sold tickets.

With the passage of time, it appears that *Chicago v. StubHub* is limited to its unique facts. It has not been given broader application in the Seventh Circuit or elsewhere.

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[9]519 F.3d 666 (7th Cir. 2008); *infra* § 37.05[3][C].

[10]*See infra* § 37.05[3][C].

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37.05[3][C] Determining When an Interactive Computer Service Provider or User Also May Be Held Liable as An Information Content Provider for *Developing* Content: From *Zeran* to *Roommate.com* and *Accusearch* and Beyond

Many opinions since *Zeran* have considered the extent to which an interactive computer service may edit or assist in the creation of third party content without itself being deemed an information content provider. In the context of defamation claims, courts have generally held that liability may not be imposed on interactive computer service providers or users by virtue of section 230 even if a person or entity pays for the content, retains the right to edit it or even in fact lightly edits it, so long as that person's contribution does not rise to the level of an information content provider.[1] Following *Zeran*, courts outside the Fourth Circuit similarly

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[Section 37.05[3][C]]

[1]*See, e.g., Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (dismissing with prejudice as preempted by the CDA claims for negligence and gross negligence over MySpace's alleged deletion of celebrity imposter user profiles); *Batzel v. Smith*, 333 F.3d 1018, 1022, 1031 (9th Cir. 2003) (rejecting the argument that by minor wording changes and the addition of a "moderator's message" to a third party posting (and by his decision to publish or not publish certain messages) a website owner was jointly responsible as an information content provider); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) ("By deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect."); *Russell v. Implode-Explode Heavy Industries, Inc.*, Civil Action No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013) (distinguishing *Roommate.com* based on its unique facts and granting summary judgment for the defendant on claims for libel and defamation where the defendant "was not completely uninvolved with the allegedly defamatory article, but his involvement was limited to editorial work, which is insufficient to transform IEHI into an 'information content provider' . . . ."). *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding editorial discretion an insufficient basis for conferring liability and finding that America Online's payments to Drudge did not change the fact that America Online was not an information content provider); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (holding that eBay's practice of actively soliciting and then compiling user comments (and ranking sellers with stars or the "Power Seller" designation) did not mean that eBay was acting as an information content provider); *Donato v. Moldow*, 374 N.J. Super. 475, 490, 497–98, 499–500, 865 A.2d 711 (App. Div. 2005) (rejecting the argument that defendant's conduct in "shaping" the content of a discussion forum by removing some but not other mes-

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have held that interactive computer service providers (or users) are under no duty to remove or prevent the posting of allegedly defamatory statements[2] or verify their accuracy.[3]

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sages could be equated with responsibility for developing it); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 465–66, 31 P.3d 37 (Div. 1 2001) (rejecting the argument that Amazon.com lost the exemption provided by the CDA because it had the right to edit and affirmatively claimed valuable licensing rights in third party content); *infra* § 37.05[3][D].

[2]*See, e.g., Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (affirming dismissal of plaintiffs' defamation claim against GoDaddy, as the host for a website where allegedly defamatory third party material was posted, based on GoDaddy's refusal to remove allegedly infringing material from its servers); *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir.) ("Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role. Section 230 'specifically proscribes liability' in such circumstances."), *cert. denied*, 540 U.S. 877 (2003); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir.) (rejecting the assertion that MySpace could be held liable for failing to implement measures that would have prevented a minor from being contacted by a predator, and stating that these "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."), *cert. denied*, 555 U.S. 1031 (2008); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (quoting *Zeran* for the propositions that "[a]t its core, § 230 bars '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.'"); *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 885 (E.D. Wis. 2009) (ruling that pursuant to section 230, Yahoo! was not liable for failing to remove offending search results that appeared when the plaintiff used Yahoo!'s search engine to perform a search using her name, where "Yahoo! did not create the offending content and did not exert any control over the third party websites" allegedly responsible for the offending content), *aff'd on other grounds,* 623 F.3d 436 (7th Cir. 2010); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (holding a claim by the Independent party candidate for governor to compel Ask.com to block from its search engine an allegedly defamatory page that included him in a list of individuals that, when viewed as a snippet, appeared to identify him with the Communist Party, barred by the CDA); *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 401, 405, 163 Cal. Rptr. 3d 919, 920, 924 (4th Dist. 2013) (affirming grant of anti-SLAPP motion in favor of the owner of the Orange County Register based on a claim that the newspaper breached its user agreement with the plaintiff by failing to remove user comments about the plaintiff from its website); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of a defamation claim where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token

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In so holding, courts have considered whether an interactive computer service provider or user's action (or failure to take action) is akin to the traditional role played by an editor or publisher. For similar reasons, the CDA has been found to insulate interactive computer service providers for their decisions to remove or de-monetize user content or remove or suspend social media profiles[4] (or their failure or refusal to

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Jews" next to negative user posts about the plaintiff); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010) (dismissing a defamation claim brought against Yelp! Inc. by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, and dismissing on the merits a deceptive acts or practices claim based on the allegation that for $300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback); *see also Stayart v. Google Inc.*, 783 F. Supp. 2d 1055 (E.D. Wis. 2011) (dismissing claims against Google similar to the ones asserted against Yahoo! in the earlier case noted above, where the court observed that the plaintiff had alleged that Google had wrongfully used her name for advertising purposes to circumvent the CDA since section 230 "effectively immunizes search engines like Yahoo and Google from claims that they displayed information created by third parties which presents an individual in an unfavorable light."), *aff'd on other grounds*, 710 F.3d 719 (7th Cir. 2013) (affirming dismissal of plaintiff's misappropriation claims arising out of the alleged use of her name in conjunction with searches for an erectile dysfunction drug because plaintiff made the search request an issue of public interest by suing Yahoo! over it in 2010 and therefore Google was shielded from liability by the incidental use exception for claims that its algorithms generated the suggestion to search for the drug Levitra when plaintiff's name was input into its search engine or displayed sponsored link advertisements for the drug), *cert. denied*, 571 U.S. 825 (2013).

[3]*See Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Tex. 2006); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App. Beaumont 2010).

[4]*See, e.g.*, *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-99 (9th Cir. 2020) (affirming dismissal of plaintiff's state law claims seeking to impose liability on Facebook for "allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor" as barred by the CDA, and rejecting arguments that Facebook's monetization of content transformed it into an information content provider or that extending § 230(c)(1) immunity would render § 230(c)(2)(A) mere surplusage), *cert. denied*, 141 S. Ct. 1067 (2021); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (affirming dismissal with prejudice of plaintiff's Civil Rights claim, based on Facebook allegedly blocking plaintiff's content in India, where plaintiff sought to "hold Facebook liable as a publisher for hosting, and later blocking, SFJ's online content."), *aff'g,* 144 F. Supp. 3d 1088, 1092-96 (N.D. Cal. 2015); *Riggs v. MySpace, Inc.,* 444 F. App'x 986, 987 (9th Cir. 2011) (affirming dismissal of negligence and gross negligence claims, holding that

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section 230(c)(1) immunized MySpace for its decision "to delete [plaintiff's] user profiles on its social networking website yet not delete other profiles [plaintiff] alleged were created by celebrity imposters."); *Brock v. Zuckerberg,* 20-cv-7513 (LJL), 2021 WL 2650070, at *4-5 (S.D.N.Y. June 25, 2021) (dismissing plaintiff's N.Y. state law claims against Facebook for allegedly removing and blocking content); *Daniels v. Alphabet Inc*., Case No. 20-cv-04687-VKD, 2021 WL 1222166, at *11-13 (N.D. Cal. Mar. 31, 2021) (dismissing claims for breach of the implied covenant of good faith and fair dealing, conversion, unjust enrichment, money had and received, and unfair competition, as preempted by section 230(c)(1), and dismissing plaintiff's breach of contract claim under section 230(c)(2), in a suit brought by MAGA rapper Young Pharaoh over videos he uploaded to YouTube, which were removed for violating YouTube's community guidelines or policy on harassment and bullying, and for allegedly shadowbanning him and preventing him from monetizing videos on his YouTube channel); *Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *1, *3-4 (D. Md. Oct. 23, 2020) (dismissing, with prejudice, eleven civil claims arising out of the permanent suspension of pro se plaintiff's Twitter account for "violation of Twitter's policies against hateful conduct"); *Zimmerman v. Facebook, Inc.*, Case No. 19-cv-04591-VC, 2020 WL 5877863, at *1 (N.D. Cal. Oct. 2, 2020) (dismissing claims without leave to amend, holding that "claims relating to the defendants' decision to block their Facebook profiles are barred by the Communications Decency Act . . ."), *appeal dismissed,* No. 20-17054, 2020 WL 9257959 (9th Cir. Nov. 30, 2020); *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209 (N.D. Cal. Aug. 14, 2020) (dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims and claim for declaratory relief, as barred by section 230(c)(1) of the CDA, because they arose out of defendant's removal of fitness and health videos containing information about unregulated substances that had not yet been approved by the FDA); *Lewis v. Google LLC*, 461 F. Supp. 3d 938, 952-55 (N.D. Cal. 2020) (dismissing claims brought by political commentator Bob Lewis alleging that YouTube and Google wrongfully demonetized, censored, restricted and removed his videos, holding that defendants' "alleged demonetization of Plaintiff's postings . . . constitutes a publishing function under § 230. . . . Deciding whether to limit advertising on a posting is not different in nature from removing a post altogether. Both fall under the rubric of publishing activities."), *aff'd on other grounds,* 851 F. App'x 723 (9th Cir. 2021); *Wilson v. Twitter, Inc.*, Case No. 3:20-cv-00054, 2020 WL 3410349, at *10-12 (S.D.W. Va. May 1, 2020) (recommending dismissal, with prejudice, of plaintiff's claims under Title II of the CRA arising out of allegedly unlawful termination of his Twitter account), *report and recommendation adopted*, 2020 WL 3256820 (S.D.W. Va. June 16, 2020); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 605 (S.D.N.Y. 2020) (dismissing plaintiff's claims under California and New York law, arising out of Vimeo's deletion or removal of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021); *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's non-constitutional

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federal and state claims, including for damages under the California Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *King v. Facebook, Inc.*, Case No. 19-cv-01987-WHO, 2019 WL 4221768, at *3-5 (N.D. Cal. Sept. 15, 2019) (dismissing plaintiff's claims for removing social media posts that Facebook alleged violated its Terms of Service agreement, but allowing leave to amend to expressly allege a claim for retaliatory breach of the ToS based on the alleged treatment of his speech that was critical of Facebook, if King was able to do so); *Federal Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1304-08 (N.D. Cal. 2019) (dismissing without prejudice, as precluded by the CDA, the claims brought under Title II of the U.S. Civil Rights Act of 1964 and California Unruh Civil Rights Act, among others, by a Russian news site whose Facebook account was terminated in early 2018 after it was determined by Facebook that the account was controlled by the Russian government's Internet Research Agency, which according to a U.S. intelligence community report had created 470 inauthentic accounts on Facebook that were used to influence the outcome of the 2016 Presidential election); *Dipp-Paz v. Facebook*, 18-CV-9037 (LLS), 2019 WL 3205842, at *3 (S.D.N.Y. July 12, 2019) (holding that plaintiff's claim, arising from suspension of his Facebook account, was barred by the CDA); *Brittain v. Twitter, Inc.*, No. 19-CV-00114-YGR, 2019 WL 2423375 (N.D. Cal. June 10, 2019) (dismissing with prejudice plaintiffs' claims for (1) violation of the First Amendment; (2) violation of federal election law; (3) breach of contract; (4) conversion, (5) negligent infliction of emotional distress; (6) tortious interference; and (7) promissory estoppel, alleging that Twitter improperly suspended four accounts linked to Craig Brittain and his U.S. Senate campaign); *Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing with prejudice plaintiff's claim under California's Unlawful Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, to the extent it relied on allegations that Facebook removed plaintiff's posts or restricted his ability to use the Facebook platform); *Dehen v. Does 1-100*, Case No. 17cv198-LAB (WCG), 2018 WL 4502336, at *3-4 (S.D. Cal. Sept. 18, 2018) (dismissing plaintiff's claims arising out of Twitter's alleged delay in taking down offending content, once Dehen notified it of the alleged impersonation); *Mezey v. Twitter, Inc.*, No. 18-CV-21069 (KMM), 2018 WL 5306769, at *2 (S.D. Fla. July 19, 2018) (dismissing plaintiff's lawsuit claiming that Twitter unlawfully suspended plaintiff's Twitter account, as precluded by section 230(c)(1) immunity); *Lancaster v. Alphabet Inc.*, Case No. 15-cv-05299-HSG, 2016 WL 3648608 (N.D. Cal. July 8, 2016) (dismissing plaintiff's *pro se* complaint arising out of the defendants' alleged removal of videos from YouTube, as preempted by the CDA).

In some instances, plaintiffs whose content was removed have been able to plead around section 230 immunity by alleging contractual or semi-contractual causes of action based on an interactive computer service provider's Terms of Service (although pleading development to negate a defense based on section 230(c)(1) may not itself be sufficient to state a claim). *See, e.g.*, *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-

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08260-HSG, 2020 WL 4732209 (N.D. Cal. Aug. 14, 2020) (dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims and claim for declaratory relief, as barred by section 230(c)(1) of the CDA, because they arose out of defendant's removal of fitness and health videos containing information about unregulated substances that had not yet been approved by the FDA, but dismissing plaintiff's claim for breach of the implied covenant of good faith and fair dealing for failure to state a claim, not CDA preemption, because plaintiff alleged bad faith to negate a CDA defense under section 230(c)(2) and, with respect to section 230(c)(1), plaintiff's theory, according to the court, was not based on its editorial decision to block the video but instead was "premised on Defendant's interference with the parties' agreement (*i.e.*, the Terms of Use and Community Guidelines)."). Other times, the CDA defense may not be apparent from the face of a complaint (or facts that a court may take judicial notice of) and therefore may require resolution at a later stage of the case. *See, e.g.*, *Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 422, 448-53, 242 A.3d 814, 819-23 (2020) (reversing dismissal of plaintiff's breach of contract claim, alleging that Facebook had violated specific promises made in its Terms of Use by deleting plaintiff's Instagram account, where the CDA defense was not apparent from the face of plaintiff's small claims court complaint and the court was not inclined to "prematurely" address the merits of the dispute, but holding nonetheless that, "[t]o the extent that Teatotaller's claim is premised upon Facebook's decision to remove its 'Instagram account, including all the content, data, and followers that had been accumulated through paid and unpaid activity,' its claim may require the court to treat Facebook as a publisher."); *infra* § 37.05[7] (analyzing the procedural posture of a case when the CDA defense may be raised).

On the other hand, numerous courts have found breach of contract claims preempted by section 230(c)(1). *See, e.g.*, *Clarks v. Private Money Goldmine*, Case No.: GJH-19-1014, 2020 WL 949946, at *7-8 (D. Md. Feb. 26, 2020) (dismissing plaintiff's breach of contract claim against REI Network, LP, which operated www.privatemoneygoldmine.com, an online subscription service that connected prospective private money borrowers and lenders, FM 41, Inc., a general partner of REI, and John Douglas Smith, FM 41's president, as barred by both the statute of limitations and the CDA, in a suit arising out of an allegedly fraudulent preliminary payment scheme, where defendants hosted a platform that allowed prospective lenders to post their information online and interact with prospective borrowers, who paid the site a subscription fee to join); *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's breach of contract and breach of the covenant of good faith and fair dealing claims arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *Jurin v. Google Inc.*, 768 F. Supp. 2d 1064 (E.D. Cal. 2011) (dismissing without leave to amend breach of contract and breach of the duty of good faith and fair dealing claims premised on an alleged failure by Google to adhere to its AdWords policy); Goddard v. Google, Inc., 640 F. Supp. 2d 1193, 1199-1201 (N.D. Cal. 2009) (dismissing plaintiff's complaint with prejudice); *Goddard v. Google, Inc.*, No. C 08-2738 (PVT), 2008

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do so[5]).

WL 5245490 (N.D. Cal. Dec. 17, 2008) (dismissing plaintiff's claim with leave to amend); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 24-34, 274 Cal. Rptr. 3d 360, 368-77 (1st Dist. 2021) (affirming the lower court's demurrer without leave to amend, dismissing plaintiff's breach of contract claim arising from plaintiff's permanent suspension from Twitter for violating its Terms of Service); *Cross v. Facebook, Inc*., 14 Cal. App. 5th 190, 206-07, 222 Cal. Rptr. 3d 250, 263-64 (1st Dist. 2017) (affirming the trial court's order granting Facebook's anti-SLAPP motion on claims for breach of contract, negligent misrepresentation, and negligent interference—based on Facebook's alleged failure to remove pages critical of the plaintiff—which were held to be preempted by the CDA); *Hupp v. Freedom Communications, Inc*., 221 Cal. App. 4th 398, 401, 405, 163 Cal. Rptr. 3d 919, 920, 924 (4th Dist. 2013) (affirming grant of anti-SLAPP motion in favor of the owner of the Orange County Register based on a claim that the newspaper breached its user agreement with the plaintiff by failing to remove user comments about the plaintiff from its website); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003-04 (Super. Ct. 2000); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); *Schneider v. Amazon.com, Inc*., 108 Wash. App. 454, 31 P.3d 37 (Div. 1 2001). In *Schneider*, the court explained that "assuming Schneider could prove the existence of an enforceable promise to remove the comments, Schneider's claim is based entirely on the purported breach—failure to remove the posting—which is an exercise of editorial discretion. This is the activity the statute seeks to protect." 108 Wash. App. at 465, 31 P.3d at 41-42.

[5]*See, e.g.*, *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 26-28 (2d Cir. 2015) (affirming dismissal under the CDA of plaintiffs' defamation claim against GoDaddy, as the host for a website where allegedly defamatory third party material was posted, based on its refusal to remove the material); *Green v. America Online (AOL),* 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003); *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1105 n.11 (9th Cir. 2009); *Bennett v. Google, LLC*, 882 F.3d 1163, 1166-68 (D.C. Cir. 2018) (affirming dismissal of plaintiff's claims against Google for defamation, tortious interference with a business relationship, and intentional infliction of emotional distress, premised on Google's refusal to remove a user's blog post, in alleged violation of its "Blogger Content Policy," as preempted by section 2301(c)(1); quoting an earlier case for the proposition that "the very essence of publishing is making the decision whether to print or retract a given piece of content."); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4-5 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's right of publicity claim under Cal. Civ. Code § 3344, unfair competition, false light invasion of privacy, and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter, which had removed the images in response to a takedown notice, had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website); *Coffee v. Google, LLC*, Case No. 20-cv-03901-BLF, 2021 WL 493387, at *6-8 (N.D. Cal. Feb. 10, 2021) (dismissing claims for alleged violations of California's unfair competition law, California's Consumers Legal Remedies Act, and unjust enrichment, as barred by the CDA, in a putative class action suit

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As explained by the Ninth Circuit in *Batzel v. Smith*,[6] interactive computer service providers and users who "take some affirmative steps to edit the material posted" are protected by section 230, which precludes liability "for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message."[7] A "publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it."[8] The CDA insulates both "affirmative acts of publication [and] . . . the refusal to remove . . . material."[9] "The 'development of information' therefore means something more substantial than merely editing portions of an email and selecting material for publication."[10]

The term *information content provider* is broadly defined to mean "any person or entity that is responsible, *in whole or part*, for the creation or development of information provided through the Internet or any other interactive com-

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seeking to hold Google Play liable for offering video games on its app store that allegedly allowed users to purchase Loot Boxes, which plaintiffs alleged constituted illegal "slot machines or devices" under California law; "an order requiring Google to screen apps offered through its Google Play store and exclude those containing Loot Boxes . . . [is] conduct that is squarely within the role of a publisher under *Roommates*. Accordingly, it appears from the face of the complaint that Plaintiffs seek to treat Google as the publisher of the video game apps in question."); *Ripple Labs Inc. v. YouTube LLC*, Case No. 20-cv-02747-LB, 2020 WL 6822891, at *6-7 (N.D. Cal. Nov. 20, 2020) (dismissing unfair competition and right of publicity claims arising out of YouTube's alleged failure to remove videos of fraudulent impersonations of Ripple, which were used by scammers to perpetrate a cryptocurrency scam that caused XRP cryptocurrency owners to deposit XRP into the scammers' wallet, and which allegedly violated Ripple's CEO's rights of publicity); *Mmubango v. Google, Inc*., CIV. A. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013) (dismissing with prejudice plaintiff's claims for defamation and negligence arising out of Google's alleged refusal to remove from its search engine links to negative statements about the plaintiff that were posted on wikiscams.com, an unrelated website); *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261, at *8 (D.N.J. July 31, 2014) (holding that the refusal to remove content was immunized by the CDA), *aff'd*, 612 F. App'x 90, 92 (3d Cir. 2015).

[6] *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

[7] *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

[8] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

[9] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 n.11 (9th Cir. 2009).

[10] *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

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puter service."[11] On the other hand, section 230(c)(1) also expansively provides that interactive computer service providers and users potentially may avoid liability literally for "*any* information provided by another information content provider,"[12] where at least part of the content did not originate with the user or provider. While the issue is not entirely free from doubt, the Ninth and Tenth Circuits have made clear that an interactive computer service may be deemed an information content provider for some material or functions on its site or service, but not others. "Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content."[13]

In *Ben Ezra, Weinstein & Co. v. America Online, Inc.*,[14] the Tenth Circuit affirmed a New Mexico district court's entry of summary judgment in favor of America Online in a defamation suit arising from a claim that the plaintiff, a designer and manufacturer of corporate finance software, had been defamed by inaccurate information published on AOL by two independent third parties—S&P ComStock, Inc., a stock quote provider, and Townsend Analytics, Ltd., a software provider designated by ComStock to provide this information to AOL.

The plaintiff in *Ben Ezra, Weinstein & Co.* had argued that AOL was both an interactive computer service *and* an information content provider to the extent it participated in the creation and development of stock quote information.[15] Although AOL conceded that "in an appropriate situation, an interactive computer service could also act as an informa-

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[11] 47 U.S.C.A. § 230(f)(3) (emphasis added).

[12] 47 U.S.C.A. § 230(c)(1) (emphasis added).

[13] *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008) (en banc); *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009) (explaining that "there may be several information content providers with respect to a single item of information (each being 'responsible,' at least 'in part,' for its 'creation or development')"; *quoting* 47 U.S.C.A. § 230(f)(3)). In its discussion on this point, the Ninth Circuit in *Roommate.com* used the terms "service provider" and "content provider" in place of *interactive computer service* and *information content provider*.

[14] *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

[15] *See Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 984 (10th Cir. 2000)..

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tion content provider by participating in the creation or development of information, and thus not qualify for § 230 immunity,"[16] the appellate court agreed with AOL that the plaintiff had not demonstrated that AOL "worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that Defendant became an information content provider."[17] Circuit Judge Baldock wrote that

> while defendant did communicate with ComStock and Townsend each time errors in the stock information came to its attention, such communications simply do not constitute the development or creation of the stock quotation information. Rather, the evidence plaintiff presented indicated that the communications consisted of emails from defendant requesting ComStock correct the allegedly inaccurate information.[18]

The Tenth Circuit held that section 230 had been enacted "to forbid the imposition of publisher liability on a service provider [merely] for the exercise of its editorial and self-regulatory functions."[19] The panel concluded that "[b]y deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect."[20]

In *Universal Communication Systems, Inc. v. Lycos*,[21] the First Circuit affirmed the dismissal of a defamation claim under subpart (c)(1) over the plaintiff's objection that Lycos had "rendered culpable assistance" in creating the allegedly defamatory posts "through the construct and operation" of its website, including a feature that allowed a single individual to post under multiple screen names.[22] The court characterized these features as "standard," concluding that imposing liability on this basis would "eviscerate Section 230

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[16] *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 n.4 (10th Cir. 2000).

[17] *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 (10th Cir. 2000).

[18] *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 (10th Cir. 2000).

[19] *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

[20] *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

[21] *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

[22] *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007).

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immunity."[23] The First Circuit also ruled that Lycos's immunity was not compromised by the fact that it regularly took legal action to protect the anonymity of its subscribers.[24]

The Ninth Circuit has decided several CDA cases involving social networking sites, including two early ones in which social networks had been sued over material that appeared in user profiles.[25] In *Carafano v. Metrosplash.com, Inc.*,[26] the Ninth Circuit ruled that the exemption applies even where an interactive computer service "lightly" edits content before it is made available online. In *Carafano*, the defendants operated matchmaker.com, an online dating service, which provided users with sixty-two multiple-choice questions and a series of essay questions tailored for each of its seventy-two virtual communities, which were used to create user profiles. However, five years later, in *Fair Housing Council v. Roommate.com, LLC*,[27] the Ninth Circuit, in an en banc decision, found that an interactive computer service acted in part as an information content provider (along with its users) with respect to multiple choice questions it wrote for users, whose answers were automatically posted to their profiles. By contrast, the Ninth Circuit concluded that the provider was not responsible for narrative text written by users on its site.

In *Fair Housing Council v. Roommate.com, LLC*, Roommate.com, the company that operated the

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[23]*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007).

[24]*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 421 (1st Cir. 2007). With respect to this last point, the court wrote that "[a]ctions taken to protect subscribers' legal rights . . . cannot be construed as inducement of unlawful activity, and UCS does not allege that Lycos lacked a reasonable basis for its legal activities." *Id.*

[25]The Ninth Circuit subsequently decided another case involving a social media profile in an unreported decision. *See Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (dismissing with prejudice as preempted by the CDA claims for negligence and gross negligence over MySpace's alleged deletion of celebrity imposter user profiles). Two other cases involved dating sites sued over an alleged duty to warn. *See Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016); *Beckman v. Match.com, LLC*, 668 F. App'x 759 (9th Cir. 2016).

[26]*Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119 (9th Cir. 2003).

[27]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

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Roommates.com website,[28] was sued by the Fair Housing Councils of the San Fernando Valley and San Diego, alleging violations of the Fair Housing Act[29] and California housing discrimination laws.[30] Roommate.com was an Internet site that allowed users to create profiles in order to match people renting out spare rooms with people looking for a place to live. Like many social networks, Roommate.com required its users to create a profile in order to search listings or post one. In addition to basic information such as name, location and email address, Roommate.com required its subscribers to disclose their sex, sexual orientation and whether the user would bring children to a household. Each subscriber also was required to describe their preference in roommates with respect to the same criteria. This information was provided by pull down menus that forced users to select from among the options provided, which were used by Roommate.com to automatically generate user profile pages. However, users were also encouraged to describe themselves and their desired roommate in an open-ended essay posted under "Additional Comments."

Chief Judge Kozinski, writing for the majority,[31] ruled that Roommate.com was protected in part by the CDA but potentially liable as an information content provider for some

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[28]The name of the defendant, Roommate.com, LLC, was different from the website it operated, Roommates.com. *See Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1161 n.2 (9th Cir. 2008) (en banc). As readers will note, some courts quoted in this chapter mistakenly cite the case by the name of the website, Roommates.com, rather than its proper case name. Adding to the confusion, Westlaw has recently changed the spelling of the case to *Roommates.com*, to correspond to website name, but that is a mistake. The defendant in that case was Roommate.com, LLC.

[29]42 U.S.C.A. §§ 3601 *et seq*.

[30]In a later decision, the Ninth Circuit ultimately concluded that Roommate.com was not liable for violating the Fair Housing Act or the California Fair Employment and Housing Act. *See Fair Housing Council v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) (vacating the entry of judgment for the plaintiff and remanding for the entry of judgment for the defendant).

[31]The majority opinion, which is almost twenty pages long with forty separate footnotes, includes a great deal of *dicta* intended to rebuff the arguments of the three dissenting judges, as well as to clarify the contours of the court's holding. In the majority opinion, Chief Judge Kozinski also recasts two earlier Ninth Circuit opinions in light of the *Roommate.com* ruling and offers his interpretation of major CDA opinions from other circuits.

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aspects of its site. He held that because Roommate.com created the questions and choice of answers, forced users to provide answers, and designed its website registration process around them, it was an information content provider for those questions and could claim no immunity for posting them on its site or requiring subscribers to answer them as a condition of service.[32] He explained, "[t]he CDA does not grant immunity for inducing third parties to express illegal preferences."[33]

With respect to the actual profiles, Judge Kozinski held that the fact that users were information content providers did not preclude Roommate.com from also being liable as an information content provider. By creating the questions and answers and forcing users to select from among the provided answers, Roommate.com helped develop the profiles in his view and therefore was "responsible . . . in part . . . for the creation or development of information provided through the Internet or any other interactive computer service" within the meaning of section 230(f)(3). He explained:

> By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not "creat[e] or develop" the information "in whole or in part." 47 U.S.C.A. § 230(f)(3).[34]

The majority held that Roommate.com likewise was not

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[32]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1164, 1170 n.26 (9th Cir. 2008) (*en banc*). In so ruling, Judge Kozinski clarified that he was not considering whether Roommate.com in fact could be held liable for these posts, or whether it might have a First Amendment defense; merely, whether section 230(c)(1) immunity applied.

[33]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (*en banc*). The content at issue in *Roommate.com* ultimately was held not to be actionable. *See Fair Housing Council v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) (vacating the entry of judgment for the plaintiff and remanding for the entry of judgment for the defendant).

For purposes of CDA analysis in the Ninth Circuit under *Roommate.com*, however, the operative question is whether the *allegedly* illegal content was developed by the interactive computer service provider or user that published it or is entirely attributable to a third party (another *information content provider*).

[34]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008) (*en banc*). Judge Kozinski noted that section 230(c) uses both the terms *create* and *develop* as separate bases for loss of immunity.

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entitled to the CDA exemption for the operation of its search feature, which filtered listings, or for its email notification system, which directed emails to subscribers according to the preferences and personal characteristics that Roommate.com itself developed (and forced subscribers to disclose). Judge Kozinski explained, "[i]f Roommate has no immunity for asking the discriminatory questions, as we concluded above, . . . it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing."[35] By contrast, he explained in *dicta*, "generic search engines such as Google, Yahoo! and MSN Live Search" would not lose their immunity because they provide "neutral tools."[36]

See id. at 1168. He defined *development* for purposes of section 230(f)(3)'s definition of information content provider, "as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness." *Id.* at 1167–68. He also cited Wikipedia approvingly for the definition of *development* as "the process of researching, writing, gathering, organizing and editing information for publication on web sites." *Id.* at 1168.

[35]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (*en banc*).

[36]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167-69 (9th Cir. 2008) (*en banc*). He explained that Roommate.com's search function was designed to steer users based on discriminatory criteria. *Id.* at 1167. By contrast:

> If an individual uses an ordinary search engine to query for a "white roommate," the search engine has not contributed to any unlawfulness in the individual's conduct; providing neutral tools to carry out what may be unlawful or illicit searches does not amount to "development" for purposes of the immunity exception. A dating website that requires users to enter their sex, race, religion and marital status through drop-down menu, and that provides means for users to search along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality; this immunity is retained even if the website is sued for libel based on these characteristics because the website would not have contributed materially to any alleged defamation. Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of user-defined criteria might help some users exclude email from other users of a particular race or sex. However, that website would be immune so long as it does not require the use of discriminatory criteria. A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word "not" from a user's message reading "[Name] did *not* steal the artwork" in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.

Id. at 1169 (emphasis in original). As a further explanation, Chief Judge Kozinski clarified that these are all examples where a business would be

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The majority held that Roommate.com was not an information content provider and therefore not liable for user comments made in the "Additional Comments" box, which was a blank area where users could type essays about themselves. Roommate.com published comments as written and did not provide any specific guidance on what should be included. The fact that Roommate.com encouraged subscribers to post *something* in response to the prompt was not enough to make it a *developer* of the information.[37]

The majority further rejected the argument that by encouraging some allegedly discriminatory preferences in its user form, Roommate.com encouraged further discriminatory preferences when it gave subscribers the opportunity to describe themselves in the "Additional Comments" section. The court held that "[s]uch weak encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter."[38]

Judge Kozinski cautioned:

> Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by 10,000 duck-bites, fighting off claims that they promoted or encouraged or at least tacitly assented to the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality—as it is clear here with respect to Roommate's questions, answers and the resulting profile pages—immunity will be lost. But in cases of enhancement by implication or development by inference—such as with respect to the "Additional Comments" here—section 230 must be interpreted to protect websites not

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held liable for its own conduct, not vicariously for third party conduct. *See id.* at 1169 n.24.

[37]*See Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1173-75 (9th Cir. 2008) (*en banc*).

[38]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*). To further clarify the distinction drawn, Judge Kozinski offered that if Roommate.com had filtered for obscenity or spam it would not make any difference because "minor editing and selection . . ." would not change the outcome. *Id.* at 1173 n.36. Similarly, Roommate.com would not be deemed the developer of discriminatory content "if it provided a free-text search that enabled users to find key words in the 'Additional Comments' of others, even if users utilized it to search for discriminatory keywords." *Id.* at 1174 n.37.

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> merely from ultimate liability, but from having to fight costly and protracted legal battles.[39]

To further elaborate on the contours of the majority holding, Judge Kozinski recast earlier Ninth Circuit cases and explained the significance of the major Good Samaritan decisions from other circuits. He emphasized that the *Roommate.com* opinion was consistent with *Batzel*, which held that an editor's minor changes to the spelling, grammar and length of third party content do not strip an interactive computer service or user from liability. "None of those changes contributed to the libelousness of the message, so they do not add up to 'development' " within the meaning of section 230(f)(3).[40] Judge Kozinski conceded that the dissent at least scored a debater's point in noting that the same activity might amount to *development* or not, under the majority's analysis depending on whether it contributed materially to the illegality of the content.[41] He responded, however, that the court was "not defining 'development' for all purposes; we are defining the term only for purposes of determining whether the defendant is entitled to immunity for a particular act."[42] Judge Kozinski further explained that the definition "does not depend on finding substantive liability, but merely requires analyzing the context in which a claim is brought. A finding that a defendant is not immune is quite different from finding liability . . . ."[43] In short, under the Ninth Circuit's conception of *development* depends

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[39]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174-75 (9th Cir. 2008) (*en banc*).

[40]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (*en banc*). Judge Kozinski explained:

> [I]f the tipster tendered the material for posting online, then the editor's job was, essentially, to determine whether or not to prevent its posting—precisely the kind of activity for which section 230 was means to provide immunity. And any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230 . . . . But if the editor publishes material that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination.

Id. at 1170–71.

[41]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 n.30 (9th Cir. 2008) (*en banc*).

[42]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 n.30 (9th Cir. 2008) (*en banc*).

[43]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 n.30 (9th Cir. 2008) (*en banc*).

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on the particular claim made, which in turn determines what content or parts of a site or service are at issue (and then, whether the defendant *developed* those parts).

Carafano v. Metrosplash.com, Inc.,[44] Judge Kozinski explained, was decided correctly but the opinion included language that was unduly broad. In that case, an unknown imposter impersonating actress Christianne Carafano created a profile for her on the defendant's online dating site. When she received threatening calls, she called the dating site to complain but the profile was not immediately removed. He wrote that the Ninth Circuit correctly ruled that the website was immune, but incorrectly suggested that it could *never* have been liable because "no [dating] profile has any comment until a user generated activity creates it."[45] Judge Kozinski explained that "even if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as the developer. Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for 'develop[ing]' unlawful content 'in whole or in part.' "[46] Likewise, he disavowed "any suggestion that *Carafano* holds an information content provider *automatically* immune so long as the content originated with another information content provider."[47] On the other hand, "[t]he mere fact that an interactive computer service 'classifies user characteristics . . . does not transform [it] into a 'developer' or the 'underlying misfortune.' "[48] He emphasized that the allegedly libelous content in that case—

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[44]*Carafano v. Metrosplash.com. Inc.,* 339 F.3d 1119 (9th Cir. 2003).

[45]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (*en banc*), *quoting Carafano*, 339 F.3d 1119, 1124 (9th Cir. 2003).

[46]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (*en banc*).

[47]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 n.31 (9th Cir. 2008) (*en banc*).

[48]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1172 n.30 (9th Cir. 2008) (*en banc*). According to the court:

> The salient fact in *Carafano* was that the website's classifications of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners depending on their voluntary inputs. By sharp contrast, Roommate's website is designed to force subscribers to divulge protected characteristics and discriminatory preferences, and to match those who have rooms with those who

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"the false implication that Carafano was unchaste—was created and developed entirely by the malevolent user, without prompting or help from the website operator."[49] Judge Kozinski explained:

> To be sure, the website provided neutral tools, which the anonymous dastard used to publish his libel, but the website did absolutely nothing to encourage the posting of defamatory content—indeed, the . . . posting was contrary to the website's express policies. The claim against the website was, in effect, that it failed to review each user-created profile to ensure that it wasn't defamatory. This is precisely the kind of activity for which Congress intended to grant absolution with the passage of section 230.[50]

Universal Communication Systems, Inc. v. Lycos,[51] in Judge Kozinski's view, involved defamatory comments made without any prompting or encouragement from the defendant. Likewise, in *Green v. America Online*[52] there was no suggestion that AOL solicited the content, encouraged users to post harmful content or otherwise had any involvement whatsoever with the harmful content, other than through providing 'chat rooms' for general use."[53] With respect to *Ben Ezra, Weinstein & Co. v. America Online, Inc.*,[54] Judge Kozinski wrote that "[w]hile AOL undoubtedly participated in the decision to make stock quotations available to members, it did not cause the errors in the stock data, nor did it encourage or solicit otherwise to provide inaccurate data. AOL was immune because 'Plaintiff could not identify any evidence indicating Defendant [AOL]

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are looking for rooms based on the criteria that appear to be prohibited by the FHA.

Id. at 1172.

[49]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (*en banc*).

[50]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171–72 (9th Cir. 2008) (*en banc*).

[51]*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

[52]*Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003).

[53]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (*en banc*). Despite the language used by Chief Judge Kozinski in footnote 33, he makes clear in his opinion that mere solicitation or encouragement, without more, would not be sufficient to strip an interactive computer service of CDA protection.

[54]*Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

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developed or created the stock quotation information."[55] Finally, with respect to *Zeran v. America Online, Inc.*,[56] Judge Kozinski wrote, "[a]gain, AOL did not solicit the harassing content, did not encourage others to post it, and had nothing to do with its creation other than through AOL's role as the provider of a generic message board for general discussions."[57]

The dissent criticized the majority for focusing on ultimate liability in evaluating whether the exemption applied.[58] Judge Kozinski countered that under *Roommate.com* businesses would be "held liable only for their own conduct; there is no vicarious liability for the misconduct of their customers."[59] He emphasized that Roommate.com was not being sued for removing some harmful messages while failing to remove others—which was the type of activity under *Stratton Oakmont* that section 230 was intended to preempt—rather, it was being sued for its own actions. While it is true that a court must analyze very specifically the partic-

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[55]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (*en banc*), *quoting Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 985 n.5 (10th Cir. 2000).

[56]*Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[57]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (*en banc*).

[58]Judge McKeown, joined by Judges Rymer and Bea, concurred with the majority to the extent it found CDA immunity but dissented from the result holding Roommate.com not exempt for claims arising out of those portions of user profiles generated by pull down menu questions written by the defendants and a search engine that focused on the same criteria. They wrote that "[t]he majority's unprecedented expansion of liability for Internet service providers threatens to chill the robust development of the Internet that Congress envisioned. By exposing every interactive service provider to liability for sorting, searching, and utilizing the all too familiar drop-down menus, . . . providers are left scratching their heads and wondering where immunity ends and liability begins." *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1176 (9th Cir. 2008) (McKeown, C.J. concurring in part dissenting in part). The dissent criticized the majority for conflating the standards under subparts (c)(1) and (c)(2)(A) and for offering "no bright lines . . . . The result in this case is driven by the distaste for housing discrimination, a laudable endgame" but not something that allows courts to make policy decisions best left to Congress. *Id.* at 1177. The dissent was also critical of the majority "rewrit-[ing] the statute with its definition of 'information content provider," and labeling "the search function 'information development'. . . ." *Id.*

[59]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1169 n.24 (9th Cir. 2008) (*en banc*).

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ular content or features challenged to evaluate immunity under the Ninth Circuit's *Roommate.com* test, finding that the exemption does not apply is not tantamount to a finding of liability. Nonetheless, with the en banc decision in *Roommate.com*, the Ninth Circuit replaced the bright line test applied in *Carafano* with a fact-specific analysis that in some instances may require extensive discovery. The end result is a test that could be more difficult to apply in particular cases.

The dissent would have held that Roommate.com was not an information content provider because: (1) providing a drop-down menu does not constitute 'creating' or 'developing' information; and (2) the structure and text of the statute make plain that Congress intended to immunize Roommate's sorting, displaying, and transmitting . . . third-party content."[60]

In contrast to the majority's opinion in *Roommate.com*, a Seventh Circuit panel, in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,[61] upheld summary judgment for Craigslist in a case that, like *Roommate.com*, had been brought under section 804(a) of the federal Fair Housing Act. In that case, a public interest group had sued Craigslist, which provided an electronic meeting place for those who want to buy, sell or rent housing (as well as many other goods and services). Some of the listings posted by users included notices such as " 'NO MINORITIES' and 'No children', along with multiple variations, bald or subtle."[62] Chief Judge Easterbrook, writing for the panel, observed that the plaintiff could

> identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination . . . . It can assemble a list of names to send to the Attorney General for prosecution. But given § 230(c)(1) it cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination.[63]

As the Seventh Circuit noted at the outset of its opinion,

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[60] *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1182 (9th Cir. 2008) (*en banc*) McKeown, J. dissenting).

[61] *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

[62] *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

[63] *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v.*

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courts regularly enforce the Fair Housing Act against newspapers that accept advertisements for four or more rental properties that are discriminatory. The CDA, however, preempts claims for computer-related conduct that potentially could be actionable in the physical world.

The panel's holding—that plaintiff's claim was preempted—was based on its conclusion that "only in a capacity as publisher could craigslist be liable" for the postings of its users.[64]

Craigslist can be reconciled with *Roommate.com* but ultimately reflects a different analytical approach. Both cases found that an interactive computer service could not be held liable for comments written entirely by users that were alleged to violate the Fair Housing Act.[65] *Roommate.com* went further, however, in holding an interactive computer service liable as an information content provider for authoring a multiple choice test that was used to generate content on

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Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

[64]*Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008). In so ruling, the court expressly rejected the argument that subsection (c)(1) should be limited to sexual material. Judge Easterbrook wrote:

> Although the impetus for the enactment of section 230 as a whole was a court's opinion holding an information content provide liable, as a publisher, because it had exercised some selectivity with respect to the sexually oriented material it would host for customers, a law's scope often differs from its genesis. Once the legislative process gets rolling, interest groups seek (and often obtain) other provisions. Congress could have written something like: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any sexually oriented material provided by another information content provider." That is not, however, what it enacted. Where the phrase "sexually oriented material" appears in our rephrasing, the actual statute has the word "information." That covers ads for housing, auctions of paintings that may have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians' promises, and everything else that third parties may post a website; "information" is the stock in trade of online service providers.

Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008).

[65]Chief Judge Kozinski, in his opinion in *Roommate.com*, characterized *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist* as consistent with *Roommate.com* because, in his view, Craigslist's service worked very much like the "Additional Comments" section of the Roommates.com website, "in that users are given an open text prompt in which to enter any description of the rental property without any structure imposed on their content or any requirement to enter discriminatory information . . . ." *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (*en banc*).

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user profiles. Taken together, these cases suggest that an Internet site or service that offers its users a blank box (or "white space") to write their own creative expression is will not lose Good Samaritan protection, but a business (or user) that creates an elaborate multiple choice test or otherwise develops user content may be liable to the extent of that *developed* content (at least to the extent that the plaintiff's claim is based in part on it and to the extent responses to questions or other use of developed content is mandatory). On the other hand, between the lines readers are left with the sense that while Judge Kozinski might have ruled the same way as Judge Easterbrook in *Craigslist* based on the distinctions he suggested in the *Roommate.com* opinion, the Seventh Circuit might well have found the defendant fully protected from liability in *Roommate.com* based on a more expansive vision of CDA immunity (including the Ninth Circuit's own earlier decision in *Metrosplash.com*).[66]

The *Roommate.com* case represented more of a departure from, rather than a natural extension of, prior case law, in giving life to the term *development* in the definition of an *information content provider*. While the Ninth Circuit nominally did not narrow the ambit of section 230(c)(1) immunity, it effectively did so by broadening the scope of conduct that could make a party liable as an information content provider. Indeed, the Ninth Circuit's focus on *development* can make it more difficult for interactive computer service providers and users to dispose of cases prior to trial in the Ninth Circuit than in other parts of the country. Whether a person or entity contributed to the development of content may be a close and fact-specific question in some cases, where the is-

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[66]While the Seventh Circuit in *Craigslist* appears to have taken a broader view of the scope of CDA immunity (where applicable) than Chief Judge Kozinski in *Roommate.com*, the Seventh Circuit potentially takes a narrower view of when the CDA in fact applies to a given claim. In *Chicago v. StubHub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010), which like other Seventh Circuit CDA opinions to date was authored by Judge Easterbrook, the court held that a suit by the City of Chicago asserting that an Internet ticket resale service was responsible for collecting a special city amusement tax on ticket sales was not preempted by the CDA. In so holding, Judge Easterbrook wrote that "subsection (c)(1) does not create an 'immunity' of any kind." *Id.* Rather, it "limits who may be called the publisher of information that appears online. That might matter for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.' " *Id.*; *see generally supra* §§ 37.05[1][C], 37.05[3][B] (analyzing *City of Chicago* in greater detail).

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sue of CDA immunity would need to be resolved on summary judgment or even at trial (although CDA defenses rarely if ever are resolved at trial), as opposed to on a preliminary motion to dismiss or motion for judgment on the pleadings.[67]

At the same time, *Roommate.com* set a high bar for what constitutes development, emphasizing that an interactive computer service provider or user's conduct must amount to a *material contribution* to the illegality to take a provider or user outside the scope of CDA immunity for third party content. "A 'material contribution' does not refer to 'merely . . . augmenting the content generally, but to materially contributing *to its alleged unlawfulness*.' "[68]

Since the Ninth Circuit's en banc decision in *Roommate.com*, it has become common for plaintiffs to seek to plead around section 230(c)(1) by alleging *development* in cases involving third party content.[69] To date, circuit[70] and

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[67]*See infra* § 37.05[7] (analyzing when procedurally in litigation cases that turn on the CDA may be resolved).

[68]*Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021), *quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (*en banc*) (emphasis added in *Gonzalez*).

[69]*See, e.g., Tan v. Quick Box, LLC*, Case No.: 3:20-cv-01082-H-DEB, 2020 WL 7226440, at *19-20 (S.D. Cal. Dec. 8, 2020) (denying motion to dismiss claims of aiding and abetting false advertising, unfair competition, and RICO violations, after plaintiff alleged defendant customer relationship management software company's "load balancing software" had been designed to enable fraudulent scheme and make it less traceable); *M.L. v. Craigslist, Inc.*, Case No. C19-6153 BHS-TLF, 2020 WL 5494903, at *3-4 (W.D. Wash. Sept. 11, 2020) (denying Craigslist's motion to dismiss plaintiff's state law Sexual Exploitation of Children Act claim, based on the finding that plaintiff had alleged sufficient facts to plausibly state a claim that Craigslist "was responsible, in whole or in part, for the development or creation of the unlawful advertisements which trafficked Plaintiff."); *Elliott v. Donegan*, 469 F. Supp. 3d 40, 55-61 (E.D.N.Y. 2020) (denying motion to dismiss defamation claim on grounds of CDA § 230 immunity in case where plaintiff's name appeared on a circulated Google spreadsheet titled "Shitty Media Men," reasoning that the complaint did not preclude the possibility that defendant creator had: (1) fabricated and inserted allegations of sexual assault; (2) made them available online without the express intent of the information provider; or (3) encouraged or augmented the allegedly defamatory nature of the content); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 986-87 (N.D. Cal. 2015) (denying an app provider's motion to dismiss claims for invasion of privacy and conversion based on CDA preemption where plaintiff's complaint plausibly alleged development); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1246-49

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(N.D. Cal. 2014) (denying defendant's motion to dismiss based on plaintiff's allegation that LinkedIn developed the content of a reminder email sent to third parties after plaintiffs submitted their content and photo for an initial email inviting their friends to join LinkedIn); *Moving & Storage, Inc. v. Panayotov*, Civil Action No. 12-12262-GAO, 2014 WL 949830, at *2 (D. Mass. Mar. 12, 2014) (denying the defendant's motion to dismiss plaintiff's claims arising out of the defendants' operation of the *MyMovingReviews.com* website and alleged practice of deleting positive reviews about plaintiffs' moving business and posting positive reviews about a competing business owned by one of the defendants, based on the finding that the plaintiff plausibly alleged development); *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090-91 (D. Nev. 2013) (denying the defendant's motion to dismiss plaintiff's amended complaint where plaintiff alleged that the website provider "acted as a 'developer' within the meaning of the CDA by promoting the publication of protected 'service plays' and thereby contributing to the misappropriation of Plaintiffs' trade secrets and commercial property."); *FTC v. LeanSpa, LLC*, 920 F. Supp. 2d 270, 275-77 (D. Conn. 2013) (denying online marketing firms' motion to dismiss claims of deceptive marketing and selling weight-loss products and creating false news sites to promote sales because it was plausible that the LeadClick defendants were both interactive computer service providers and responsible for development of third party content), *aff'd in relevant part sub nom. FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016) (holding LeadClick liable for FTC Act and Connecticut Unfair Trade Practice Act (CUTPA) violations and ineligible for CDA immunity because it participated in the development of the deceptive content at issue in that case; declining to decide whether LeadClick was an interactive computer service provider); *Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080 (C.D. Cal. 2012) (denying in part defendant's motion to dismiss plaintiff's false advertising claim "[b]ecause Defendant's entitlement to immunity under the CDA depends on whether Defendant 'developed' or materially contributed to the content of these advertisements, it is too early at this juncture to determine whether CDA immunity applies."); *Robins v. Spokeo, Inc.,* No. CV 10-05306 ODW (AGRx), 2011 WL 1793334 (C.D. Cal. May 11, 2011) (denying in part the defendant's motion to dismiss based on the CDA where the plaintiff alleged that the defendant "develops original content based on information obtained from a variety of sources and posts it online"); *Swift v. Zynga Game Network, Inc.*, 51 Communications Reg. (P & F) 1118, 2010 WL 4569889 (N.D. Cal. Nov. 3, 2010) (denying defendants' motion to dismiss where the plaintiff alleged development based on Zynga's provision of virtual currency for third party ad offers); *Certain Approval Programs, LLC v. XCentric Ventures LLC*, No. CV08–1608–PHX–NVW, 2009 WL 596582 (D. Ariz. Mar. 9, 2009) (granting leave to amend to allow plaintiff to allege that defendant "Ripoff Report" created or developed content and was therefore acting as an information content provider, rather than merely an interactive computer service provider); *Perfect 10, Inc. v. Google, Inc.*, 2008 Copr. L. Dec. ¶ 26,909, 2008 WL 4217837 (C.D. Cal. July 16, 2008) (denying defendant's motion to dismiss state law claims because "preemption under the CDA is an affirmative defense that is not proper to raise in a Rule 12(b)(6) motion" even though "it is highly likely that P10 will encounter

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difficulty in establishing that Google engaged in the 'creation or development in whole or in part' of unlawful content . . . ."); *J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc) (affirming that minor plaintiffs sufficiently stated Washington state law claims that were not preempted by the CDA where they alleged that the defendants developed Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message.").

[70]*See, e.g., Force v. Facebook, Inc.,* 934 F.3d 53, 69-71 (2d Cir. 2019) (rejecting the argument that *Roommate.com* held that "requiring or encouraging users to provide any particular information whatsoever to the interactive computer service transforms a defendant into a developer of that information. The *Roommates.Com* holding, however, was not so broad; it concluded only that the site's conduct in requiring users to select from 'a limited set of pre-populated answers' to respond to particular 'discriminatory questions' had a content-development effect that was actionable in the context of the Fair Housing Act."), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (rejecting the argument that Google made a material contribution to the unlawfulness of ISIS content posted on YouTube by pairing it with selected advertising and other videos because "pairing" allegedly enhanced user engagement with the underlying content or that algorithms that recommended content to users based on their viewing history and what was known about them were not neutral tools under *Roommate.com*); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-1101 (9th Cir. 2019) (affirming dismissal of claims against The Experience Project website for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability Act, Cal. Health & Safety Code §§ 11700, *et seq.,* as preempted by section 230(c)(1), in a suit brought by the mother of a man who participated in an anonymous heroin-related forum, where the deceased user solicited and found someone on the forum to sell him heroin, which turned out to have been laced with fentanyl, which caused his death, because Ultimate Software, through its Experience Project, acted as a publisher in recommending user groups and sending email notifications of posts, and did not become a developer of content (or owe a duty of care to the dedecent or collude with the drug dealer) by providing neutral tools that a user could exploit to create a profile or perform a search); *Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Sherman Act I (conspiracy) and II (monopolization) and Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located).

As explained by the Second Circuit, although the term *development* is not defined in the statute,

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district courts following[71] following *Roommate.com* generally

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consistent with broadly construing "publisher" under Section 230(c)(1), we have recognized that a defendant will not be considered to have developed third-party content unless the defendant directly and "materially" contributed to what made the content itself "unlawful." *LeadClick*, 838 F.3d at 174 (quoting *Roommates.Com*, 521 F.3d at 1168). This "material contribution" test, as the Ninth Circuit has described it, "draw[s] the line at the 'crucial distinction between, on the one hand, taking actions . . . to . . . display . . . actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable.' " *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 n.4 (9th Cir. 2016) (quoting *Jones*, 755 F.3d at 413–14).

Force v. Facebook, Inc., 934 F.3d 53, 68 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020).

[71] *See, e.g., Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California right of publicity claim under Cal. Civ. Code § 3344, and claims for intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200, arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity, holding that Ancestry.com did not *develop* the third party content by extracting data (names, photographs, and yearbook date), adding content on its webpages and in its email solicitations, and adding information (such as estimated birth year and age) and interactive buttons (such as a button prompting a user to upgrade to a more expensive subscription); *Ripple Labs Inc. v. YouTube LLC*, Case No. 20-cv-02747-LB, 2020 WL 6822891, at *6-7 (N.D. Cal. Nov. 20, 2020) (dismissing right of publicity and unfair competition claims arising out of YouTube's alleged failure to remove impersonations of Ripple's cryptocurrency enterprise from its video-sharing platform; rejecting arguments that YouTube materially contributed to the alleged scam (and created content) by (1) allowing users to display "views" received for the video, and (2) awarding a "verification badge" — by giving the MarcoStyle hacked channel a badge that it allegedly reserves for "authentic" channels — because "[t]he badge did not materially contribute to the content's illegality here. . . . What made the content illegal was that the scammers hijacked users' content and tricked them into sending their XRP to a digital wallet."); *Elliott v. Donegan*, 469 F. Supp. 3d 40, 59-61 (E.D.N.Y. 2020) (rejecting the argument that highlighting plaintiff's entry in red and noting "Multiple women allege misconduct" amounted to development, holding that "visually aggregating or classifying user content does not constitute 'creation or development' under Section 230(f)(3)."); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 593 (S.D.N.Y. 2018) (holding that the Grindr mobile app provided merely neutral assistance to users), *aff'd,* 765 F. App'x 586 (2d Cir. 2019); *Russell v. Implode-Explode Heavy Industries, Inc.*, Civil Action No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013) (distinguishing *Roommate.com* based on its unique facts and granting summary judgment for the defendant on claims for libel and defamation where the defendant "was not completely uninvolved with the allegedly defamatory article, but his involvement was limited to editorial work, which is insufficient to transform IEHI into an 'information content provider' . . . ."); *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351

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EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs' extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014); *Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (holding that defendant's allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section 230 and that "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found."); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009) (dismissing with prejudice plaintiff's complaint based on alleged harm from click fraud, holding that Google's Keyword Tool was a neutral tool that could not subject Google to liability for developing whatever word combinations users generated with the tool); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (dismissing plaintiff's complaint, noting that in *Roommates.com* the website required its users to provide certain information as a condition of use, whereas MySpace users were not required to supply additional information to their profiles); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009) ("key to the Ninth Circuit's decision was the fact that Roommates.com was actively participating in creating the objectionable content, by providing the questions and by requiring users to answer them. In this case, . . . Playlist merely provides the interface for accessing that content—by providing users to listen to the songs on Playlist's website—and provides links so users can download the songs on third-party websites . . . . At best, Playlist is guilty of 'passive acquiescence in the misconduct of its users,' and, even under *Roommate.com*, Playlist is entitled to immunity under Section 230(c)(1)."); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (concluding that in *Roommate.com* the lawsuit revolved around a portion of profiles generated by responses to a mandatory questionnaire, whereas here the responses were not at issue); *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012) (reversing the entry of summary judgment for the plaintiff, finding that the defendant was entitled to CDA immunity). As explained in *Doe II*:

> *Roommates.com* presents us with two ends of the spectrum with respect to how much discretion a third party user has in the content he posts on the site. A subscriber writing in the additional comments section is given almost unfettered discretion as to content. On the other hand, the subscriber must select one answer from a limited number of choices in the question and answer profile section. Our situation falls somewhere in between. MySpace members are not allowed unfettered discretion as to what they put in their profile. Instead, it is alleged that MySpace users are urged to follow the on-screen prompts to enter a name, email address, gender, postal code, and date of birth. Users are also "encouraged" to enter personal information such as schools, interests, and personality and background and lifestyle . . . . Unlike the questions and answers in *Roommates.com*, however, Appellants do not allege that the MySpace profile questions are discriminatory or otherwise illegal. Nor do they allege that MySpace requires its members to answer the profile questions as a condition of using the site.

96 Cal. Rptr. 3d at 158.

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have construed the case reasonably narrowly, consistent with its specific holding (although a few trial court opinions from outside the Ninth Circuit have allowed cases to proceed based merely on allegations of solicitation and shaping of content,[72] which doesn't seem to rise to the level of martial

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[72]*See, e.g., Pace v. Baker-White*, 432 F. Supp. 3d 495, 502-08 (E.D. Pa. 2020) (withholding CDA § 230 immunity from an online project that collected police officers' Facebook posts in an effort to highlight their racism or misogyny, because plaintiff's defamation-by-implication and false light claims were "premised on the inclusion of his and other officer's comments and posts on the website *as prefaced by* statements explaining why those posts and comments were included."), *aff'd on other grounds*, 850 F. App'x 827 (3d Cir. 2021); *Doctor's Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010) (denying defendant's motion for summary judgment in a case where Quiznos held an Internet contest for customers to submit their own advertisements comparing Quiznos sandwiches to those of Subway, where the plaintiff alleged that defendants "went beyond the role of a traditional publisher by 'soliciting disparaging material' and 'shaping the eventual content' " by using a domain name for the contest (meatnomeat.com) that arguably falsely implied that Subway sandwiches had no meat and posted four "sample videos" on the user submission site that allegedly shaped user submissions; holding that a reasonable jury might conclude that defendants "did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos."); *New England Patriots, L.P. v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009).

QIP arguably presented a close case where the line between user content and website-developed content was difficult to draw without a full presentation of the evidence at trial.

In *New England Patriots*, a widely discussed unreported trial court decision from a state court judge in Massachusetts, the court concluded that StubHub was not entitled to the CDA exemption for liability based on the conduct of its users in re-selling tickets to New England Patriots games in alleged violation of a state law. Although the court accepted that StubHub did not sell the tickets itself, and merely provided an online forum for others to do so, the court concluded that the plaintiffs could prove that StubHub "induced a breach of contract by improper means if they can show that StubHub intentionally induced or encouraged others to violate [state law] . . . or profited from such violations while declining to stop or limit it." *New England Patriots, L.P. v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009). In so ruling, however, the court relied on the standard for secondary copyright liability set forth in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005); *see generally supra* § 4.11[7]. Copyright law obviously has no bearing on the CDA. Citing *Roommate.com*, the court then concluded that there was "evidence in the record that StubHub materially contributed to the illegal 'ticket scalping' of its sellers" which could sup-

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development). Indeed, some courts outside the Ninth Circuit have been affirmatively skeptical of *Roommate.com*'s complex analysis and applied the CDA more broadly.[73] Even the Ninth Circuit has chastised efforts by plaintiffs to try to "plead around" CDA preemption.[74] Nevertheless, since *Roommate.com*, clever plaintiffs lawyers typically seek to do just that.

In *FTC v. Accusearch, Inc.*,[75] the Tenth Circuit went even further than the Ninth Circuit in broadly construing *information content provider,* thereby effectively narrowing the scope of the exemption potentially available to interactive

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port a claim that it developed the material under *Roommate.com* based on "knowing participation in illegal 'ticket scalping.'. . . ." *New England Patriots, L.P. v. StubHub, Inc.*, 2009 WL 995483, at *13.

The Sixth Circuit subsequently rejected the argument that soliciting or shaping content could deprive an interactive computer service of CDA protection in *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014), which is discussed later in this section and in section 37.05[3][D][ii].

[73]*See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (purporting to distinguish *Roommate.com* but in fact arguably applying the CDA more broadly than under *Roommate.com*'s development analysis because " 'immunity is an immunity from suit rather than a mere defense to liability' and 'it is effectively lost if a case is erroneously permitted to go to trial . . . .") (citations omitted); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *see generally infra* § 37.05[3][D] (and cases discussed in that section).

In *Shiamili v. Real Estate Group*, the New York Court of Appeals, over a strong dissent by Chief Judge Lippman, concluded that it "need not decide whether to apply the Ninth Circuit's relatively broad view of 'development' since, even under that court's analysis, Shiamili's claim fail[ed]."

[74]*See Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265–66 (9th Cir. 2016) (affirming dismissal of a defamation claim that "pushes the envelope of creative pleading in an effort to work around § 230. . . . Instead of asserting that Yelp was liable in its well-known capacity as the passive host of a forum for user reviews—a claim without any hope under our precedents, such as *Roommates.Com*—Kimzey cryptically alleged that Yelp in effect created and developed content. . . . Kimzey apparently hoped to plead around the CDA to advance the same basic argument that the statute plainly bars: that Yelp published user-generated speech that was harmful to Kimzey.").

[75]*FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

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computer service providers and users under section 230(c)(1). In *Accusearch*, the majority held that the defendant *developed* confidential telephone records originating with third parties merely by publishing them on its site and was *responsible* for this development because it solicited and then paid for them. The defendant had argued that because the phone records provided to its customers originated with telecommunications carriers, it made nothing new and brought nothing new into existence. The majority, however, defined *develop* to mean "the act of drawing something out, making it 'visible,' 'active,' or 'useable' " or "to make actually available or usable (something previously only potentially available or usable)."[76] When confidential phone records were exposed to public view on the defendant's site, the majority concluded that the information was *developed*.[77]

Judge Hartz, writing for the majority, emphasized that evidence of *development* alone was insufficient to make a site or service an information content provider, which depends on a showing that it was " 'responsible in whole or in part, for the . . . development of' the offending content."[78] *Responsible*, like *development,* is not specifically defined in the statute.

The majority held that "a service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive

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[76]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009)*, quoting* Webster's Third New International Dictionary 618 (2002).

[77]The majority broadly construed develop in part because cardinal principles of statutory construction require that *develop* mean something different than create based on the CDA definition of an information content provider to mean "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C.A. § 230(f)(3) (emphasis added). The majority explained that "[u]nder a long-standing cannon of statutory construction, one should avoid construing a statute so as to render statutory language superfluous." *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009), *quoting McCloy v. U.S. Dept. of Agriculture*, 351 F.3d 447, 451 (10th Cir. 2003), *cert. denied*, 125 S.Ct. 38 (2004) *and citing Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (*en banc*).

[78]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009), *quotingFair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (*en banc*) (quoting 47 U.S.C.A. § 230(f)(3)).

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about the content."[79] Judge Hartz explained that "to be 'responsible' for the development of offensive content, one must be more than a neutral conduit for that content."[80] This construction, he wrote, "comports with the clear purpose of the CDA—to encourage Internet services that increase the flow of information by protecting them from liability when independent persons negligently or intentionally use those services to supply harmful content."[81]

In holding that Accusearch was an information content provider because it solicited the requests for the confidential information and then paid researchers to obtain it, the majority sought to distinguish other cases where mere solicitation was insufficient to lead to liability.

Judge Hartz distinguished *BenEzra, Weinstein & Co. v. America Online, Inc.*[82] because even though AOL had solicited stock quotations in that case, the plaintiff's claim was based on inaccuracies in the solicited quotations. AOL had not solicited the errors, which was the offending content at issue in that case. On the other hand, "[i]f the information solicited by America Online had been inherently unlawful, for example, if it were protected by contract or was child pornography . . . [the court's] reasoning would necessarily have been different."[83]

The majority also contrasted its holding with the Ninth Circuit's decision in *Carafano v. Metrosplash.com, Inc.*,[84] where a dating site was sued for a phony profile posted by a user. Although members were required to respond to multiple choice questions in setting up their profiles (in addition to submitting an essay), the website's classifications of user characteristics did nothing to enhance the defamatory sting of the message, to encourage defamation or to make

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[79]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

[80]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009). By analogy, the majority explained that one who builds a highway ordinarily is not responsible "for the use of that highway by a fleeing bank robber, even though the culprit's escape was facilitated by the availability of the highway." *Id.*

[81]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

[82]*Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

[83]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

[84]*Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119 (9th Cir. 2003).

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defamation easier.[85] By contrast, Judge Hartz ruled that Accusearch was not merely a provider of neutral tools. It "solicited requests for confidential information protected by law, paid researchers to find it, knew that the researchers were likely to use improper methods, and charged customers who wished the information to be disclosed."[86] In the words of Judge Hartz, "Accusearch's actions were not 'neutral' with respect to generating offensive content; on the contrary, its actions were intended to generate such content."[87]

In his concurring opinion, Judge Tymkovich criticized the majority for reaching the issue of the CDA's applicability when he believed it was not necessary to do so, for narrowing the scope of the CDA's exemption and ultimately for making it more difficult to distinguish when the exemption afforded by section 230(c)(1) may apply. Judge Tymkovich lamented the majority's "unnecessary extension of the CDA's terms 'responsible' and 'development,' thereby widening the scope of what constitutes an 'information content provider' with respect to particular information under the Act."[88] By holding that Accusearch was responsible, at least in part, for developing the material at issue by soliciting third parties to obtain confidential telephone records and then exposing them to public view, Judge Tymkovich wrote that "the line between passive posting of tortious or unlawful commentary, news articles, or other previously unpublished information and content development depends on an amorphous analysis of the motivations of the content provider in soliciting or acquiring that information."[89] The majority's test turns on whether the interactive service provider was acting in good faith. "If the provider's motivations are not in good faith," he wrote, "the majority's approach transforms the provider into a developer of that information."[90]

Judge Tymkovich would not have reached the issue of the

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[85]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009), *quotingFair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008) (*en banc*).

[86]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009).

[87]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009).

[88]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J. concurring).

[89]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J. concurring).

[90]*FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J. concurring).

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CDA's applicability, believing that the FTC sought and ultimately held Accusearch liable for its own misconduct, rather than the content it had made available online.

Accusearch arguably applies a broader interpretation of *development* than *Roommate.com*, which itself may be viewed as a departure from, rather than necessarily a logical outgrowth of, earlier case law.

Although the majority in *Accusearch* emphasized both the terms *development* and *responsible,* the fact is that the phone records at issue existed independently of anything Accusearch had done. Accusearch unquestionably solicited the material, but it did not contribute to its creation. Under *Roommate.com* solicitation alone is not enough to support liability where the content originates with another information content provider.[91] Solicitation, shaping of content or encouragement also subsequently were rejected by the Sixth Circuit as grounds for taking an interactive computer service outside the CDA.[92]

Accusearch alternatively may be viewed narrowly as a case involving solicitation of and payment for specific content (third party phone records) that was uniformly illegal. At least one court has narrowly construed *Accusearch* as standing for the proposition that soliciting and paying researchers for personal phone records amounted to development because obtaining the personal phone records of third parties is almost always unlawful. In *Hill v. StubHub, Inc.*,[93] the North Carolina Court of Appeals distinguished *Accusearch* on this basis, ruling that StubHub did not lose CDA protection and was not liable for violating a North Carolina law prohibiting the re-sale of concert tickets for more than $3 over the face value of the tickets where StubHub allegedly knew about the law and that users of the site were ignoring it, and had a suggestion tool that displayed similar ticket sales to help sellers decide what price to set for their tickets, because the individual seller, not StubHub, had "complete control" over the price actually charged (with StubHub merely earning 10% on each sale). In so ruling, the court made clear that liability could not be imposed under the CDA simply (1) for

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[91] *See infra* § 37.05[3][D][ii]

[92] *See Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 413–15 (6th Cir. 2014); *see generally infra* § 37.05[3][D][ii] (discussing the case in greater detail).

[93] *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012).

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having notice of the illegal conduct, (2) for making a profit from the illegal conduct, or (3) if the conduct was "reasonably foreseeable" or for "willful blindness."[94] Rather, the court emphasized that to "materially contribute" to the creation of unlawful content, "a website must effectively control the content posted by those third parties or take other actions which essentially ensure the creation of unlawful content."[95]

The court in *Hill v. StubHub, Inc.* similarly held that acting as a broker or hosting a site where third parties may post material does not make the site the agent for the individual directly responsible for the content.[96]

In *Jones v. Dirty World Entertainment Recordings, LLC*,[97] the Sixth Circuit interpreted *Accusearch* as a case where "the website was responsible for the illegal purchase and resale of confidential telephone records."[98] In *Jones,* the Sixth Circuit vacated a jury award for the plaintiff and reversed the lower court's denial of the defendant's motion for judgment in a case involving comments on a gossip site. The appellate court explained that "[t]he district court elided the crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable."[99] It was also on this basis that the Sixth Circuit distinguished *Accusearch* and *Roommate.com* (to the extent immunity was denied) from those aspects of the service entitled to CDA protection in *Roommate.com* and *Chicago Lawyers' Committee v. Craigslist, Johnson, Batzel, Nemet*, and *Zeran,* where courts found the interactive computer service entitled to CDA protection.

Accusearch ultimately may be seen as an outlier decision perhaps reflecting the defendant's egregious misconduct and therefore limited to circumstances where a site solicits and

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[94]*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 (N.C. App. 2012).

[95]*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 561 (N.C. App. 2012).

[96]*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 (N.C. App. 2012).

[97]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014).

[98]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014).

[99]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014); *see generally infra* § 37.05[3][D][ii] (discussing the case in greater detail).

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pays for the specific content at issue, where that content is almost always illegal, as *Hill v. StubHub, Inc.* suggests, or an overly broad extension of *Roommate.com* that finds *development* based on preexisting content, perhaps arrived at because the plaintiff in *Accusearch,* the Federal Trade Commission, sought an expansive ruling in a case involving bad facts. Under either interpretation, a general solicitation (or solicitation of neutral content) would not be sufficient to strip away CDA immunity. The solicitation at issue must be specifically for the content at issue (and in the view of *Hill v. StubHub* would have to involve content that is almost always unlawful).

In practice, the fact patterns reflected by *Roommate.com* and *Accusearch* are not typical of most CDA section 230(c)(1) cases, which largely are decided in favor of immunity.

Which circuit's approach to CDA preemption, however, may determine whether the issue of immunity is resolved at the outset of a case, on a motion to dismiss, or later, at greater expense to the interactive computer service provider or user.[100] Given that CDA immunity is to be broadly construed, the narrower interpretation of the scope of CDA immunity reflected in the *Roommate.com* and *Accusearch* cases is the better one. Indeed, the First, Second, Fourth and Sixth Circuits, among other courts, broadly apply CDA immunity,[101] while in the Seventh Circuit courts will broadly apply the CDA to cases where it applies but will more narrowly evaluate when a case in fact seeks to hold a defendant liable as a publisher or speaker of information provided by

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[100] *See infra* § 37.05[7] (procedural issues).

[101] *See, e.g., Jane Doe No. 1 v. Backpage.com, LLC,* 817 F.3d 12, 18 (1st Cir. 2016) ("There has been near-universal agreement that section 230 should not be construed grudgingly."); *Force v. Facebook, Inc.,* 934 F.3d 53, 68-71 (2d Cir. 2019) (narrowly construing *Roommate.com,* applying the "material contribution" test to evaluate allegations of development, and holding that neutral algorithms that promoted particular content did not amount to development), *cert. denied*, 140 S. Ct. 2761 (2020); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (holding that CDA determinations must be made as early as possible in a case because " 'immunity is an *immunity from suit* rather than a mere defense to liability' and 'it is effectively lost if a case is erroneously permitted to go to trial.' . . . ."; citations omitted); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014) (rejecting encouragement as a basis for imposing liability and broadly applying the CDA); *supra* § 37.05[3][B]; *infra* § 37.05[3][D].

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another information content provider.[102] Ultimately, with the passage of time, even the Ninth Circuit reads *Rommate.com* narrowly to apply to cases where a site or service required users to disclose content that was at issue in the case and actionable.[103]

Typical CDA cases involving publication of third party material are likely to be decided the same in all circuits. What test is applied may make a difference, however, in cases involving commercial gripe sites, which are considered in section 37.05[3][D]. That section also analyzes payment for content and editing, which is a traditional editorial function and in most cases should not affect section 230(c)(1) analysis.

37.05[3][D] Commercial Gripe Sites, Editing, Soliciting and Paying for Content

37.05[3][D][i] Overview

The circumstances under which an information content provider may be ineligible for CDA immunity pursuant to section 230(c)(1) for particular content that it is deemed to have *developed* are analyzed in the preceding section.[1] As set forth in that section, and as analyzed below in section 37.05[3][D][ii] a party may not be deemed to have *developed* third party material under *Fair Housing Council v. Roommate.com, LLC*[2] merely by hosting, lightly editing or even soliciting actionable content. Where development is found, it may apply only to particular material and only

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[102] *See supra* § 37.05[3][B][iii] (analyzing Seventh Circuit law on this point).

[103] *See Dyroff v. Ultimate Software Group, Inc.,* 934 F.3d 1093, 1098-99 (9th Cir. 2019) ("We rested our decision, however, on the fact that *Roommates.com* affirmatively required users to disclose information related to protected classes through discriminatory questions and answer choices. As a result, this information, especially information related to a user's protected class, served as the focus of the registration process and, ultimately, became the cornerstone of each user's online profile. Moreover, the website designed its search function to guide users through the required discriminatory criteria. *Id.* at 1164, 1167. . . . [A] website does not become a developer of content when it provides neutral tools that a user exploits to create a profile or perform a search using criteria that constitutes a protected class.").

[Section 37.05[3][D][i]]

[1] *See supra* § 37.05[3][C].

[2] *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *supra* § 37.05[3][C].

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where that material is at issue in a given suit.[3] Similarly, where a defendant adds additional content to material from another information content provider, the defendant's own contribution should not be sufficient to expose it to liability unless the added portion is itself actionable.[4]

In *FTC v. Accusearch, Inc.*,[5] the Tenth Circuit found that soliciting and paying for content amounted to *development*, even though the third party phone records at issue in that case existed independently of anything Accusearch had done. If a site specifically encourages actionable content or activity, it could be deemed *responsible* in whole or part for the *development* and thus liable as an information content provider under *Accusearch*.[6] Other circuits and state courts to date have not gone that far.

A compelling argument may be made that the Tenth Circuit panel in *Accusearch* did not properly distinguish between preexisting content such as a phone record, which originated with the phone company—another information content provider—and could not have been *developed* since it already existed, and material *developed* by an information content provider, which arguably implies new material that is created, rather than preexisting content that is merely republished.[7] *Accusearch* thus may be seen either as a misapplication of *Roommate.com* or an extension of its holding

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[3]*See supra* § 37.05[3][C].

[4]*See, e.g., Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (en banc) ("we interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct"); *see also Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 415–17 (6th Cir. 2014) (rejecting arguments that selecting and editing content for display or ratifying or adopting the content could disqualify an interactive computer service from CDA protection and holding that the defendant was not liable for its own added commentary); *Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding plaintiff's defamation claim barred by section 230(c)(1) where the plaintiff had alleged that the defendant was liable for adding additional information to an allegedly defamatory email that the defendant re-circulated; holding that the defendant did not make a material contribution where nothing he added was itself defamatory).

[5]*FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

[6]*See supra* § 37.05[3][C].

[7]*See supra* § 37.05[3][C].

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that is controlling in the Tenth Circuit, but not elsewhere.

On the other hand, one court construed *Accusearch* narrowly as holding merely that soliciting and paying researchers for personal phone records amounted to development in that case because obtaining the personal phone records of third parties is almost always unlawful.[8] Read this way, *Accusearch* is limited to instances where a site solicits and pays for specific content that is almost always actionable (as opposed to soliciting neutral content that in a particular case happens to be actionable).

In the Ninth Circuit under *Roommate.com,* payment plus solicitation is not sufficient to amount to development (as opposed to soliciting neutral content that in a particular case happens to be actionable).[9]

Outside the Ninth and Tenth Circuits, there is no controlling authority that solicitation alone would be sufficient[10] (other than a district court opinion or two purporting to follow *Accusearch*, which are discussed later in this section).

Whether and to what extent *development* may be found ultimately may depend in part on where suit is filed.

The First, Fourth and Sixth Circuits arguably provide the greatest protection for interactive computer service providers and users under section 230(c)(1).[11] The Ninth and Tenth Circuits have broadly construed *development,* which necessarily narrows the scope of CDA immunity in some cases, but even in the Ninth Circuit Chief Judge Kozinski made clear there is a high bar set to find *development* and questionable cases are to be resolved in favor of immunity.[12] The Seventh Circuit does not consider the CDA as affording immunity and may view narrowly what constitutes liability imposed for publishing or speaking, but where applicable broadly applies protection to interactive computer service providers and users.[13]

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[8] *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012); *supra* § 37.05[3][B][iii].

[9] *See supra* § 37.05[3][C].

[10] *See supra* § 37.05[3][C].

[11] *See supra* §§ 37.05[3][B], 37.05[3][C]; *infra* § 37.05[3][D][ii].

[12] *See supra* § 37.05[3][C]; *infra* § 37.05[3][D][ii].

[13] *See supra* § 37.05[3][B][iii].

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37.05[3][D][ii] Commercial Gripe Sites and Other Sites and Services that Solicit Potentially Actionable Content

The line between an exempt interactive computer service provider and a potentially liable information content provider may be hardest to draw in cases involving commercial gripe sites such as *RipoffReport.com, Badbusinessbureau.com* and *PissedConsumer.com,* which actively solicit, and earn money by hosting, stridently negative information about companies and have been accused of promoting negative comments and deleting positive ones unless a company pays for a premium membership (which allegedly allows companies to respond to the negative comments solicited about them from consumers in ways not afforded to non-paying customers).[1] Plaintiffs in suits against commercial gripe sites have alleged that some interactive

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[Section 37.05[3][D][ii]]

[1]The alleged practices of *RipOffReport*, *PissedConsumer.com* and *ConsumerAffairs.com*, in allegedly seeking to charge companies for the opportunity to respond to negative comments posted about them or to improve their online ratings, have led to suits alleging, among other things, RICO violations based on extortion. Courts to date have not been receptive to extortion claims, to the extent based on RipoffReport's alleged solicitation to pay to join its "Corporate Advocacy Program" as the only way to mitigate the effect of negative comments about a company ostensibly posted by users on the RipoffReport.com site, on the threat that RipoffReport.com otherwise would vigorously defend all claims against it based on the CDA, or similar assertions leveled against *PissedConsumer.com*'s "Reputation Management Service" or *ConsumerAffairs.com*. *See Asia Economic Institute v. Xcentric Ventures, LLC*, CV 10-1360 SVW (C.D. Cal. Order Granting in Part and Denying in Part Motion for Summary Judgment on RICO Claims Based on Predicate Acts of Extortion July 19, 2010); *Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, Case No. 1:16-cv-00168, 2017 WL 2728413 (D. Utah June 23, 2017) (dismissing plaintiff's RICO claim focused on *ConsumerAffairs.com*'s alleged practice of superimposing negative comments on the product pages of companies that would not pay the website a monthly fee and removing unfavorable consumer comments from the product pages of those companies that paid the monthly fee; dismissing in part other claims to the extent based on user content subject to the CDA but allowing claims based on aspects of the site developed by the defendant); *see also Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com; rejecting arguments that the defendant should be liable as an information content provider for user comments because it (1) claimed copyright protection in its website content

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computer service providers actually write some of the content they host, edit user submissions to make them more sharply negative and allegedly defamatory, and actively and specifically solicit particular defamatory comments. Under *Roommate.com*, merely hosting,[2] editing,[3] passively acquiesc-

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and (2) promoted content to be searchable on Google); *Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (granting summary judgment for the defendant on claims for defamation, false light and intentional and negligent interference with economic relations based on the CDA); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 477–78 (E.D.N.Y. 2011) (finding plaintiffs unlikely to prevail on their RICO or other claims against the owners of PissedConsumer.com, in denying plaintiffs' motion for preliminary injunction); *Ascentive, LLC v. Opinion Corp.,* No. 10 Civ. 4433 (ILG) (SMG), 2012 WL 1569573 (E.D.N.Y. May 3, 2012) (granting plaintiffs' motion for voluntary dismissal, over defendants' objections, and denying defendants' motion for sanctions). Courts, however, have allowed other claims to proceed. *See, e.g., Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012) (denying defendant's motion to dismiss state claims based on CDA preemption or plaintiff's trademark claims).

Perhaps somewhat ironically, Ripoff Report itself apparently was ripped off by another site based in Latvia, www.complaintsboard.com, which allegedly copied Ripoff Report content. *See Xcentric Ventures, LLC v. Arden*, No. C 10-80058 (SI) (N.D. Cal. June 22, 2010) (refusing to vacate a default judgment entered against complaintboard.com, in a suit by Xcentric, the owner of RipoffReport.com, to collect on the default judgment).

[2]*See, e.g., Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563 (N.C. App. 2012).

[3]*See Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (holding that section 230 allows interactive computer services "to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they edit or delete."); *id.* at 1169 (approving of "editing user-created content—such as by correcting spelling, removing obscenity or trimming for length."); *id.* at 1170 ("an editor's minor changes to the spelling, grammar and length of third-party content do not strip him of section 230 immunity."), *id.* at 1171 n.29 ("there can be no meaningful difference between an editor starting with a default rule of publishing all submissions and then manually selecting material to be removed from publication, and a default rule of publishing no submissions and manually selecting material to be published—they are flip sides of precisely the same coin."); *see also, e.g.*, *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011) (dismissing with prejudice as preempted by the CDA claims for negligence and gross negligence over MySpace's alleged deletion of celebrity imposter user profiles); *Batzel v. Smith*, 333 F.3d 1018, 1022, 1031 (9th Cir. 2003) (rejecting the argument that by minor wording changes and the addition of a "moderator's message" to a third party posting (and

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ing,[4] ratifying or adopting,[5] and even encouraging or solicit-

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by his decision to publish or not publish certain messages) a website owner was jointly responsible as an information content provider); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) ("By deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect."); *Russell v. Implode-Explode Heavy Industries, Inc.*, Civil Action No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013) (distinguishing *Roommate.com* based on its unique facts and granting summary judgment for the defendant on claims for libel and defamation where the defendant "was not completely uninvolved with the allegedly defamatory article, but his involvement was limited to editorial work, which is insufficient to transform IEHI into an 'information content provider' . . . ."). *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding editorial discretion an insufficient basis for conferring liability and finding that America Online's payments to Drudge did not change the fact that America Online was not an information content provider); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (holding that eBay's practice of actively soliciting and then compiling user comments (and ranking sellers with stars or the "Power Seller" designation) did not mean that eBay was acting as an information content provider); *Donato v. Moldow*, 374 N.J. Super. 475, 490, 497–98, 499–500, 865 A.2d 711 (App. Div. 2005) (rejecting the argument that defendant's conduct in "shaping" the content of a discussion forum by removing some but not other messages could be equated with responsibility for developing it); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 465–66, 31 P.3d 37 (Div. 1 2001) (rejecting the argument that Amazon.com lost the exemption provided by the CDA because it had the right to edit and affirmatively claimed valuable licensing rights in third party content). In *Roommate.com* Chief Judge Kozinski explained:

> A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word "not" from a user's message reading "[Name] did *not* steal the artwork" in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.

Id. at 1169 (emphasis in original). He further noted that "Congress sought to immunize the removal of user-generated content, not the creation of content." *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc).

[4]*See Coffee v. Google, LLC*, Case No. 20-cv-03901-BLF, 2021 WL 493387, at *6-8 (N.D. Cal. Feb. 10, 2021) (dismissing claims for alleged violations of California's unfair competition law, California's Consumers Legal Remedies Act, and unjust enrichment where plaintiffs "alleged no more than Google's 'passive acquiescence in the misconduct of its users[,]' as barred by the CDA, in a putative class action suit seeking to hold Google Play liable for offering video games on its app store that allegedly allowed users to purchase Loot Boxes, which plaintiffs alleged constituted illegal "slot machines or devices" under California law; quoting *Fair Hous-*

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ing[6] actionable content do not amount to development, although interactive computer service providers or users potentially may be held liable for material they actually

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ing Council v. Roommate.com, LLC, 521 F.3d 1157, 1169 n.24 (9th Cir. 2008) (en banc)).

[5]*See, e.g., Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 415 (6th Cir. 2014); *Parisi v. Sinclair*, 774 F. Supp. 2d 310, 316 (D.D.C. 2011), a*ppeal dismissed*, Appeal No. 11–7077, 2012 WL 3068437 (D.C. Cir. 2012).

[6]*See Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 413–15 (6th Cir. 2014); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1166 n.19 (9th Cir. 2008) (en banc) (rejecting the dissent's argument that the majority found Roommate.com ineligible for section 230(c)(1) immunity for mere *encouragement* or *solicitation*, writing that "Roommate . . . does much more than encourage or solicit; it forces users to answer certain questions and thereby provide information that other clients can use to discriminate unlawfully."); *id.* at 1174 ("The fact that Roommate encourages subscribers to provide *something* in response to the prompt is not enough to make it a 'develop[er]' of the information."; emphasis in the original); *id.* at 1174 ("weak encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter").

In *Roommate.com,* Chief Judge Kozinski further made clear that *solicitation* alone is not the same as *development* by the way he used the term. *See id.* at 1171 n.30 ("[o]ur holding is limited to a determination that the CDA provides no immunity to Roommate's actions in soliciting *and* developing the content of its website"; emphasis added); *id.* at 1170 (writing that Roommate.com was sued for "creating a website designed to solicit *and* enforce housing preferences that are alleged to be illegal"; emphasis added).

As Chief Judge Kozinski explained:

> We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content . . . . Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality—as it is clear here with respect to Roommate's questions, answers and the resulting profile pages—immunity will be lost. But in cases of enhancement by implication or development by inference . . . section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

Id. at 1174–75; *see also Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (applying *Roommate.com* in holding that encouraging users to post on a message board is not enough for the message board operator to be deemed a "developer" of content and hence an information content provider).

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write themselves,[7] but only if their contribution is itself actionable.[8] In the Tenth Circuit, under *Accusearch*, solicitation and payment alone may be enough to amount to development, at least if the content solicited is almost always illegal, although this would not be enough in the Ninth Circuit under *Roommate.com*.[9]

A number of courts have held commercial gripe sites (or consumer review sites alleged to solicit and potentially develop or pay for negative content[10]) to be immune from liability under the CDA,[11] while others prior to *Roommate.com* had suggested that they might lie outside it (although some

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[7]*See, e.g., Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008) (declining to dismiss claims against an Internet publisher who was alleged to have posted statements on its website by fictitious people, creating the false impression that the postings were from bona fide disgruntled patients of the plaintiffs' hair restoration clinic).

[8]*See, e.g., Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 415–17 (6th Cir. 2014) (rejecting arguments that selecting and editing content for display or ratifying or adopting the content could disqualify an interactive computer service from CDA protection and holding that the defendant was not liable for its own added commentary); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (en banc) ("we interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct"); *A.B. v. Facebook, Inc.*, Case No.: CV 20-9012-CBM-(MAAx), 2021 WL 2791618, at *3 (N.D. Cal. June 1, 2021) (holding that alleged data mining by Facebook in a suit brought against Facebook and WhatsApp, and their subsequent alleged sale of the resulting information, did not deprive defendants of section 230(c)(1) immunity because plaintiff sought to hold defendants liable for the specific statements of a third party user); *see also Hung Tan Phan v. Lang Van Pham*, 182 Cal. App. 4th 323, 105 Cal. Rptr. 3d 791 (4th Dist. 2010) (holding plaintiff's defamation claim barred by section 230(c)(1) where the plaintiff had alleged that the defendant was liable for adding additional information to an allegedly defamatory email that the defendant re-circulated; holding that the defendant did not make a material contribution where nothing he added was itself defamatory).

[9]*See supra* § 37.05[3][C] (analyzing Ninth and Tenth Circuit law).

[10]Cases brought against legitimate consumer review sites are grouped with gripe sites to the extent the plaintiff alleged that the site *developed* actionable content. While a neutral blog or consumer review site is less likely to risk losing CDA protection than a site that actively solicits specific negative commentary, under *Roommate.com* the legal standard applied by courts is the same, and mere solicitation, payment and light editing, without more, should not be sufficient to strip away CDA immunity.

[11]*See, e.g., Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313,

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322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com; rejecting arguments that the defendant should be liable as an information content provider for user comments because it (1) claimed copyright protection in its website content and (2) promoted content to be searchable on Google); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (affirming dismissal of a claim against a consumer criticism site on a Rule 12 motion to dismiss); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014) (vacating a jury award and reversing the lower court's denial of the defendant's motion for judgment in a defamation suit brought against the owners of *TheDirty.com*); *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (dismissing plaintiffs' extortion and unfair competition claims based on the allegation that Yelp! unlawfully manipulated the content of its business review pages in order to induce plaintiffs to pay for advertising), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014); *Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011) (holding that defendant's allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section 230 and that "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found."); *GW Equity LLC v. Xcentric Ventures LLC*, Civil Action No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009) (affirming the Magistrate Judge's recommendation to enter summary judgment for the defendant in a suit over postings on RipoffReport.com and BadBusinessBureau.com, where the plaintiff alleged that the defendants developed the offending content and objected that the Magistrate Judge had not considered the *Roommate.com* cases); *Whitney Information Network Inc. v. Xcentric Ventures, LLC,* No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008) (granting summary judgment on plaintiff's defamation claim based on content posted on RipOffReport.com); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (dismissing a claim alleging that RipoffReport.com and its owners were liable for actively soliciting defamatory material and for keeping an allegedly defamatory post on its site after the author asked that it be removed); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal of defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010) (dismissing a defamation claim brought against Yelp! Inc. by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, and dismissing on the merits a deceptive acts or practices claim based on the allegation that for $300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback); *Intel-*

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of those cases were decided on motions to dismiss, rather

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lect Art Multimedia, Inc. v. Milewski, 24 Misc. 3d 1248(A), 899 N.Y.S.2d 60 (N.Y. Sup. Ct. 2009) (dismissing defamation and products liability claims brought against Xcentric Ventures, LLC, the operator of RipOffReport.com, based on user posts, in an unreported opinion).

In *Shaiamili*, the New York Court of Appeals concluded that the content alleged to have been created by the defendant itself (a picture of the plaintiff superimposed over an image of Jesus next to the statement "King of the Token Jews"—what the court referred to as "the heading, sub-heading and illustration that accompanied the reposting" of an objectionable user comment) was not defamatory, and therefore not actionable. The court further held that the defendants did not become content providers merely by virtue of moving a user post from one location to their own website (which the court characterized as "well-within 'a publisher's traditional editorial functions."). Moreover, unlike *Doctor's Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010), which is discussed later in this section, there was no allegation that the defamatory comments were posted in response to any specific invitation for users to bash the plaintiff or his business.

With respect to *Roommate.com,* New York's highest court concluded that it "need not decide whether to apply the Ninth Circuit's relatively broad view of 'development' since, even under that court's analysis, Shiamili's claim fail[ed]."

In a strong dissent, however, Chief Judge Lippman argued that under *Roommate.com* and *Accusearch* plaintiff's complaint should not have been dismissed. According to the complaint, Chief Judge Lippman wrote, defendants "not only moved defamatory comments to an independent post entitled 'Ardor Reality and Those People,' but embellished the comment thread by attaching a large, doctored photograph of plaintiff depicted as Jesus Christ, with the heading: 'Chris Shiamili: King of the Token Jews.' " He further emphasized that the defamatory statements were preceded by a disparaging editor's note that allegedly was written by one of the defendants. In conclusion he wrote that "an interpretation that immunizes a business's complicity in defaming a direct competitor takes us so far afield from the purpose of the CDA as to make it unrecognizable. Dismissing this action on the pleadings is not required by the letter of the law and does not honor its spirit."

In *GW Equity*, the court approved of a Magistrate Judge's recommendation over objections that *Roommate.com* compelled a different result. The trial court gave little credence to evidence that defendant's employees modified the text of user submissions to add words such as "Ripoff," which it characterized as not material because all but one of the employees who admitted engaging in this practice testified that they had not done so recently.

In dismissing plaintiff's claim in *Global Royalties*, Judge Frederick Martone, in a controversial passage, wrote that:

> It is obvious that a website entitled Ripoff Report encourages the publication of defamatory content. However, there is no authority for the proposition that this makes the website operator responsible, in whole or in part, for the "creation or development" of every post on the site.

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than on summary judgment or at trial with developed evidentiary records).[12]

Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008).

Judge Martone seemed to suggest that a different case might be presented if the defendants had solicited defamatory posts about the plaintiff (as opposed to defamatory posts in general) in noting that plaintiffs did not allege that defendants solicited the particular posts at issue or any targeted at plaintiff nor did they allege that plaintiffs altered the allegedly defamatory comments or had "any more than the most passive involvement (providing a list of possible titles) in composing them." *Id.*

[12]*See, e.g., Whitney Information Network, Inc. v. Xcentric Venture, LLC*, 199 F. App'x 738 (11th Cir. 2006) (vacating and remanding a lower court order dismissing the case for failing to meet the requirements of Florida's long arm statute where the plaintiff alleged that the defendants, operators of badbusinessbureau.com, rewrote consumer posts to add words such as "ripoff," "dishonest," and "scam," and knowingly fabricated entire consumer complaints which were then attributed to anonymous writers or people with phony names, taking them outside the scope of the CDA exemption and therefore subject to jurisdiction based on conduct directed to a Florida resident); *Energy Automation Systems, Inc. v. Xcentric Ventures, LLC*, No. 3:06-1079, 2007 WL 1557202 (M.D. Tenn. May 27, 2007) (denying defendant's motion to dismiss, which the court treated as a motion for summary judgment, and lifting a stay on discovery, where the plaintiff alleged that the defendants created and developed the allegedly defamatory content at issue and therefore that the protections afforded by the CDA did not apply); *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1148–49 (D. Ariz. 2005) (denying a motion to dismiss based on the CDA where the plaintiff alleged that the defendant had produced editorial comments, titles and other original content contained in allegedly defamatory postings); *MCW, Inc. v. Badbusinessbureau.com, LLC,* Civ. A.3:02-CV-2727-G, 2004-1 Trade Cas. ¶ 74,391 (N.D. Tex. Apr. 19, 2004) (denying defendants' motion to dismiss, holding that badbusinessbureau.com and ripoffreport.com and their owner could be liable as information content providers for the postings (titles, headlines and editorial messages) which plaintiff alleged they created as original material, developed and posted).

In *MCW, Inc.,* the court also ruled that "actively encouraging and instructing a consumer to gather specific detailed information" was an activity that went "substantially beyond the traditional publisher's editorial role" and therefore left them exposed to liability for "developing" the material.

In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544 (E.D. Va. 2008), *aff'd,* 591 F.3d 250 (4th Cir. 2009), *MCW* was distinguished and explained by the district court as a case where "the defendants were encouraging posters to take pictures to add to the website, and were actively soliciting postings." 564 F. Supp. 2d at 550.

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Since *Roommate.com*, some state[13] and federal[14] courts

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[13]*See, e.g., Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294, 313, 175 Cal. Rptr. 3d 131, 145 (2d Dist. 2014) (reversing the lower court and holding that a California false advertising claim against Yelp was not preempted by the CDA because it was not premised on user reviews but on Yelp's own statements about the accuracy of its review filter); *New England Patriots, L.P. v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009) (declining to dismiss plaintiff's complaint based on "evidence in the record that StubHub materially contributed to the illegal 'ticket scalping' of its sellers" which could support a claim that it developed the material under *Roommate.com* based on "knowing participation in illegal 'ticket scalping'. . . ."); *Woodhull v. Meinel*, 145 N.M. 533, 202 P.3d 126 (Ct. App. 2008) (broadly construing the scope of section 230(c)(1) but finding defendant's entitlement to the exemption presented a factual question precluding summary judgment based on defendant's requests that users post potentially defamatory material for the purpose of "making fun of" the plaintiff, in a post-*Roommate.com* case that does not actually cite to *Roommate.com*), *cert. denied*, 145 N.M. 655, 203 P.3d 870 (2009).

None of these cases, of course, was decided on the merits. Allowing a case to proceed—either past a motion to dismiss to discovery, or past a summary judgment motion to trial—is different from entering judgment for the plaintiff following consideration of all of the underlying evidence. Nevertheless, courts evaluating dispositive motions, including motions to dismiss or for judgment on the pleadings at the outset of a case, should consider that section 230 " 'immunity is an *immunity from suit* rather than a mere defense to liability' and 'it is effectively lost if a case is erroneously permitted to go to trial.' . . . ." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (emphasis in original; citations omitted); *see infra* § 37.05[7] (analyzing procedural issues).

[14]*See, e.g., Xcentric Ventures LLC v. Smith*, C15-4008-MWB, 2015 WL 4940812 (N.D. Iowa Aug. 19, 2015), *report and recommendation adopted*, C 15-4008-MWB, 2015 WL 5184114 (N.D. Iowa Sept. 4, 2015) (entering injunctive relief); *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012) (denying defendant's motion to dismiss state claims based on CDA preemption without addressing either *Roommate.com* or development, finding that the plaintiff had alleged sufficient conduct by the defendant itself); *Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012) (denying defendant's motion for judgment as a matter of law in a defamation suit where the defendant operated a website called *TheDirt.com*, which the court found operated for the purpose of encouraging defamatory statements, and had personally appended a tagline to the postings of others and supplemented user submissions with his own comments in a way that the court found adopted the defamatory statements as his own; applying *Accusearch* and relying in part on a law review article that criticized *Roommate.com* for affording interactive computer service providers too much immunity; following trial the Sixth Circuit ultimately held that the defendant was entitled to CDA immunity); *Certain Approval*

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have been more receptive to the argument that a gripe site or Internet location that hosts critical material may be liable for development of user content, making a site that is otherwise eligible for protection as an interactive computer service potentially liable as an information content provider, at least at the pleadings stage where a claim need only be alleged, not proven by admissible evidence.

In some instances, the issue of development may present a factual dispute that cannot be resolved short of trial. For example, in *Doctor's Associates, Inc. v. QIP Holder LLC*,[15] the court denied defendant's motion for summary judgment based on the CDA in a case involving user submitted videos, where Quiznos had held an Internet contest for customers to submit their own advertisements comparing Quiznos sandwiches to those of Subway. The plaintiff had alleged that defendants "went beyond the role of a traditional publisher by 'soliciting disparaging material' and 'shaping the eventual content' " by using a domain name for the contest (meatnomeat.com) that arguably falsely implied that Subway sandwiches had no meat and posted four "sample videos" on the user submission site that allegedly shaped user submissions. The court held that a reasonable jury might conclude that defendants "did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos."

In *FTC v. LeadClick Media, LLC*,[16] the Second Circuit upheld the entry of summary judgment for the Federal Trade Commission and State of Connecticut, in a suit brought by them against LeadClick, the operator of an affiliate market-

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Programs, LLC v. XCentric Ventures LLC, No. CV08–1608–PHX–NVW, 2009 WL 596582 (D. Ariz. Mar. 9, 2009) (granting leave to amend to allow plaintiff to allege that defendant "Ripoff Report" created or developed content and was therefore acting as an information content provider, rather than merely an interactive computer service provider).

Dirty World ultimately prevailed before the Sixth Circuit. *See Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014). XCentric also was found entitled to CDA protection by the First Circuit in a later case. *See Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313 (1st Cir. 2017).

[15]*Doctor's Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010).

[16]*FTC v. LeadClick Media, LLC,* 838 F.3d 158 (2d Cir. 2016).

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ing network, for deceptive practices under the FTC Act and the Connecticut Unfair Trade Practice Act (CUTPA). Judge Denny Chin, writing for the panel, held that LeadClick was not entitled to CDA immunity because it had participated in the development of the deceptive content at issue in the case, which oversold the product LeanSpa on fake news sites operated by LeadClick affiliates. In so ruling, Judge Chin made clear that under CDA case law, a defendant "will not be held responsible unless it assisted in the development of what made the content unlawful."[17]

In *LeadClick,* the court noted that there was substantial evidence that LeadClick orchestrated a scheme to market LeanSpa through false and deceptive advertising, where LeadClick knew that its affiliates were selling LeanSpa products via fake news sites and participated in the deceptive practices. Among other things, a LeadClick employee "scouted" fake news sites to recruit potential affiliates. LeadClick employees required affiliates to make alterations to the content of their fake news pages. In one instance, an employee instructed an affiliate to adjust weight loss results on a fake news site to be more believable and not appear "crazy [misleading]." LeadClick provided affiliates with advice on how to increase traffic, noting that it would be much more realistic if affiliates represented that a person lost 10-12 pounds in 4 weeks rather than more aggressive claims. LeadClick also purchased banner advertising space that it resold to affiliates to advertise their fake news sites.

The court found that LeadClick had the authority to control the deceptive acts or practices of its affiliates. Among other things, LeadClick had authority to review and approve or disapprove of an affiliate using a fake news site, it permitted affiliates using fake news sites to join its network and paid them for referring customers to LeanSpa, and LeanSpa knew and approved of affiliates' use of fake news sites.

In holding that LeanSpa was not entitled to CDA immunity based on its participation in the development of the deceptive content posted on fake news pages, Judge Chin emphasized that LeadClick recruited affiliates for the LeanSpa account that used false news sites. LeadClick paid those affiliates to advertise LeanSpa products online, knowing that false news sites were common in the industry. LeadClick employees occasionally advised affiliates to edit

[17] *FTC v. LeadClick Media, LLC,* 838 F.3d 158, 174 (2d Cir. 2016).

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content on affiliate pages to avoid being "crazy [misleading]," and to make a report of alleged weight loss appear more "realistic" by reducing the number of pounds claimed to have been lost. LeadClick also purchased advertising banner space from legitimate news sites with the intent to resell it to affiliates for use on their fake news sites, thereby increasing the likelihood that a consumer would be deceived by that content. Based on this evidence, Judge Chin concluded that "LeadClick's role in managing the affiliate network far exceeded that of neutral assistance. Instead, it participated in the development of its affiliates' deceptive websites, 'materially contributing to [the content's] alleged unlawfulness.' Accordingly, LeadClick is an information content provider with respect to the deceptive content at issue and is not entitled to immunity under Section 230."[18]

The Second Circuit also affirmed the entry of summary judgment against LeadClick on the additional ground that it was not being held liable as a publisher or speaker of another's content. Rather, LeadClick was "being held accountable for its own deceptive acts or practices — for directly participating in the deceptive scheme by providing edits to affiliate webpages, for purchasing media space on real news sites with the intent to resell that space to its affiliates using fake news sites, and because it had the authority to control those affiliates and allowed them to publish deceptive statements."[19] Judge Chin concluded that because LeadClick's liability under Section 5 of the FTC Act was "not derived from its status as a publisher or speaker, imposing liability under Section 5 does not 'inherently require [ ] the court to treat the [LeadClick] as the 'publisher or speaker'" of its affiliates' deceptive content, and Section 230 immunity should not apply."[20]

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[18]*FTC v. LeadClick Media, LLC,* 838 F.3d 158, 176 (2d Cir. 2016), *quoting* Fair Housing Council v. Roommate.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc).

[19]*FTC v. LeadClick Media, LLC,* 838 F.3d 158, 176 (2d Cir. 2016).

[20]*FTC v. LeadClick Media, LLC,* 838 F.3d 158, 176–77 (2d Cir. 2016), *citing Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1101-02 (9th Cir. 2009); *FTC v. Accusearch Inc*., 570 F.3d 1187, 1204-05 (10th Cir. 2009) (Tymkovitch, J., concurring) (noting that "the FTC sought and ultimately held [defendant] liable for its conduct rather than for the content of the information it was offering on [its] website" and arguing that there should be no immunity because 'Section 230 only immunizes publishers or speakers for the content of the information from other providers that they make

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In *Huon v. Denton*,[21] the Seventh Circuit reversed and remanded the lower court's order dismissing defamation and false light claims asserted by an accused rapist against Gawker over user comments posted on Gawker's website in connection with an article Gawker had published about plaintiff Huon suing the website *Above the Law* for implying that he was a rapist in an article published on the same day he was acquitted of rape, entitled "Acquitted Rapist Sues Blog for Calling Him Serial Rapist." Judge Williams, writing for himself, Judge Easterbrook and Southern District of Illinois Judge Yandle (who was sitting by designation), explained that although the "Gawker Defendants may well be correct in contending that none of Huon's various allegations actually occurred, . . ." they had stated a claim by alleging that some of the allegedly defamatory comments had been authored by Gawker employees, allegedly to generate revenue.[22] Judge Williams wrote that "[d]iscovery is the proper tool for Huon to use to test the validity of his allegations, and if he is unable to marshal enough facts to support his claim the Gawker Defendants can move for summary judgment."[23] In that case, Huon had pled that the Gawker Defendants: (1) "encouraged and invited" users to defame Huon, through selecting and urging the most defamation-prone commentators to post more comments and continue to escalate the dialogue; (2) edited, shaped and choreographed the content of the comments it received; (3) selected for publication every comment that appeared beneath the Jezebel article; and (4) employed individuals who authored at least some of the comments themselves.[24] The court declined to parse through Huon's specific allegations, most of which Gawker alleged amounted to traditional publishing activities insulated by the CDA, because it did not need to "wade into that debate, since at least some of the allegedly defamatory comments were authored by Gawker employees—thus making Gawker an 'information content provider' under § 230(f)."[25]

Development likewise was found in *Enigma Software*

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public' ").

[21] *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016).

[22] *Huon v. Denton*, 841 F.3d 733, 741-43 (7th Cir. 2016).

[23] *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016).

[24] *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016).

[25] *Huon v. Denton*, 841 F.3d 733, 743 (7th Cir. 2016); *see also Lukis v.*

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Group USA, LLC v. Bleeping Computer LLC,[26] a case where Enigma sued Bleeping for libel, alleging that the poster of the allegedly libelous statements, Quietman7, was acting as Bleeping's agent when he posted them. Enigma alleged that Quietman7 was a "Global Moderator" for Bleeping, who was touted as an expert who could be relied upon to provide correct and understandable answers. In denying Bleeping's motion to dismiss, the court emphasized that Bleeping was not being sued merely because Quietman7 was a forum moderator. Rather, the court emphasized in a footnote that Quietman7 had been designated as a staff member with special privileges.

The CDA similarly was held insufficient to support defendant's summary judgment motion on plaintiff's unfair competition claim in *Small Justice LLC v. Xcentric Ventures LLC*,[27] where the district court ultimately granted summary judgment for the defendant on the merits, after first concluding that RipOffReport.com was not entitled to CDA protection for those aspects of plaintiff's unfair competition claim that arose "not from any third-party content, but from Xcentric's own solicitations and advertisements."[28] In that case, the plaintiff alleged that Ripoff Report's solicitation of

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Whitepages Inc., 454 F. Supp. 3d 746, 763 (N.D. Ill. 2020) (applying *Huon* in denying defendant's motion to dismiss plaintiff's claim under the Illinois Right of Privacy Act because "Whitepages did not act as a mere passive transmitter or publisher of information that was 'provided by another information content provider.' Rather, it is alleged to have actively compiled and collated, from several sources, information regarding Lukis.") (citation omitted). Compiling third party content and collating it is a traditional editorial function that would not be deemed development in most other circuits..

[26]*Enigma Software Group USA, LLC v. Bleeping Computer LLC,* 194 F. Supp. 3d 263, 273-76 (S.D.N.Y. 2016).

[27]*Small Justice LLC v. Xcentric Ventures LLC,* 99 F. Supp. 3d 190, 200 (D. Mass. 2015), *aff'd*, 873 F.3d 313, 325 (1st Cir. 2017).

[28]*Small Justice LLC v. Xcentric Ventures LLC,* 99 F. Supp. 3d 190, 200 (D. Mass. 2015) (granting summary judgment on other grounds), *aff'd*, 873 F.3d 313, 325 (1st Cir. 2017); *see also Congoo, LLC v. Revcontent, LLC,* Civil Action No. 16-401 (MAS)(TBJ), 2016 WL 1547171 (D.N.J. Apr. 15, 2016) (denying defendant's motion to dismiss in a case involving native advertising where the plaintiff alleged that the defendant developed at least some of the advertisements at issue); *Diamond Ranch Academy, Inc. v. Filer,* Case No. 2:14-CV-751-TC, 2016 WL 633351, at *19-22 (D. Utah Feb. 17, 2016) (denying defendant's motion to dismiss plaintiff's intentional interference with prospective economic advantage claim because plaintiff's allegations "focus on publications that are, at a minimum, summaries of third-party statements with Ms. Filer's editorial com-

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companies defamed on its website, for its fee-based reputation restoration business, was an unfair practice. Plaintiff's claims for libel, intentional interference with prospective contractual relations, and other alleged acts of unfair competition previously had been dismissed under the CDA.[29]

In a similar case subsequently brought against the same defendant—*Icon Health & Fitness, Inc. v. ConsumerAffairs.com*,[30] the court held that while the operator of a consumer review site enjoyed CDA immunity for its "Overall Satisfaction Rating" which rated companies based on user input, it developed, and therefore did not enjoy immunity for, content it created, including an overlay allegedly superimposed on product pages of companies that refused to pay to join the site, which said "Not Impressed with [non-paying brand]? Find a company you can trust."[31]

Development was also found in *J.S. v. Village Voice Media Holdings*,[32] in which a majority of the Washington Supreme Court, sitting en banc, held that plaintiffs, minor children who sued alleging that they were "bought and sold for sexual

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ments and her own opinion. Ms. Filer is not entitled to the exemption in the CDA for statements in articles she authored."); *Tanisha Systems, Inc. v. Chandra,* Civil Action No. 1:15-CV-2644-AT, 2015 WL 10550967, at *9 (N.D. Ga. Dec. 4, 2015) (denying defendant's motion to dismiss where Tanisha Systems alleged that Chandra, a former employer, adopted or vouched for third party content that she published on her blog, even though she was not alleged to have authored the posts herself, where she and another former employee developed a "hit list" of current employees to solicit for confidential information to use in connection with misrepresentations, which plausibly alleged development).

Diamond Ranch may be criticized because in that case the defendant was accused of engaging in the type of editorial functions that typically are protected by the CDA and adding her own opinions, which, unlike facts, would not be actionable under the First Amendment.

[29]*See Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal).

[30]*Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, Case No. 1:16-cv-00168, 2017 WL 2728413 (D. Utah June 23, 2017). The court subsequently dismissed plaintiff's amended complaint for defamation based on the CDA, holding that "ConsumerAffairs' star rating represents a protected opinion . . . ." *Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, Case No. 1:16-cv-00168, 2018 WL 1183372, at *2-3 (D. Utah Mar. 6, 2018).

[31]*Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, Case No. 1:16-cv-00168, 2017 WL 2728413, at *4-5 (D. Utah June 23, 2017).

[32]*J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc).

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services online on Backpage.com in advertisements . . . ," stated a claim against the owner of Backpage.com, where plaintiffs alleged that the defendants developed Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message."[33] The majority found that plaintiffs alleged that "Backpage did more than simply maintain neutral policies prohibiting or limiting content."[34] Significantly, Backpage.com succeeded in obtaining dismissal of other, similar claims,[35] underscoring

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[33]*J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 99, 359 P.3d 714, 716 (Wash. 2015) (en banc).

[34]*J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 102, 359 P.3d 714, 717 (Wash. 2015) (en banc). The six specific factual allegations that the majority relied upon were that:

> (1) "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," (2) "Backpage.com has developed content requirements that it knows will allow pimps and prostitutes to evade law enforcement," (3) "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," (4) "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," (5) 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 (6) Backpage has a "substantial role in creating the content and context of the advertisements on its website." . . . According to J.S., Backpage's advertisement posting rules were not simply neutral policies prohibiting or limiting certain content but were instead "specifically designed. . . so that pimps can continue to use Backpage.com to traffic in sex."

184 Wash. 2d at 102-03, 359 P.3d at 717-18.

[35]*See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by section 230(c)(1), in an opinion that was subsequently abrogated with respect to the federal trafficking statute, by the enactment of 47 U.S.C.A. § 230(e)(5)); *Backpage.com, LLC v. Hoffman*, 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA), *appeal dismissed,* No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Coo-*

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potentially how easy it can be for a plaintiff to plead around the CDA under *Roommate.com.*[36]

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per, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding claims of a victim of a child sex trafficker under 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595, brought against the publisher of Backpage, where sexually explicit ads of the minor plaintiff were placed, were preempted by the CDA); *see also Backpage.com, LLC v. Dart,* 807 F.3d 229 (7th Cir. 2015) (directing entry of an injunction barring the Cook County Sheriff from threatening credit card companies with prosecution for doing business with Backpage.com); *see generally supra* § 37.05[1][C] (discussing the *Dart* case).

Backpage's website was ultimately seized and shut down by federal agencies and Congress enacted a new category of exclusions to preclude section 230(c)(1) from providing immunity to interactive computer service providers or users for certain federal civil claims and state criminal charges for advertising related to sex trafficking and related actions to encourage or profit from sex trafficking. The exclusions do not restrict the applicability of section 230(c)(2)(A) for these claims, nor do they apply to state law civil claims. *See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions).

[36]*J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc) was explained in terms of Washington state's high threshold for dismissing claims and criticized as inconsistent with the plain terms of the CDA by the Wisconsin Supreme Court in *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 725 (Wisc.), *cert. denied*, 140 S. Ct. 562 (2019). The Wisconsin Supreme Court elaborated that

> Washington's pleading standard is much different than Wisconsin's. Under Washington law, a complaint may be dismissed for failure to state a claim "only if it appears beyond a reasonable doubt that no facts exist that would justify recovery." . . . Washington courts may consider "hypothetical facts" that were not pled. Therefore, a complaint may not be dismissed "if any set of facts could exist that would justify recovery," whether such facts were pled in the complaint or not. *Hoffer v. State*, 110 Wash.2d 415, 755 P.2d 781, 785 (1988). For this reason, Washington courts may grant motions to dismiss "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *J.S.*, 359 P.3d at 716. . . .
>
> More importantly, the Washington Supreme Court ignored the text of the CDA, and the overwhelming majority of cases interpreting it, by inserting an intent exception into § 230(c)(1). The Washington Supreme Court opined that "[i]t is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking . . . because 'a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.' " *J.S.,* 359 P.3d at 718 (citing

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Most courts, however, have read *Roommate.com* narrowly, based on its unique facts.[37] An important example is the

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Roommates.com, 521 F.3d at 1168). Underlying this statement is the implicit assumption that a website operator's subjective knowledge or intent may transform what would otherwise be a neutral tool into a "material contribution" to the unlawfulness of third-party content. As explained in Section II. C., however, this assumption has no basis in the text of § 230(c)(1). The relevant inquiry, regardless of foreseeability or intent, is "whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." *Backpage.com, LLC*, 817 F.3d at 19 (citing *Barnes*, 570 F.3d at 1101-02).

Daniel v. Armslist, LLC, 926 N.W.2d at 725.

[37]*See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (affirming dismissal of a defamation claim based on critical comments on a website, while distinguishing *Roommate.com* on its facts); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014) (narrowly construing *Roommate.com*); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them were not neutral tools under *Roommate.com*; "The *Gonzalez* complaint is devoid of any allegations that Google specifically targeted ISIS content, or designed its website to encourage videos that further the terrorist group's mission. Instead, the Gonzalez Plaintiffs' allegations suggest that Google provided a neutral platform that did not specify or prompt the type of content to be submitted, nor determine particular types of content its algorithms would promote. The Gonzalez Plaintiffs concede Google's policies expressly prohibited the content at issue. See id. at 1171. Accordingly, the type of algorithm challenged here, without more, is indistinguishable from the one in *Dyroff* and it does not deprive Google of § 230 immunity."); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-1101 (9th Cir. 2019) (affirming dismissal of claims against a social network for providing neutral suggestion tools that encouraged users to join various groups, including one that promoted the use of heroin (where the plaintiff's son met a dealer who sold him fentanyl-laced heroin, which killed plaintiff's son) and which notified users by email when new posts were made to the group, because the service had a "blank box" approach to user content, which was created and posted exclusively by users, not the service; "By recommending user groups and sending email notifications, Ultimate Software, through its Experience Project website, was acting as a publisher of others' content. These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves."); *Bennett v. Google, LLC*, 882 F.3d 1163, 1167 n.7 (D.C. Cir. 2018) (distinguishing *Roommate.com* on its facts as a case that "marks an outer limit of CDA immunity . . . ."); *Seldon v. Magedson*, No. CV-13-00072-PHX-DGC, 2014 WL 1456316 (D. Ariz. Apr. 15, 2014) (granting summary judgment to the defendant on claims for defamation and intentional infliction of emotional distress where the defendant website reviewed, screened and posted third party content but did not write the material itself); *Small Justice LLC v. Xcentric Ventures LLC,* Civil Action No. 13-cv-11701, 2014 WL 1214828, at

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Sixth Circuit's 2014 opinion in *Jones v. Dirty World Entertainment Recordings, LLC*,[38] which vacated a jury award and effectively mooted two year's-worth of earlier opinions in the case, which had been widely relied upon by plaintiffs seeking to avoid CDA preemption is suits involving consumer criticism.

In *Jones v. Dirty World Entertainment Recordings, LLC*,[39] the district court in Kentucky had denied defendant's motion for judgment as a matter of law in a defamation suit where the defendants ran a website called *TheDirt.com*, which the court found operated for the purpose of encouraging defamatory statements, and where the site's owner had personally appended a tagline to the postings of others and supplemented user submissions with his own comments in a way that the court found adopted the defamatory statements as his own. The court held that "by reason of the very name of the site, the manner in which it is managed, and the personal comments of defendant Richie, the defendants have specifically encouraged development of what is offensive about the content of the site."[40] Senior District Court Judge Bertelsman explained, "[o]ne could hardly be more encouraging of

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*7–8 (D. Mass. Mar. 24, 2014) (dismissing libel and tortious interference claims as preempted by the CDA and dismissing in part plaintiff's unfair competition claim under Mass. Gen. L. c. 93A § 11 to the extent based on Xcentric's continued display and refusal to take down reports from the Ripoff Report website, but holding that plaintiff's allegation about Xcentric's CAP and VIP Arbitration services could proceed based on the allegation that it was unfair for Xcentric to refuse to take down defamatory reports while simultaneously advertising services by which the plaintiff could pay Xcentric to restore his reputation), *aff'd*, 873 F.3d 313, 322-23 (1st Cir. 2017) (rejecting arguments that the defendant should be liable as an information content provider for user comments because it (1) claimed copyright protection in its website content and (2) promoted content to be searchable on Google); *Russell v. Implode-Explode Heavy Industries, Inc.*, Civil Action No. DKC 08-2468, 2013 WL 5276557 (D. Md. Sept. 18, 2013) (distinguishing *Roommate.com* based on its unique facts and granting summary judgment for the defendant on claims for libel and defamation where the defendant "was not completely uninvolved with the allegedly defamatory article, but his involvement was limited to editorial work, which is insufficient to transform IEHI into an 'information content provider' . . . .").

[38]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014).

[39]*Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012).

[40]*Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008, 1012–13 (E.D. Ky. 2012).

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the posting of such content than by saying to one's fans (known not coincidentally as 'the Dirty Army'): 'I love how the Dirty Army has war mentality.' "[41]

Jones was a suit by a teacher and cheerleader brought against a foul-mouthed individual who ran a crass website where the teacher's sexual morality had been questioned, and was decided by a senior judge in Kentucky. At the time of the decision there was no controlling Sixth Circuit precedent construing the CDA and the judge, in his brief opinion, specifically cited as authority, in addition to *Roommate.com* and *Accusearch,* the dissenting opinion in the New York Court of Appeals' decision in *Shiamili v. Real Estate Group*[42] and a law review article advocating a narrower scope of CDA immunity than even the Ninth Circuit recognized in *Roommate.com*,[43] underscoring that the *Jones* court was applying a standard for evaluating *development* that was broader than any circuit court had ever recognized.

In a subsequent ruling on defendants' post-trial motion for judgment as a matter of law pursuant to Rule 50, after a jury trial in which the plaintiff was awarded $38,000.00 in compensatory damages and $300,000.00 in punitive damages, Judge Bertelsman sought to cast the jury award in terms of existing case law, relying in particular on the Ninth Circuit's decision in *Roommate.com* and Seventh Circuit criticism of case law holding that the CDA creates immunity or an exemption from liability.[44] In rejecting cases cited by the defendant, Judge Bertelsman explained that they were "entirely distinguishable because none involve[d] facts where a website contributed to the development of actionable content by adding its own comments implicitly adopting an

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[41]*Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008, 1012 (E.D. Ky. 2012).

[42]*Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011, 1020–21 (2011) (Lippman, C.J. dissenting).

[43]*See Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008, 1012–13 & n.5 (E.D. Ky. 2012)*, citing Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011, 1020–21 (2011) (Lippman, C.J. dissenting); *and* Ali Grace Zieglowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of The Communications Decency Act,* 61 Hastings L.J. 1307 (2010).

[44]*See Jones v. Dirty World Entertainment Recordings, LLC*, 965 F. Supp. 2d 818 (E.D. Ky. 2013), *rev'd*, 755 F.3d 398 (6th Cir. 2014).

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offensive posting and encouraging similar posts."[45] He wrote that "a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or adopting the posts becomes a 'creator' or 'developer' of that content and is not entitled to immunity."[46]

The Sixth Circuit, however, vacated the jury verdict and reversed the district court's denial of defendants' motion for judgment, ruling that the defendants were insulated by the CDA from liability. In so ruling, the court adopted what it referred to as "the material contribution test to determine whether a website operator is 'responsible, in whole or part, for the creation or development of [allegedly tortious

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[45]*Jones v. Dirty World Entertainment Recordings, LLC*, 965 F. Supp. 2d 818, 821(E.D. Ky. 2013), *rev'd*, 755 F.3d 398 (6th Cir. 2014).

[46]*Jones v. Dirty World Entertainment Recordings, LLC*, 965 F. Supp. 2d 818, 821(E.D. Ky. 2013) (*citing Hare v. Richie,* Civil Action No. ELH–11–3488, 2012 WL 3773116, at *19 (D. Md. Aug. 29, 2012)), *rev'd*, 755 F.3d 398 (6th Cir. 2014). *Hare* was another case arising out of posts on *TheDirty.com*. The plaintiff in that case had sued the company that owned TheDirty.com, its editor, Nik Richie, and an investor over five message strings that referred to plaintiff as "The Baltimore Stalker" and included extensive commentary from users and from Richie himself. The court denied the motion to dismiss made by the website owner in *Hare* because it was not clear whether all of the potentially actionable posts had been written by users or by the site itself. The *Hare* court cited to both *Jones* and *S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012), in which a different court granted summary judgment for the owner of TheDirty.com under the CDA, noting that in denying defendant's motion it was not pre-judging the applicability of the CDA. The court explained that:

> [I]f Dirty World is the creator or developer, in whole or in part, of the content at issue, it is not entitled to immunity under § 230(c)(1) as to that content. To be sure, Dirty World contends that it is not responsible for the actions of Nik Richie. . . . However, "Section 230 does not preclude joint liability for the joint development of content." *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998). If Dirty World were merely a passive provider of Mr. Richie's material, then Dirty World's argument might have some weight. But, Richie is the founder and editor-in-chief of thedirty.com. Moreover, "a corporation can only act through its agents." *Western Md. Wireless Connection v. Zini*, 601 F. Supp. 2d 634, 643 (D. Md. 2009). At this stage of the litigation at least, when reasonable factual inferences must be resolved in the plaintiff's favor, I must conclude that Richie was acting on behalf of Dirty World in authoring his comments. This distinguishes Dirty World from *Blumenthal*, 992 F. Supp. at 50, where a publisher had immunity under the CDA for distributing a gossip column because there was no support for the allegation that the publisher "had some role in writing or editing the material."

Hare v. Richie, Civil Action No. ELH–11–3488, 2012 WL 3773116, at *17 (D. Md. Aug. 29, 2012).

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information.' "[47]

Judge Julia Smith Gibbons, on behalf of herself and Judges Ralph B. Guy, Jr. and Richard Allen Griffin, in the first reported Sixth Circuit opinion to construe the CDA, explained that section 230, "[a]t its core, . . . bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to withdraw, postpone or alter content.' "[48] She explained that "barring publisher-liability and notice-liability defamation claims lodged against interactive computer service providers . . ." serves three main purposes: (1) maintaining "the robust nature of Internet communication and, accordingly . . . keep[ing] government interference in the medium to a minimum"; (2) protecting "against the 'heckler's veto' that would chill free speech . . .;" and (3) encouraging interactive computer service providers to self-regulate."[49] She also observed that the protection provided by section 230 has merited expansion,[50] that courts have construed its immunity provisions broadly[51] and that close cases must be resolved in favor of immunity.[52]

Judge Gibbons wrote that resolution of *Jones* depended on "how narrowly or capaciously the statutory term 'develop-

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[47]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 413 (6th Cir. 2014), *citing* 47 U.S.C.A. § 230(f)(3).

[48]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 407 (6th Cir. 2014), *quoting Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998).

[49]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 407–08 (6th Cir. 2014), *quoting and citing Zeran v. America Online, Inc.*, 129 F.3d 327, 330-21 (4th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998) and 47 U.S.C.A. § 230(b)(2).

[50]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014), *citing* 28 U.S.C.A. § 4102(c)(1) (providing that U.S. courts "shall not recognize or enforce" foreign defamation judgments that are inconsistent with section 230); 47 U.S.C.A. § 941(e)(1) (extending section 230 protection to new class of entities); *see generally infra* § 37.09[3] (analyzing the SPEECH Act).

[51]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014), *citing Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (collecting cases).

[52]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014), *quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc).

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ment' in § 230(f)(3) is read."[53] The Sixth Circuit panel ultimately concluded that *development* refers "not merely to augmenting the content generally, but *to materially contributing to its alleged unlawfulness.* In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, *if it contributes materially to the alleged illegality of the conduct.*"[54] Judge Gibbons explained that a "material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed

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[53] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 409 (6th Cir. 2014). The court explained that:

> An overly inclusive interpretation of "development" in § 230(f)(3) would posit that a website operator is responsible for the development of content created by a third party merely by displaying or allowing access to it. *Cf. Roommates,* 521 F.3d at 1167 ("It's true that the broadest sense of the term 'develop' could include the functions of an ordinary search engine—indeed, just about any function performed by a website."). But to read the term so broadly would defeat the purposes of the CDA and swallow the core immunity that § 230(c) provides for the "exercise of a publisher's traditional editorial functions." *See Zeran,* 129 F.3d at 330; *see also Roommates,* 521 F.3d at 1167 (stating that "development" cannot be read to swallow § 230 immunity). Our recognition that the CDA affords immunity forecloses this overbroad reading of "development."
>
> By contrast, an overly exclusive interpretation of "development" would exclude all the publishing, editorial, and screening functions of a website operator from the set of actions that the term denotes. Some courts have implied this interpretation, however. *See, e.g., Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 727 (N.D. Ohio 2007), *aff'd,* 551 F.3d 412 (6th Cir. 2008). But we have refused to adopt it. *See Doe,* 551 F.3d at 415 ("[W]e do not reach the question of whether the [CDA] provides SexSearch with immunity from suit. We do not adopt the district court's discussion of the Act, which would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services."). We have maintained that, despite the CDA, *some* state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities.
>
> Therefore, . . . the proper interpretation of "*development* of information provided through the Internet," § 230(f)(3), means something more involved than merely displaying or allowing access to content created by a third party; otherwise § 230(c)(1) would be meaningless. And instances of development *may* include some functions a website operator may conduct with respect to content originating from a third party. *See SexSearch.com,* 551 F.3d at 415.

Id. at 409–10.

[54] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 410 (6th Cir. 2014), *quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (en banc) (emphasis added by the Sixth Circuit in *Jones*).

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content allegedly unlawful."[55]

Applying the material contribution test, which largely follows the CDA opinions of other circuits, the Sixth Circuit rejected the definition of *development* applied by the district court, which the appellate panel characterized as a misapprehension "of how other circuits, particularly the Ninth Circuit in *Roommates,* have separated what constitutes 'development' . . . from what does not."[56] Judge Gibbons explained that "[t]he district court elided the crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable . . . . This is the distinction that divides the holdings in *Roommates* and *Accusearch,* which stripped the respective defendants of the CDA's protection, from the holdings in *Roommates, Chicago Lawyers' Committee, Johnson, Batzel, Nemet*, and *Zeran,* which barred the respective plaintiffs' claims."[57] The panel explained that "an encouragement theory of 'development' [as applied by the district court] does not obviously capture what was allegedly unlawful about the

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[55]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 410 (6th Cir. 2014).

[56]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014).

[57]*Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014), *citing Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1169–74 (9th Cir. 2008) (en banc). The panel explained that:

> In *Roommates,* the website was responsible for the alleged discrimination by requiring users to submit protected characteristics and hiding listings based on those submissions. 521 F.3d at 1165–68. In *Accusearch,* the website was responsible for the illegal purchase and resale of confidential telephone records. 570 F.3d at 1200–01. But in *Chicago Lawyers' Committee,* 519 F.3d at 671–72, and *Nemet,* 591 F.3d at 256–57, for example, the website operators provided a forum for user posts, did not require users to violate the law as a condition of posting, did not compensate for the posting of actionable speech, did not post actionable content themselves, and therefore were not responsible for the actionable speech that was displayed on their websites. The district court's rule does not neatly divide these cases. An encouragement theory of "development" does not obviously capture what was allegedly unlawful about the design of Roommate's website, particularly its search engine, or Accusearch's payment for unlawful conduct. And it does not obviously leave out the neutral fora created by the commercially oriented websites targeted by the claims in *Chicago Lawyers' Committee* and *Nemet* (craigslist.com and www.consumeraffairs.com, respectively).

Jones v. Dirty World Entertainment Recordings, LLC, 755 F.3d 398, 414 (6th Cir. 2014).

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design of Roommate's website, particularly its search engine, or Accusearch's payment for unlawful conduct. And it does not obviously leave out the neutral fora created by the commercially oriented websites targeted by the claims in *Chicago Lawyers' Committee* and *Nemet* (craigslist.com and www.consumeraffairs.com, respectively)."[58] The court elaborated:

> More importantly, an encouragement test would inflate the meaning of "development" to the point of eclipsing the immunity from publisher-liability that Congress established. Many websites not only allow but also actively invite and encourage users to post particular types of content. Some of this content will be unwelcome to others—*e.g.,* unfavorable reviews of consumer products and services, allegations of price gouging, complaints of fraud on consumers, reports of bed bugs, collections of cease-and-desist notices relating to online speech. And much of this content is commented upon by the website operators who make the forum available. Indeed, much of it is "adopted" by website operators, gathered into reports, and republished online. Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers' suits aimed at the publisher. Moreover, under the district court's rule, courts would then have to decide what constitutes "encouragement" in order to determine immunity under the CDA—a concept that is certainly more difficult to define and apply than the Ninth Circuit's material contribution test. *See Zeran,* 129 F.3d at 333. Congress envisioned an uninhibited, robust, and wide-open internet, *see* § 230(a)(1)-(5), but the muddiness of an encouragement rule would cloud that vision.[59]

The Sixth Circuit in *Jones* likewise rejected the district court's suggestion that "when an interactive computer service provider adds commentary to third-party content that 'ratifies or adopts' that content, then the provider becomes a 'creator' or 'developer' of that content and is not entitled to the CDA's protection."[60] Judge Gibbons explained that:

> An adoption or ratification theory . . . is not only inconsistent with the material contribution standard of "development" but also abuses the concept of responsibility. A website operator cannot be responsible for what makes another party's statement actionable by commenting on that statement *post hoc.*

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[58] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014).

[59] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 414–15 (6th Cir. 2014).

[60] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 415 (6th Cir. 2014).

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> To be sure, a website operator's previous comments on prior postings could encourage subsequent invidious postings, but that loose understanding of responsibility collapses into the encouragement measure of "development," which we reject. *See, e.g., Roommates,* 521 F.3d at 1174; *Batzel,* 333 F.3d at 1031. As other courts have recognized, the adoption theory of "development" would undermine the CDA for the same reasons as an encouragement theory. *See Parisi v. Sinclair,* 774 F. Supp. 2d 310, 316 (D.D.C. 2011) (dismissing plaintiffs' claims as barred by the CDA despite their argument that defendant "adopted" the statements at issue as its own and finding that "it would be contrary to the purpose of the CDA, which sought to encourage the vibrant and competitive free market of ideas on the Internet, by establishing immunity for internet publication of third-party content to require a fact-based analysis of if and when a defendant adopted particular statements and revoke immunity on that basis"; internal citations and quotation marks omitted).

Applying the material contribution test to the facts of *Jones,* the Sixth Circuit held that the defendants did not materially contribute to the illegality of third party postings because they did not author the statements at issue and could not be found to have materially contributed to the defamatory content simply by selecting the posts for publication, which is a traditional editorial function.[61] Nor could they be found to have materially contributed to the defamatory content through the decision not to remove the posts.[62] The Sixth Circuit explained:

> Unlike in *Roommates,* the website that Richie operated did not require users to post illegal or actionable content as a condition of use. *Cf. Roommates,* 521 F.3d at 1165–68. Nor does the name of the website, www.TheDirty.com, suggest that only illegal or actionable content will be published. Unlike in *Accusearch,* Richie or Dirty World did not compensate users for the submission of unlawful content. *Cf. Accusearch,* 570 F.3d at 1200–01. The website's content submission form simply instructs users to "[t]ell us what's happening. Remember to tell us who, what, when, where, why." The form additionally provides labels by which to categorize the submission. These tools, neutral (both in orientation and design) as to what third parties submit, do not constitute a material contribution to any defamatory speech that is uploaded. *See Nemet,* 591 F.3d at 256 (finding that the

[61] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 415–16 (6th Cir. 2014).

[62] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

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> "structure and design of [defendant's] website" and the website's "solicit[ion of] its customers' complaints [and] steer-[ing] them into specific categor[ies]" did not constitute development under § 230(f)(3)" (fifth alteration in original) (internal quotation marks omitted)); *Roommates,* 521 F.3d at 1173–74 (holding that § 230 barred the fair housing councils' claims grounded on the discriminatory statements displayed through Roommate's operation of the "additional comments" section of its website).[63]

The appellate panel similarly found that Richie's comment on a user's December 7 post—"Why are all high school teachers freaks in the sack?"—"although absurd, did not materially contribute to the defamatory content of the statements uploaded on October 27 and December 7, 2009. Richie's remark was made after each of the defamatory postings had already been displayed."[64] Judge Gibbons explained that "[i]t would break the concepts of responsibility and material contribution to hold Richie responsible for the defamatory content of speech because he later commented on that speech. Although ludicrous, Richie's remarks did not materially contribute to the defamatory content of the posts appearing on the website. More importantly, the CDA bars claims lodged against website operators for their editorial functions (or content moderation), such as the posting of comments concerning third-party posts, so long as those comments are not themselves actionable."[65] The appellate panel clarified that Richie was an information content provider with respect to his comment on the December 7 post, but Jones had not alleged that Richie's comments were defamatory – only that the defendants encouraged and ratified the statements posted by users.[66] The Sixth Circuit reiterated that the "district court's adoption or ratification test . . . is inconsistent with the material contribution standard of 'development' and, if established, would undermine the CDA."[67]

The Sixth Circuit's decision in *Jones* was relied upon by

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[63] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

[64] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

[65] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

[66] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

[67] *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398,

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the California Supreme Court, in *dicta*, in stating that Yelp, had it been sued for defamation, intentional infliction of emotional distress, and false light, would have been entitled to immunity under section 230(c)(1) despite allegations (which Yelp denied) that Yelp "aided and abetted" a defendant by featuring an allegedly defamatory user review as a "Recommended Review," by not factoring some positive reviews into the plaintiff's overall rating on Yelp, and by writing to the plaintiff explaining why it was not willing to takedown certain posts which had been found defamatory by a default judgment.[68]

Prior to the Sixth Circuit's ruling in *Jones,* the owners of TheDirty.com had prevailed in other CDA challenges. In *S.C. v. Dirty World, LLC*,[69] a court in Missouri applying Eighth Circuit law granted summary judgment for the owners of TheDirty.com in a defamation case brought in the Western District of Missouri, concluding both that the court in *Jones* applied an unduly narrow interpretation of the CDA that was inconsistent with Eighth Circuit law and that the two cases were factually distinguishable.[70] District Court Judge Dean Whipple, who had written the district court opinion that was subsequently affirmed in the first Eighth Circuit case applying the CDA, *Johnson v. Arden*,[71] sought to distance himself in *S.C. v. Dirty World, LLC* from Judge Bertelsman's initial ruling in *Jones,* explaining:

> This Court . . . distances itself from certain legal implications set forth in *Jones*. In particular, Jones appears to adopt a relatively narrow interpretation of CDA immunity. *Id*. at *3,

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417 (6th Cir. 2014).

[68]*Hassell v. Bird*, 5 Cal. 5th 522, 543 n.14, 234 Cal. Rptr. 3d 867, 884 n.14 (2018). In that case, the California Supreme Court held that the plaintiff, a lawyer, could not make an "end-run" on the CDA by obtaining a default judgment against the defendant, her former client, in a case in which Yelp could have asserted CDA immunity as a defense had it been joined in the action, and then seek to enforce that judgment against Yelp, without affording Yelp the opportunity to raise the CDA defense in the second action. In the context of that opinion, the California Supreme Court cited *Jones* to reject arguments raised by the plaintiff and a dissenting justice questioning whether Yelp would have been entitled to section 230(c)(1) immunity had it been sued by the plaintiff directly.

[69]*S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012).

[70]*S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012).

[71]*Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010).

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> 5. This is in conflict with the "broad" interpretation recognized in this circuit. *See Johnson*, 614 F.3d at 791. Additionally, *Jones* found that "**the name of the site in and of itself** encourages the posting only of 'dirt,' that is material which is potentially defamatory . . . ." *Jones*, 2012 WL 70426, at *4 (emphasis supplied). As explained above, however, the CDA focuses on the specific content at issue and not the name of a website. *See Global Royalties, Ltd.*, 544 F. Supp. 2d at 933 (finding that although a website entitled "Ripoff Report" encourages defamatory content, this does not make the website operator liable for every post). As also explained above, the Website is not devoted entirely to "dirt."[72]

Judge Whipple underscored that "merely encouraging defamatory posts is not sufficient to defeat CDA immunity."[73]

In addition to disagreeing with the district court opinion in *Jones* on the law (which the Sixth Circuit eventually did as well), Judge Whipple distinguished the two cases on their facts (at least as alleged, because *S.C.* was decided prior to the trial and post-trial Rule 50 ruling in *Jones*). Judge Whipple explained that:

> *Jones* is factually distinguishable. The plaintiff in that case was a high school teacher. Among other posts about the plaintiff, one third party posted that her "ex" had "tested positive for [two sexually transmitted diseases] . . . so im sure [plaintiff] also has both." The third party also posted that the plaintiff's ex "brags about doing [plaintiff] in the gym . . . football field . . . her class room at the school where she teaches . . . ." In response to this post, Richie stated "Why are all high school teachers freaks in the sack?" Richie made other comments about the plaintiff, including a comment to her that "[y]ou dug your own grave here . . . . It was also undisputed that Richie refused to remove the posts despite the plaintiff's requests.
>
> Here, the Plaintiff has not identified any posts by Richie that could be seen as ratifying the Church Girl Post or encouraging further development of it. For example, this case could have been different if, as in *Jones*, Richie had responded to the Church Girl Post with "Why are all church girls freaks in the sack?" Instead, Richie simply made an opinion about the Plaintiff's appearance that did not relate to the alleged defamatory statements. Unlike *Jones*, Richie also removed the Church Girl Post. Again, this suggests that the Defendants neither adopted nor encouraged further development of the

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[72] *S.C. v. Dirty World, LLC,* No. 11–CV–392–DW, 2012 WL 3335284, at *5 (W.D. Mo. Mar. 12, 2012).

[73] *S.C. v. Dirty World, LLC,* No. 11–CV–392–DW, 2012 WL 3335284, at *4 (W.D. Mo. Mar. 12, 2012).

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post. Given these significant factual differences, *Jones* is not persuasive.[74]

The district court's ruling in *Jones* previously was construed narrowly by one court, along with *Accusearch*, as cases where "liability was predicated upon the website's decision to affirmatively adopt or ensure the presentation of unlawful material."[75] Both opinions, however, could equally be seen as applying a more expansive view of *development*—and hence a narrower scope of CDA immunity—than even what was delineated by the Ninth Circuit in *Roommate.com*, which is eventually what the Sixth Circuit itself concluded on appeal.

A number of courts that have read *Roommate.com* narrowly, based on its unique facts, have been tough in evaluating claims that allege development in light of the heightened pleading requirements to state a claim set by the U.S. Supreme Court in *Ashcroft v. Iqbal*[76] and *Bell Atlantic Corp. v. Twombly*.[77]

In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,[78] for example, the Fourth Circuit affirmed the dismissal of a defamation claim brought by a car dealership against a com-

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[74]*S.C. v. Dirty World, LLC,* No. 11–CV–392–DW, 2012 WL 3335284, at *5 (W.D. Mo. Mar. 12, 2012) (footnote omitted). Judge Whipple noted that "Richie's comment about the size of Plaintiff's gumline is a non-actionable statement of opinion regarding the Plaintiff's physical appearance. It had nothing to do with whether the Plaintiff is unchaste." *Id*. at *5 n.4.

[75]*Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. App. 2012). *Jones* was explained as a case where

> the website operator was found to have participated in the development of defamatory posts by appending a "tagline" to the postings of others and adding his own comments, actions 'which the jury could certainly interpret as adopting the preceding allegedly defamatory comments.

Id. The *StubHub* court similarly construed *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009) as holding merely that soliciting and paying researchers for personal phone records amounted to development in that case because obtaining the personal phone records of third parties is almost always unlawful. *See Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. App. 2012).

[76]*Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

[77]*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007); *infra* § 37.05[7] (procedural issues on when to raise the CDA defense and pleading requirements); *see generally infra* § 57.04[1] (analyzing *Iqbal* and *Twombly* and their impact on pleading standards).

[78]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

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mercial gripe site for 20 statements posted on its website. The plaintiff had alleged Consumeraffairs.com should be held liable as an information content provider based on: (1) the structure and design of its website, and (2) its participation in the preparation of consumer complaints, including soliciting complaints, steering them into specific categories designed to attract attention by class action lawyers, contacting users to ask questions about their complaints, helping users draft or revise their complaints and promising customers that they could obtain a financial recovery by joining a class action suit.

The court ruled that the plaintiff failed to plead facts sufficient to show responsibility for development of the posts, where the complaint alleged that Consumeraffairs.com developed consumer complaints by allegedly "soliciting" them, "contacting the consumer" to ask questions and help draft or revise complaints, or structuring and designing its website to develop information related to class-action lawsuits, which is not illegal content.[79] The Fourth Circuit panel made clear that these actions did not amount to responsibility for development under the CDA where the content allegedly developed related to class action suits, not the 20 posts at issue, and encouraging discussions about class action suits was not illegal.

By contrast, the court noted that the website in *Roommate.com required* users to input illegal content as a necessary condition of use. Moreover, developing content to further a class action lawsuit, the appellate panel wrote, did not amount to "materially contributing" to a given piece of information's "alleged unlawfulness."[80]

The majority also found insufficient the allegation that Consumeraffairs.com itself fabricated eight posts, based on the fact that Nemet could not match eight of the twenty posts with specific people in its database. Chief District Judge Jones, sitting by designation, concurred in part, but dissented with respect to the eight posts that Nemet alleged Consumeraffairs.com itself fabricated, arguing that the court, in evaluating a motion to dismiss, was required to ac-

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[79] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256–57 (4th Cir. 2009).

[80] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009), *quoting Fair Housing Council v. Roommate.com*, LLC, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (*en banc*).

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cept as true the allegation that these posts were not made by real customers.[81] In the Ninth Circuit, under *Roommate.com*, composing eight posts could well have been found to amount to development, provided the posts were actionable. If the posts merely promoted class action litigation, which the court noted was not illegal, then even in the Ninth Circuit this allegation would not have been sufficient to avoid dismissal.

The Fourth Circuit emphasized that " 'immunity is an *immunity from suit* rather than a mere defense to liability' and 'it is effectively lost if a case is erroneously permitted to go to trial.' . . . ."[82] For this reason, the court explained that entitlement to section 230 immunity should be resolved "at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.' "[83]

The D.C. Circuit, in dismissing claims against Google over a user's blog post based on the CDA, distinguished *Roommate.com* on its facts as a case that "marks an outer limit of CDA immunity . . . ."[84] The court noted that it was "not bound by extra-circuit precedent . . . ,"[85] but nonetheless addressed *Roommate.com* given the plaintiff's reliance on the case. D.C. Circuit Court Judge Karen LeCraft Henderson, writing for herself and Circuit Court Judge (now Supreme Court Justice) Brett Kavanaugh and Circuit Court Judge Judith W. Rogers, characterized the case narrowly, explaining that "[b]ecause Roommates.com created the universe of pre-populated answers, required users to answer its questions before registering and used those answers in

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[81] He wrote:

> It is true that there may be alternative explanations for these posts that show that they are not attributable to Consumeraffairs.com. Nemet may have simply overlooked eight actual customers in its review of the company sales documents. The fictitious posts may have come from mischief makers unrelated to Consumeraffairs.com, or from real consumers who wished to remain anonymous by falsifying the details of their transactions. But I don't believe that any of these alternatives are any more plausible than Nemet's claim.

Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 262 (4th Cir. 2009) (Jones, J. concurring in part, dissenting in part).

[82] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (citations omitted).

[83] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

[84] *Bennett v. Google, LLC*, 882 F.3d 1163, 1167 n.7 (D.C. Cir. 2018).

[85] *Bennett v. Google, LLC*, 882 F.3d 1163, 1167 n.7 (D.C. Cir. 2018).

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providing tailored services to its users, the court held that Roommates.com was a content provider as well as a service provider and that it was not entitled to CDA immunity for the content that remained on its site."[86]

The Sixth Circuit similarly broadly construed the scope of CDA immunity and narrowly construed the reach of *Roommate.com* in *O'Kroley v. Fastcase, Inc.*,[87] a case decided two years after *Jones*. In *O'Kroley v. Fastcase*, the Sixth Circuit affirmed dismissal of O'Kroley's suit against the Texas Office of Court Administration, Google, Fastcase and others over allegations that he was harmed because he appeared to be falsely listed as having been convicted of indecency with a child, in search results when his name was queried, because of the way the Texas Advance Sheet previewed information.

The court expressed sympathy for O'Kroley's position but affirmed dismissal because his suit sought to impose liability on Google for merely providing access to and reproducing allegedly defamatory text. The appellate panel conceded that Google "performed some automated editorial acts on the content, such as removing spaces and altering font, and it kept the search result up even after O'Kroley complained about it. But these acts come within 'a publisher's traditional editorial functions'—'deciding whether to publish, withdraw, postpone or alter content'—and thus Google remains eligible for the statute's immunity."[88] The court also rejected the argument that Google plausibly could be accused of having developed the content under *Roommate.com* because *development* "does not 'include the functions of an ordinary search engine.' "[89] The panel further observed that Google's alterations, in any case, did not "materially contribute to the alleged unlawfulness of the content."[90] The court also affirmed dismissal of the plaintiff's claims against the other defen-

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[86]*Bennett v. Google, LLC*, 882 F.3d 1163, 1167 n.7 (D.C. Cir. 2018).

[87]*O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016).

[88]*O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016), *quoting Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

[89]*O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016), *quoting Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014).

[90]*O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016), *quoting Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 412 (6th Cir. 2014).

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dants on the same grounds.

In *Small Justice LLC v. Xcentric Ventures LLC*,[91] the First Circuit affirmed dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com. In so ruling, the court rejected plaintiff's argument that the defendant should be liable as an information content provider for user comments because it (1) claimed copyright protection in its website content and (2) promoted content to be searchable on Google.[92]

Plaintiff's claims likewise were dismissed, in *Dart v. Craigslist, Inc.*,[93] a suit in which the court rejected conclusory allegations intended to plead around *Roommate.com*. In *Dart*, Thomas Dart, the Cook County Sheriff, sued Craigslist alleging that it was maintaining a public nuisance by hosting an "adult" section of its site where users could post sexually suggestive advertisements, including, Sheriff Dart alleged, a large number of advertisements for prostitutes in the Chicago area. The court noted that "[a]lthough he carefully avoids using the word 'publish,' Sheriff Dart's complaint could be construed to allege 'negligent publishing.' "[94] Among other things, Sheriff Dart alleged that Craigslist itself caused or induced illegal content, but the court rejected this assertion based on Craigslist's repeated warnings to users not to post such material.[95] Similarly, Sheriff Dart alleged that Craigslist knowingly "arranged" meetings for purposes of prostitution and "direct[ed]" people to places of prostitution, but the court found "these allegations [to] strain the ordinary meaning of the terms 'arrange' and 'direct' unless Craigslist

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[91] *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313 (1st Cir. 2017).

[92] *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017). The court emphasized that other courts had similarly held that merely providing direction to search engines to index content does not transform an interactive computer service provider into an information content provider. *Id.*, *citing Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270–71 (9th Cir. 2016) ("Yelp is not liable for disseminating. . . [user-generated] content in essentially the same format to a search engine, as this action does not change the origin of the third-party content." (*citing Ascentive, LLC v. Op. Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011)).

[93] *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

[94] *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009).

[95] *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009).

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itself created the offending ads" which plaintiff did not allege.[96] In rejecting Sheriff Dart's "conclusory allegations" and granting judgment on the pleadings, the court ruled that "[e]ven at this stage of the case we are not required to accept those allegations at face value . . . ."[97]

The court in *Dart* emphasized that nothing "Craigslist offers induces anyone to post any particular listing."[98] The court made clear that offering an adult services section was not itself unlawful, nor did it necessarily call for unlawful content.[99] Although the court accepted as true for purposes of the motion the allegation that users routinely flout Craigslist's guidelines, the court emphasized that it was "not because Craigslist has caused them to do so."[100] It also rejected the argument that liability could be imposed because Craigslist had a search function, which the court characterized as a neutral tool. Ultimately, the court concluded that "Sheriff Dart may continue to use Craigslist's website to identify and pursue individuals who post allegedly unlawful content . . . . But he cannot sue Craigslist for their conduct."[101]

Following *Dart,* the court in *M.A. v. Village Voice Media Holdings LLC*,[102] held that the claims of a victim of a child sex trafficker under 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595, against the publisher of Backpage, where sexually explicit ads of the minor plaintiff were placed, were preempted by the CDA. This case was followed by a similar ruling from the First Circuit, in *Doe No. 1 v. Backpage.com, LLC*,[103] which affirmed dismissal under the CDA of claims for civil remedies under the Trafficking Victims Protection

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[96]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009).

[97]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009).

[98]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009), *quoting Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

[99]665 F. Supp. 2d at 968, *citing Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc) (concluding that section 230(c)(1) did not protect a website operator whose roommate-matching service "require[d]" users to answer discriminatory questions from a menu of answers that the defendant supplied).

[100]665 F. Supp. 2d at 969.

[101]665 F. Supp. 2d at 969.

[102]*M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

[103]*Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016).

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Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50. As a result of these rulings, Congress enacted a new category of exclusions to preclude section 230(c)(1) from providing immunity to interactive computer service providers or users for certain federal civil claims brought under 18 U.S.C.A. § 1595 and state criminal charges related to sex trafficking.[104]

Before it was shut down, Backpage.com had also been successful in affirmatively enjoining enforcement of state criminal laws that would have been barred by section 230(c)(1) at the time,[105] as well as enjoining the Cook County, Illinois Sheriff, Tom Dart, in *Backpage.com, LLC v. Dart*,[106] from threatening credit card companies with potential prosecution if they did not stop doing business with Backpage.com, because it hosted advertisements for adult listings, where the Seventh Circuit found that the Sheriff would not sue Backpage.com directly because of the outcome in *Dart v.*

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[104]*See* 47 U.S.C.A. § 230(e)(5). The exclusions do not restrict the applicability of section 230(c)(2)(A) immunity, nor do they apply to state law civil claims. *See infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions).

[105]*See Backpage.com, LLC v. Hoffman,* 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA, in a case pre-dating the enactment of section 230(e)(5)), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA, in a case pre-dating the enactment of section 230(e)(5)); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230, in a case pre-dating the enactment of section 230(e)(5)).

Congress subsequently enacted new exclusions that made section 230(c)(1) inapplicable to state criminal actions related to sex trafficking. *See* 47 U.S.C.A. § 230(e)(5). That section, however, provides that a defense may still be asserted under section 230(c)(2)(A). *See id.; infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions).

[106]*Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015).

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Craigslist, Inc.,[107] where, as noted earlier in this section, similar claims brought against a different online service were held preempted by the CDA.[108] In *Dart*, Judge Posner explained, although the CDA provides merely a defense, not a claim, where the government threatens action that would allow for First Amendment and CDA defenses to be raised, but declines to bring the suit, a plaintiff's only remedy is an injunction against the violation of First Amendment rights.[109]

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[107]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

[108]*See Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015).

[109]*See Backpage.com, LLC v. Dart*, 807 F.3d 229, 238-39 (7th Cir. 2015), *citing Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). In that case, Cook County Sheriff Tom Dart had sued unsuccessfully to shut down Craigslist's adult section, in a suit held preempted by the CDA. *See Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009). Craigslist nevertheless shut down its adult section. Judge Posner explained that, "[t]he suit against Craigslist having failed, the sheriff decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers." 807 F.3d at 231. Sheriff Dart sent threatening letters dated June 29, 2015 to VISA and MasterCard, implying that he would take legal action if they continued to work with Backpage.com. The letter, according to Judge Posner, "was not merely an expression of Sheriff Dart's opinion. It was designed to compel the credit card companies to act . . . ." *Id.* at 232. He followed up the letters with calls advising he would be holding a press conference a few days later to either announce that they had stopped accepting advertisements from Backpage.com or pointing out their ties to sex trafficking. *Id.* at 232-33. In response to the letters, both VISA and MasterCard stopped allowing their credit cards to be used to pay for any advertisements on Backpage.com, not merely adult advertisements.

Judge Posner wrote that "Visa and MasterCard were victims of government coercion aimed at shutting up or shutting down Backpage's adult section (more likely aimed at bankrupting Backpage . . . ." *Id.* at 234. He emphasized that the listings in the "adult" section of Backpage included listings for activities that were not illegal and that throttling Backpage also impacted advertisements in other sections that it offered. Judge Posner explained that Sheriff Dart was free to express his views as a private citizen." And even in his official capacity the sheriff can express his distaste for Backpage and its look-alikes; that is, he can exercise what is called "[freedom of] government speech." *Id.* at 234-35, *citing Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833–34 (1995); *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011). "A government entity, including therefore the Cook County Sheriff's Office, is entitled to say what it wants to say—but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens." *Backpage.com, LLC v. Dart*, 807 F.3d at 235. Judge Posner elaborated:

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Backpage.com was unsuccessful, however, in Washington state in seeking dismissal of a suit by children who sued alleging that they were "bought and sold for sexual services online on Backpage.com in advertisements. . . ,"[110] where plaintiffs alleged that the defendants developed

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In his public capacity as a sheriff of a major county (Cook County has a population of more than 5.2 million), Sheriff Dart is not permitted to issue and publicize dire threats against credit card companies that process payments made through Backpage's website, including threats of prosecution (albeit not by him, but by other enforcement agencies that he urges to proceed against them), in an effort to throttle Backpage. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). For where would such official bullying end, were it permitted to begin? Some public officials doubtless disapprove of bars, or pets and therefore pet supplies, or yard sales, or lawyers, or "plug the band" (a listing of music performances that includes such dubious offerings as "SUPERCELL Rocks Halloween at The Matchbox Bar & Grill"), or men dating men or women dating women—but ads for all these things can be found in non-adult sections of Backpage and it would be a clear abuse of power for public officials to try to eliminate them not by expressing an opinion but by threatening credit card companies or other suppliers of payment services utilized by customers of Backpage, or other third parties, with legal or other coercive governmental action.

With very limited exceptions, none applicable to this case, censorship—"an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive," *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001), as distinct from punishing such dissemination (if it falls into one of the categories of punishable speech, such as defamation or threats) after it has occurred—is prohibited by the First Amendment as it has been understood by the courts. "Threatening penalties for future speech goes by the name of 'prior restraint,' and a prior restraint is the quintessential first-amendment violation." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009).

Backpage.com, LLC v. Dart, 807 F.3d at 235. Accordingly, the Seventh Circuit panel reversed the lower court's refusal to grant Backpage.com relief with instructions to enter an injunction directing Sheriff Dart and those acting on his behalf to "take no actions, formal or informal, to coerce or threaten credit card companies, processors, financial institutions, or other third parties with sanctions intended to ban credit card or other financial services from being provided to Backpage.com." *Id.* at 239. The injunction also required Sheriff Dart to transmit a copy of the order to Visa and MasterCard and all other recipients of his June 29, 2015 letter. *Id.*

Backpage's website was seized and shut down in a raid by the federal government in April 2018 and a new exclusion limiting CDA immunity in cases involving advertising for sex trafficking was enacted shortly thereafter. *See infra* § 37.05[5][C].

[110] *J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 98, 359 P.3d 714, 715 (Wash. 2015) (en banc). *J.S. v. Village Voice Media Holdings* was subsequently explained in terms of Washington state's high threshold for dismissing claims (compared to most other states and federal courts) and criticized as inconsistent with the plain terms of the CDA by the Wisconsin Supreme Court in *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 725 (Wisc.), *cert. denied*, 140 S. Ct. 562 (2019).

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Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message."[111] The U.S. Senate has also expressed interest in this issue.[112] Ultimately, Backpage's website was seized by federal agencies and Congress amended the CDA to preclude CDA protection under section 230(c)(1) certain federal civil claims and state criminal charges related to sex trafficking, including hosting or advertising adult escort or similar services (although the exemption created by section 230(c)(2)(A) may still apply).[113]

By contrast, Google was successful in using the CDA defense affirmatively to obtain injunctive relief (in that case, preliminarily enjoining enforcement of a Canadian court order that required it to delist certain search results on a world-wide basis).[114]

Airbnb similarly was successful in part in preliminarily enjoining enforcement of those aspects of a City ordinance that required booking agents to prevent, remove, or de-list any ineligible listings, and which required monthly disclosure of the number of nights that a housing unit was occupied the preceding month, based on the finding that Airbnb was likely to prevail on the merits in showing that these provisions of

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[111] *J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 99, 359 P.3d 714, 716 (Wash. 2015) (en banc).

[112] *See Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 136–37 (D.D.C. 2016) (enforcing a subpoena compelling the CEO of Backpage.com, LLC to testify before the U.S. Senate; "Given the relevance of section 230 of the CDA and its focus on self-monitoring, the Subcommittee is legitimately interested in investigating the nature and extent of Backpage's moderation procedures, as well as evaluating the measures taken by other service providers to prevent their websites from becoming sex trafficking havens."), *vacated and appeal dismissed as moot*, 856 F.3d 1080 (D.C. Cir. 2017).

[113] *See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions).

[114] *See Google LLC v. Equustek Solutions Inc.*, Case No. 5:17-cv-04207-EJD, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017) (preliminarily enjoining enforcement of the Canadian court order because Google was likely to prevail in establishing that it was immune under section 230 from claims seeking to force it to remove links to third party websites; "By forcing intermediaries to remove links to third-party material, the Canadian order undermines the policy goals of Section 230 and threatens free speech on the global internet.").

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the ordinance violated 47 U.S.C.A. § 230(c)(1).[115]

In *Collins v. Purdue University*,[116] the court, in granting judgment on the pleadings on libel and false light claims that sought to hold the defendant liable for user comments posted to its interactive website, based on plaintiff's assertion that the defendant solicited and encouraged message board community members to engage in defamatory statements, the court observed that "[a]lthough Collins goes to great lengths in his response to argue (albeit, without a single supporting case cite) that Federated is not an interactive computer service but a content provider, and therefore is not entitled to the CDA immunity, Federated's website . . . fits the CDA scheme."[117]

In *Levitt v. Yelp! Inc.*,[118] Judge Edward Chen of the Northern District of California dismissed plaintiffs' extortion and unfair competition claims against Yelp based on the allegation that it had unlawfully manipulated the content of its business review pages to induce plaintiffs to pay for advertising. Plaintiffs had alleged that Wheel Techniques had noticed negative reviews on its Yelp page that did not correspond with its records of actual customers. Around the same time, it alleged that it had received a call from Yelp! requesting that it advertise its business on Yelp. Plaintiffs alleged that the "false" reviews were created and posted by Yelp "as a threat to induce Wheel Techniques to advertise." Also in 2009, plaintiffs alleged that when Wheel Techniques contacted Yelp to ask why a competitor had a high rating on Yelp, a Yelp representative told him that the competitor advertised and "we work with your reviews if you advertise with us." In 2010, Wheel Techniques was again contacted to purchase advertising. Upon declining, plaintiffs alleged that a 1-star review was moved to the top of the business page "within minutes" as a threat to induce the company to purchase advertising. Plaintiffs also alleged that Wheel Techniques' owner was told that several Yelp employees had

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[115]*See Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 119-25 (D. Mass. 2019).

[116]*Collins v. Purdue University*, 703 F. Supp. 2d 862 (N.D. Ind. 2010).

[117]*Collins v. Purdue University*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010).

[118]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

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been fired and their computers had been frozen "as a result of scamming related to advertising." While Yelp denied these allegations, the court, in dismissing plaintiffs' claims, assumed the allegations to be true, consistent with the standard for evaluating a motion to dismiss.

In dismissing plaintiffs' claims Judge Chen characterized plaintiffs' allegations that Yelp manufactured its own negative reviews or deliberately manipulated reviews to the detriment of businesses that refuse to purchase advertising as "entirely speculative." Judge Chen explained "[t]hat Yelp employees have written reviews, even for pay, does not raise more than a mere possibility that Yelp has authored or manipulated content related to Plaintiffs in furtherance of an attempt to 'extort' advertising revenue."[119]

Similarly, Judge Chen wrote "that Wheel Techniques noticed negative reviews of its business that did not match its customer records does not support the logical leap that Yelp created those reviews. Nor does an allegation that . . . Wheel Techniques' owner . . . 'was told' by an unnamed source 'that a former Yelp employee stated that Yelp, upon information and belief, terminated a group of sales employees . . . as a result of scamming related to advertising' . . . raise more than a speculative possibility that Yelp employees created or substantively manipulated the content of Plaintiff's reviews in this case."[120]

Judge Chen similarly rejected the allegation that Yelp manipulated user generated content as barred by the CDA. The court explained that removing content was immunized by the CDA.[121] Judge Chen further held that Yelp could not be held liable for creating or "developing" plaintiff's aggregate business rating (a star rating at the top of each company's review page) since a company's rating was

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[119] *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *5 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[120] *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *5 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[121] *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

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determined by user generated data,[122] notwithstanding allegations that Yelp manipulated the aggregate rating by including and excluding particular reviews.[123] The court held that "the text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith"[124]—noting that, unlike section 230(c)(2),[125] which expressly requires a showing of good faith, the immunity created by section 230(c)(1) "contains no explicit exception for impermissible editorial motive . . . ."[126] Indeed, citing a consumer gripe case, Judge Chen noted that courts have found that section 230(c)(1) immunity applies even "to conduct that arguably constitute[s] bad faith."[127] Before the case had been reassigned to Judge Chen, follow-

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[122]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011) (*citing Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 834, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (holding that eBay's star ratings based on user generated data did not render eBay a content provider because such as construction "would treat eBay as the publisher or speaker of the individual defendants' materials, and thereby conflict with section 230.")), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[123]*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011)(*citing Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[124]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[125]Section 230(c)(2)(A) provides that:

> 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 . . . .

47 U.S.C.A. § 230(c)(2)(A); *see generally infra* § 37.05[4].

[126]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[127]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011) (*citing Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) (holding that defendant's allegedly deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was immune under section

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ing the retirement of former Chief Judge Marilyn Hall Patel, Judge Patel had suggested, in dismissing an earlier complaint in the case, that wrongfully manipulating a business's review page for the purpose of soliciting advertising revenues would seem distinct from "the traditional editorial functions of a publisher." Judge Chen, however, emphasized that CDA cases immunize, rather than scrutinize the purposes behind, an editor's exercise of those functions. He wrote that "traditional editorial functions often include subjective judgments informed by political and financial considerations" and that because one purpose of enacting section 230(c) was "to avoid the chilling effect of imposing liability on providers by both safeguarding the 'diversity of political discourse . . . and myriad avenues for intellectual activity' on the one hand, and 'remov[ing] disincentives for the development and utilization of blocking and filtering technologies' on the other hand"[128] that, as Chief Judge Kozinski wrote in *Roommate.com,* "close cases . . . must be resolved in favor of immunity."[129]

Citing the district court opinion in *Levitt v. Yelp! Inc.* with approval, the Ninth Circuit subsequently affirmed dismissal of a different suit against Yelp in *Kimzey v. Yelp! Inc.*,[130] a defamation suit which Judge M. Margaret McKeown, writing on behalf of herself and Judge Michael Daly and Fourth

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230 and that "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found.")), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[128]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011) (*quoting* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 86 (1996)), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[129]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011) (*quoting Roommate.com*, 521 F.3d at 1174), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014); *see infra* § 37.05[3][D][iii] (further discussing the case in the context of editorial function). In another case brought against Yelp, *Westlake Legal Grp. v. Yelp, Inc.*, 599 F. App'x 481, 485 (4th Cir. 2015), the Fourth Circuit affirmed dismissal of a defamation claim brought against Yelp over a user post, where the appellate panel, in an unreported opinion, held that Yelp's operation of an automated system that filtered reviews was a traditional editorial function that did not render Yelp an information content provider. The court, however, did not discuss *Roommate.com*, and instead relied on *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-56, 258 (4th Cir. 2009), in which the Fourth Circuit had distinguished *Roommate.com*.

[130]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263 (9th Cir. 2016).

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Circuit Senior Circuit Judge Andre M. Davis, sitting by designation, characterized as one that "pushes the envelope of creative pleading in an effort to work around § 230."[131] *Kimzey* was a suit brought over two negative business reviews posted on Yelp about Douglas Kimzey's locksmith business. Kimzey alleged that Yelp was responsible for causing a review from another site to appear on its site, provided a star-rating function that transformed user reviews into Yelp's own content, and promoted negative reviews about his business on Google's search engine. The court observed that "[i]nstead of asserting that Yelp was liable in its well-known capacity as the passive host of a forum for user reviews—a claim without any hope under our precedents, such as *Roommates.Com*—Kimzey cryptically alleged that Yelp in effect created and developed content."[132]

In affirming dismissal of plaintiff's claims, the appellate panel wrote that "Kimzey apparently hoped to plead around the CDA to advance the same basic argument that the statute plainly bars: that Yelp published user-generated speech that was harmful to Kimzey."[133] In evaluating whether Yelp had *developed* the content at issue, Judge McKeown explained that a website may lose immunity under the CDA "by making a material contribution to the creation or development of content"[134] which requires courts to "dra[w] the line at the 'crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable.' "[135]

With respect to Yelp's rating system, the Ninth Circuit

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[131] *Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1265 (9th Cir. 2016).

[132] *Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1265–66 (9th Cir. 2016).

[133] *Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1266 (9th Cir. 2016). Judge McKeown elaborated:

> We decline to open the door to such artful skirting of the CDA's safe harbor provision. This case is in some sense a simple matter of a complaint that failed to allege facts sufficient to state a claim that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But it is also more consequential than that, given congressional recognition that the Internet serves as a "forum for a true diversity of . . . myriad avenues for intellectual activity" and "ha[s] flourished . . . with a minimum of government regulation." 47 U.S.C. § 230(a)(3)–(4).

836 F.3d at 1266

[134] *Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1269 (9th Cir. 2016).

[135] *Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1269 n.4 (9th Cir. 2016), *quot-*

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held that even though it questioned whether a one star rating could be defamatory, since the aggregate rating was determined by user generated reviews, it was merely a "neutral tool" reflecting "user-generated data . . . ."[136]

The court likewise held that republishing content as advertising or promoting it on Google did not amount to development. It explained that "[n]othing in the text of the CDA indicates that immunity turns on how many times an interactive computer service publishes 'information provided by another information content provider.' . . . Just as Yelp is immune from liability under the CDA for posting user-generated content on its own website, Yelp is not liable for disseminating the same content in essentially the same format to a search engine, as this action does not change the origin of the third-party content."[137] Judge McKeown concluded that, "[s]imply put, proliferation and dissemination of content does not equal creation or development of content."[138]

Similarly, in *Ascentive, LLC v. Opinion Corp.*,[139] Senior District Court Judge Glaser of the Eastern District of New York held that plaintiffs were unlikely to succeed on the merits on claims against the company that operated PissedConsumer.com and its officers under Pennsylvania's unfair trade practices and consumer protection law and for interference with contractual and prospective economic advantage and unjust enrichment, based on CDA immunity. In that case, one of the plaintiffs in two consolidated actions

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ing Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 413–14 (6th Cir. 2014); *and citing Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257–58 (4th Cir. 2009) (distinguishing *Roommate.com* on the basis that the content that the website solicited from users was not itself unlawful); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197-1201 (10th Cir. 2009) (denying immunity where a website intentionally made illegal purchases of confidential consumer information).

[136]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1270 (9th Cir. 2016), *citing Gentry v. eBay, Inc.,* 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703, 717 (4th Dist. 2002); Levitt v. Yelp! Inc., Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011) (applying *Gentry* to Yelp and concluding that "[s]ince the aggregate rating . . . is likewise based on user-generated data, the Court finds that aspect of *Gentry* persuasive"), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[137]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1270 (9th Cir. 2016).

[138]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1271 (9th Cir. 2016).

[139]*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (denying plaintiffs' motion for a preliminary injunction).

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had alleged that PissedConsumer encouraged and created negative postings on its site. In ruling for the defendants, Judge Glaser rejected the mere assertion that the defendants created negative content, explaining that "[w]hile . . . 'Section 230(c) immunity is not so broad as to extend to an interactive computer service that . . . takes an active role in creating or developing the content at issue,' . . . [a]sserting or implying the mere possibility that PissedConsumer did so is insufficient to overcome the immunity granted by the CDA."[140]

Judge Glaser also rejected plaintiffs' contention that PissedConsumer.com was liable for developing the content of its users by (1) encouraging negative complaints; (2) inviting consumers to post public complaints on its website; (3) displaying those negative postings as prominently as possible absent participation in its "Reputation Management Service" (a paid service that allowed companies to directly respond to negative comments about them); and (4) increasing the prominence of PissedConsumer webpages by various allegedly improper means, including by using plaintiffs' trademarks.

In so ruling the court contrasted PissedConsumer with the BadBusinessBureau website at issue in *MCW, Inc. v. Badbusinessbureau.com, LLC*,[141] which Judge Glaser explained involved a consumer forum that did not dispute that it created, developed and posted defamatory information and further actively encouraged by email a consumer to take photos of a business owner, his car, and his license plate in front of his store, so that the defendant could include those photos on its website beside headings such as "Con Artists," "Scam" and "Ripoff." Judge Glaser explained, while "PissedConsumer does invite third-party content providers to submit negative reviews . . . its actions are not unlike the targeted solicitation of editorial material engaged in by a narrow genre of publishers and are nothing like those in *Badbusinessbureau.com*."[142] Further, the court ruled, "there is simply 'no authority for the proposition that [encouraging

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[140] *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 475 (E.D.N.Y. 2011), *quoting MCW, Inc. v. Badbusinessbureau.com, LLC,* Civ. A.3:02-CV-2727-G, 2004 WL 833595, at *8 (N.D. Tex. Apr. 19, 2004).

[141] *MCW, Inc. v. Badbusinessbureau.com, LLC,* Civ. A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004).

[142] *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 475–76

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the publication of defamatory content] makes the website operator responsible, in whole or in part, for the 'creation or development' of every post on the site . . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage.' "[143]

The court also rejected the notion that modifying user posts could amount to development. Judge Glaser wrote in *dicta* that there may be circumstances where modifying the display of content constitutes development, but held that "[t]he fact that the defendants invite postings and then in certain circumstances alter the way those postings are displayed is not 'development' of information for Section 230 purposes."[144]

Judge Glaser further held that PissedConsumer's "SEO tactics and its use of plaintiffs' marks to make PissedConsumer's pages appear higher in search engine results list[s]" similarly did not render PissedConsumer.com an information content provider.[145] He wrote that " '[a]t best, increasing the visibility of a website in internet searches amounts to

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(E.D.N.Y. 2011).

[143] *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011), *quoting Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (holding the consumer review site *RipOffReport.com* not liable as an information content provider where the plaintiff alleged defendants used reviews as leverage to coerce targeted businesses to pay for defendants' Corporate Advocacy Program, which purported to help investigate and resolve posted consumer complaints, and argued that defendants encouraged defamatory postings from others for their own financial gain and, therefore are partly responsible for the "creation or development" of the messages).

[144] *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011), *citing Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011) ("[A]llegations of extortion based on [consumer review site] Yelp's alleged manipulation of their review pages—by removing certain reviews and publishing others or changing their order of appearance—falls within the conduct immunized by § 230(c)(1)."), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014) *and Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("[L]awsuits 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."), *cert. denied*, 524 U.S. 937 (1998).

[145] *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011), *citing Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) (holding that the defendant consumer report website's deliberate

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"enhancement by implication," which is insufficient to remove' PissedConsumer from the shelter of the CDA."[146] Judge Glaser, in conclusion, explained that "[w]hile the Court finds some aspects of PissedConsumer's business practices troubling and perhaps unethical, it has been unable to find a legal remedy for conduct that may offend generally accepted standards of behavior."[147]

By contrast, in *Amerigas Propane, L.P. v. Opinion Corp.*,[148] Senior District Judge Ronald Buckwalter of the Eastern District of Pennsylvania denied PissedConsumer's motion to dismiss similar claims raised in a similar lawsuit by propane distributor, Amerigas. Without discussing *Roommate.com,* which was not binding in the Third Circuit, or the concept of development, Judge Buckwalter found that the Complaint explicitly alleged that PissedCompany.com not only allowed third parties to post complaints but actually created some them as well.[149] Although Judge Buckwalter did not cite to the CDA analysis in *Ascentive*, he distinguished Judge Glaser's analysis of plaintiffs' trademark claims in *Ascentive* by noting that in that case Judge Glaser had considered claims against PissedConsumer.com in the context of a preliminary injunction motion, where the relevant standard was whether the plaintiffs were likely to prevail on the merits, and following a period of discovery and two evidentiary hearings, whereas in *Amerigas* Judge Buckwalter was ruling on a motion to dismiss, where the plaintiff merely

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manipulation of webpage code to make certain reports more visible in online search results was immune under section 230(c)(1) because "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found.").

[146]*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011)*, citing Asia Economic Institute v. Xcentric Ventures LLC,* No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) ((*quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (en banc)).

[147]*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 478 (E.D.N.Y. 2011). Plaintiffs ultimately dismissed their case without prejudice, over defendants' objection. *See Ascentive, LLC v. Opinion Corp.,* No. 10 Civ. 4433 (ILG) (SMG), 2012 WL 1569573 (E.D.N.Y. May 3, 2012).

[148]*Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012).

[149]*See Amerigas Propane, L.P. v. Opinion Corp.,* Civil Action No. 12-713, 2012 WL 2327788, at *13 (E.D. Pa. June 19, 2012).

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needed to show that it could state a claim for relief.[150] The court also found that the plaintiff had sufficiently alleged that the defendant controlled ads on its site to benefit from ad sales to competitors to be used in conjunction with negative comments about the plaintiff.[151] Judge Buckwalter made clear, however, that the ruling did not preclude the defendant from asserting CDA immunity as a defense later in the litigation.[152]

Judge Buckwalter's unreported opinion reflects the reluctance of some judges to dismiss cases based on CDA preemption at the outset of a case, rather than on summary judgment after the parties have engaged in discovery.[153] However, as the Fourth Circuit emphasized in *Nemet Chevrolet,* " 'immunity is an *immunity from suit* rather than a mere defense to liability'. . ." and entitlement to section 230 immunity should be resolved "at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.' "[154] As Ninth Circuit Chief Judge Kozinski admonished in *Roommate.com,* courts "must keep firmly in mind that this is an immunity statute we are expounding . . . and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230."[155]

37.05[3][D][iii] Payment and Editorial Control

Paying for and editing user content constitute traditional

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[150]*See Amerigas Propane, L.P. v. Opinion Corp.,* Civil Action No. 12-713, 2012 WL 2327788, at *9 (E.D. Pa. June 19, 2012).

[151]*See Amerigas Propane, L.P. v. Opinion Corp.,* Civil Action No. 12-713, 2012 WL 2327788, at *13 (E.D. Pa. June 19, 2012) (distinguishing *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628, 633 (E.D. Va. 2010), *aff'd in relevant part on other grounds,* 676 F.3d 144, 165–66 (4th Cir. 2012), where third party advertisers were responsible for selecting the terms that triggered the appearance of their advertisements).

[152]*See Amerigas Propane, L.P. v. Opinion Corp.,* Civil Action No. 12-713, 2012 WL 2327788, at *13 (E.D. Pa. June 19, 2012).

[153]*See infra* § 37.05[7] (analyzing procedural issues surrounding when a CDA defense is raised in litigation).

[154]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (citations omitted).

[155]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc) (emphasis in original).

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editorial functions that should not result in a loss of section 230(c)(1) immunity, even in the Ninth Circuit under *Roommate.com*.[1] In the Tenth Circuit, under *Accusearch*, payment plus solicitation may amount to responsibility for development, at least in those circumstances where the content solicited is almost always unlawful.[2] Nevertheless, as Chief Judge Kozinski made clear in *Roommate.com*, which the Tenth Circuit relied upon in *Accusearch*, courts, in close cases, must err on the side of finding immunity.[3] Outside the Ninth and Tenth Circuits, courts may be more reticent to even undertake the kind of substantive analysis that *Roommate.com* may require if a plaintiff credibly alleges development on the part of a site that hosts user generated content (as perhaps underscored by the Fourth Circuit's approach and decision in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*[4]).

In *Roommate.com*, the Ninth Circuit implied that payment is not determinative inasmuch as Roommate.com was held partially immune from liability as an information content provider for some of its activities even though the site "sought to profit by collecting revenue from advertisers and subscribers."[5]

Since *Roommate.com*, district courts from within the Ninth Circuit have ruled that payment is irrelevant to

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[Section 37.05[3][D][iii]]

[1]*See, e.g.*, *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-99 (9th Cir. 2020) (rejecting the argument that Facebook's monetization of content transformed it into an information content provider in affirming dismissal of plaintiff's state law claims seeking to impose liability on Facebook for "allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor" as barred by the CDA), *cert. denied*, 141 S. Ct. 1067 (2021); *see generally supra* § 37.05[3][D][ii] (discussing *Roommate.com*).

[2]*See supra* § 37.05[3][D][i] (analyzing *Accusearch*).

[3]*See Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc) (admonishing that courts "must keep firmly in mind that this is an immunity statute we are expounding . . . and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230."; emphasis in original).

[4]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009); *supra* § 37.05[3][D][ii].

[5]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174-75 (9th Cir. 2008) (*en banc*).

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development.[6] The Ninth Circuit itself, in *Fyk v. Facebook, Inc.*,[7] even rejected the argument that Facebook's monetization of content transformed it into an information content provider. In *Gonzalez v. Google LLC*,[8] however, the Ninth Circuit held that while most of plaintiffs' claims were precluded by the CDA, Google was not entitled to CDA immunity for revenue-sharing payments allegedly made to ISIS for advertisements allegedly run on ISIS videos on YouTube

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[6]*See, e.g.*, *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's non-constitutional federal and state claims, including for damages under the California Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *Evans v. Hewlett-Packard Co.,* No. C 13-02477, 2013 WL 5594717, at *4 (N.D. Cal. Oct. 10, 2013) (rejecting the argument that an app store's "profit sharing" amounted to development, in an opinion denying plaintiffs' motion to amend the complaint to "plead around" the CDA; "While defendants do 'share' profits with content developers, the proper characterization is not traditional 'profit-sharing,' but rather a mere commission. . . . Defendants were working 'together' with the content developer to sell apps in a loose sense, but defendants were not jointly engaged in development of the *content*."); *Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. 2008) ("[T]he fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider 'creates' or 'develops' that content."). In *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 891 (N.D. Cal. 2017), however, the court suggested in *dicta* that, although plaintiff failed to allege causation so there was no issue in *Pennie* itself, payments that were illegal perhaps could be treated differently from mere payments to a contributor for content where the payment was lawful. Relying on *Blumenthal v. Drudge*, 992 F. Supp. 44, 50–53 (D.D.C. 1998), Northern District of California Judge Ryu wrote that:

> Assuming for the sake of argument that this Court would follow *Blumenthal*'s holding that CDA immunity applied to user-generated content even where a service provider paid for that content, *Blumenthal* does not address the question of whether the CDA immunizes payments that otherwise could themselves give rise to liability. Providing money to Matt Drudge generally is legal; providing money to Hamas generally is not. *See Boim*, 549 F.3d at 693–94. Because Plaintiffs' failure to allege a causal connection between Hamas and the Dallas shooting is reason enough to dismiss all claims, the Court declines to resolve the question of if or how the CDA applies where an interactive service provider shares advertising revenue with a content developer that has been designated as a foreign terrorist organization.

Pennie v. Twitter, Inc., 281 F. Supp. 3d 874, 891 (N.D. Cal. 2017).

[7]*Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-99 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 1067 (2021).

[8]*Gonzalez v. Google LLC,* 2 F.4th 871 (9th Cir. 2021).

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through Google's AdSense program, although not because it was an information content provider (and the appellate court ultimately affirmed judgment for Google on plaintiffs' revenue-sharing claims based on plaintiffs' failure to state a claim). *Gonzalez* does not change the law on what constitutes an information content provider, although it has the potential to be miscited by lawyers or courts that don't analyze the opinion closely.

Gonzalez was a suit brought by family members of a young woman killed during an ISIS terrorist attack in Paris. Plaintiffs had filed suit alleging, in their Third Amended Complaint, that Google was secondarily liable for their relative's death because Google had allegedly aided and abetted an act of international terrorism and engaged in a conspiracy with a perpetrator of an act of international terrorism. Plaintiffs also alleged that Google was directly liable under 18 U.S.C.A. § 2333(a) for providing material support and resources to ISIS, and for concealing that support, in violation of 18 U.S.C. §§ 2339A, 2339B(a)(1), and 2339C(c).

Plaintiffs' theory of liability was premised on the allegation that because it allegedly shared advertising revenue with ISIS through Google's AdSense program (which allows third parties to sign up to display advertisements in connection with their content), Google should be held directly liable for providing material support to ISIS pursuant to section 2333(a) and secondarily liable for providing substantial assistance to ISIS pursuant to section 2333(d).

Gonzalez thus should be understood in the context of a statute that prohibited providing aiding or abetting or providing material support to terrorists, where the Ninth Circuit held that potential liability was premised on Google's alleged act of sharing revenue from advertisements, not publication and material development. As the appellate panel explained:

> The Gonzalez Plaintiffs' revenue-sharing allegations are not directed to the publication of third-party information. These allegations are premised on Google providing ISIS with material support by giving ISIS money. Thus, unlike the Gonzalez Plaintiffs' other allegations, the revenue-sharing theory does not depend on the particular content ISIS places on YouTube;

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> this theory is solely directed to Google's unlawful payments of money to ISIS.[9]

Gonzalez does not change Ninth Circuit law on what constitutes material development in those case where liability is premised on treating an interactive computer service provider as a speaker or publisher. As the appellate panel noted elsewhere in *Gonzalez,* a *material contribution* that amounts to development, and could bring conduct outside the scope of CDA immunity, "does not refer to 'merely . . . augmenting the content generally, but to materially contributing to its alleged unlawfulness.' "[10] Thus, payment—including revenue sharing—generally should not amount to development.[11]

Writers and editors, after all, are paid for their work. Payment, *per se,* should not be a determining factor in evaluating whether material is developed by a site or obtained from another information content provider (albeit, for payment). As one court explained, in rejecting the argument that Facebook's profit motive transformed its alleged data mining activities into the provision of content,

> there is no "for-profit exception to § 230's broad grant of immunity," *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011). The "fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider 'creates' or 'develops' that content." *Goddard v. Google*, 2008 WL 5245490, at *3 (N.D. Cal. Dec. 17, 2008); *accord Levitt v. Yelp! Inc*., 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014) ("[T]raditional editorial functions often include subjective judgments informed by po-

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[9] *Gonzalez v. Google LLC,* 2 F.4th 871, 898 (9th Cir. 2021).

[10] *Gonzalez v. Google LLC,* 2 F.4th 871, 892 (9th Cir. 2021), *quoting Fair Housing Council v. Roommate.com, LLC,* 521 F.3d 1157, 1167-68 (9th Cir. 2008) (en banc).

[11] The issue of revenue-sharing in *Gonzalez* was not fully briefed by the parties before the Ninth Circuit and was not material to the outcome of the decision, which with respect to revenue-sharing was decided based on plaintiffs' failure to state a claim. Indeed, the court observed that Google had not separately addressed the issue of revenue-sharing—which had been dismissed by the district court—writing that "Google lump[ed] all of the TAC's theories together for purposes of its § 230 argument." *Gonzalez v. Google LLC,* 2 F.4th 871, 898 (9th Cir. 2021). Ultimately, in *Gonzalez,* revenue-sharing itself was the allegedly illegal conduct (payment to terrorists), in a case where the court found that liability was not premised on publication, so material development was not even at issue.

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litical and financial considerations. Determining what motives are permissible and what are not could prove problematic."[12]

Another court has held that taking an exclusive license in a work does not deprive an interactive computer service provider from the protections of the CDA because a service provider does not "adopt[] content by virtue of copyright ownership" and the issue of whether a service provider specifically encouraged the development of offensive content does not turn on ownership.[13] The court concluded that "acquisition of an exclusive license to the content . . . is an insufficient level of involvement in the development of the content to nullify CDA immunity."[14] On appeal, the First Circuit agreed, holding that Ripoff Report was immune under the CDA for these claims, rejecting plaintiffs' argument that Ripoff Report should be treated as an information content provider for user comments because it (1) claimed copyright protection in its website content and (2) promoted content to be searchable on Google.[15]

Monetizing or de-monetizing content through advertising likewise should be immunized by the CDA.[16]

Earlier cases had established that payment, like light edit-

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[12]*Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1119 (N.D. Cal. 2020). Data mining, which is not *per se* unlawful, also was alleged in a subsequent case brought against Facebook. *See A.B. v. Facebook, Inc.*, Case No.: CV 20-9012-CBM-(MAAx), 2021 WL 2791618, at *3 (N.D. Cal. June 1, 2021) (holding that alleged data mining by Facebook in a suit against Facebook and WhatsApp, and their alleged subsequent sale of the resulting information, did not deprive defendants of section 230(c)(1) immunity because plaintiff sought to hold defendants liable for the specific statements of a third party user).

[13]*Small Justice LLC v. Xcentric Ventures LLC,* Civil Action No. 13-cv-11701, 2014 WL 1214828, at *7 (D. Mass. Mar. 24, 2014) *aff'd*, 873 F.3d 313, 322-23 (1st Cir. 2017) (affirming dismissal of claims for libel, intentional interference with prospective contractual relations, and certain aspects of plaintiff's unfair competition claim, brought against the operator of RipoffReport.com; rejecting arguments that the defendant should be liable as an information content provider for user comments because it (1) claimed copyright protection in its website content and (2) promoted content to be searchable on Google).

[14]*Small Justice LLC v. Xcentric Ventures LLC,* Civil Action No. 13-cv-11701, 2014 WL 1214828, at *7 (D. Mass. Mar. 24, 2014), *aff'd*, 873 F.3d 313, 322-23 (1st Cir. 2017).

[15]*Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322-23 (1st Cir. 2017).

[16]*See, e.g.*, *Lewis v. Google LLC*, 461 F. Supp. 3d 938, 952-55 (N.D. Cal. 2020) (dismissing claims brought by political commentator Bob Lewis

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ing, was protected (or at least immaterial to the issue of whether an interactive computer service provider or user was entitled to the CDA defense).[17] In *Blumenthal v. Drudge*,[18] which was the first case to address the circumstances under which an interactive computer service could be held to be liable as an information content provider, Clinton White House advisor Sidney Blumenthal sued Matt Drudge, publisher of the Drudge Report, an online political gossip service, and America Online, which hosted the Drudge Report. Mr. Blumenthal alleged that Drudge published two false reports that he had a history of spousal abuse. He further alleged that AOL was liable because it paid Drudge $3,000 per month to disseminate the Drudge Report to its 8.6 million subscribers (pursuant to a May 1997 contract to provide AOL with proprietary content) and AOL touted the report in press releases intended to attract subscribers.[19]

Judge Paul Friedman of the District of the District of Columbia ultimately entered summary judgment in favor of AOL based on the finding that there was "no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of AOL . . . ."[20] Although the court found that the Blumenthal story was written by Drudge without any substantive or editorial involvement by AOL, AOL acknowledged in court papers that under different facts an interactive service provider would not be immunized by subpart (1) of the Good Samaritan exemption with respect to information "developed or created entirely by itself" and that there were "situations in which there may be

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alleging that YouTube and Google wrongfully demonetized, censored, restricted and removed his videos, holding that defendants' "alleged demonetization of Plaintiff's postings . . . constitutes a publishing function under § 230. . . . Deciding whether to limit advertising on a posting is not different in nature from removing a post altogether. Both fall under the rubric of publishing activities."), *aff'd on other grounds,* 851 F. App'x 723 (9th Cir. 2021).

[17]*See, e.g., Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (granting summary judgment for AOL under the CDA); *see also Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 823, 121 Cal. Rptr. 2d 703, 708 (4th Dist. 2002) (dismissing claims against eBay on demurrer under the CDA where "eBay charged placement fees to dealers listing an item for auction, and success fees (percentage fees) when items were sold.").

[18]*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

[19]AP, "Clinton Adviser: AOL Responsible for Drudge Comments," Mercury Center, Jan. 28, 1998.

[20]*Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998).

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two or more information content providers responsible for material disseminated on the Internet . . . ."[21]

As articulated by the court in *Blumenthal v. Drudge*,[22] merely because a service provider retains editorial discretion to modify a work disseminated by it is an insufficient basis to impose liability because Congress provided "immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others."[23]

Similarly, in *Schneider v. Amazon.com, Inc.*,[24] an intermediate appellate court in Washington state rejected the argument that Amazon.com could be held liable for a third-party posting because it had the right to edit it and claimed licensing rights in the posted material.

As with minor edits, an intermediate appellate court in California ruled in *Gentry v. eBay, Inc.*[25] that e-Bay's practice of soliciting and then compiling user comments (and ranking sellers with stars or the "Power Seller" designation) as part of its Feedback Forum did not mean that eBay was acting as an information content provider. The court reasoned that, based on these facts, "enforcing appellants' negligence claim would place liability on eBay for simply compiling false and/or misleading content created by the individual defendants and other . . ." third parties.

Since *Roommate.com*, plaintiffs have sought to avoid dismissal or judgment on the pleadings by alleging development based on an interactive computer service provider editing third party content. In *Cornelius v. Deluca*,[26] for example, the court denied Bodybuilding.com's motion to dismiss where the plaintiff alleged that it appointed moderators to act as representatives of the company to control and edit content on the Forum message board and that the person who posted the messages at issue was a moderator acting within the scope of her representation. Oddly, in analyzing plaintiff's

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[21]*Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998).

[22]*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

[23]*Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).

[24]*Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 465–66, 31 P.3d 37 (Div. 1 2001).

[25]*Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002).

[26]*Cornelius v. DeLuca*, 709 F. Supp. 2d 1003 (D. Idaho 2010).

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Lanham Act claim and the defendant's CDA defense, the court overlooked the fact that the CDA does not preempt Lanham Act claims.[27] This failure to appreciate the exclusion for laws pertaining to intellectual property[28] was a glaring oversight.

The district court in *Cornelius v. Deluca* noted that exercising editorial functions does not take an interactive computer provider outside the scope of CDA immunity by making it liable as an information content provider, but held that, for purposes of a motion to dismiss, it would accept as plausible plaintiff's allegation that board moderators were agents for the site.[29] The court ultimately granted summary judgment for the defendant on plaintiff's Lanham Act unfair competition claim, finding that the forum moderator did not have authorization to speak on the defendant's behalf,[30] underscoring that *Roommate.com* allows plaintiffs who offer plausible theories of development a way to get past a motion to dismiss, and obtain discovery, at least in some courts.

Cornelius v. Deluca also points up the particular risk faced by blogs, discussion forums, chat rooms and online communities that use moderators to help focus the discussion or enforce community rules, at least in cases where courts do not closely scrutinize claims in light of the heightened pleading standards imposed by *Ashcroft v. Iqbal*[31] and *Bell Atlantic Corp. v. Twombly*.[32] This issue is separately addressed below in subsection 37.05[3][D][iv].

In *Shiamili v. Real Estate Group*,[33] the New York Court of

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[27]*See infra* § 37.05[5][B].

[28]47 U.S.C.A. § 230(e)(2); *infra* § 37.05[5][B].

[29]*Cornelius v. DeLuca*, 709 F. Supp. 2d 1003, 1022–23 (D. Idaho 2010).

[30]*See Cornelius v. Bodybuilding.com, LLC,* No. 1:10-cv-027-BLW, 2011 WL 2160358, at *5–6 (D. Idaho June 1, 2011) (granting summary judgment where plaintiff's unfair competition claim was based on a post by a forum moderator who lacked authority to speak on the defendant's behalf).

[31]*Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

[32]*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007); *see generally infra* § 37.05[7] (analyzing procedural issues associated with raising the CDA defense in a motion to dismiss, motion for judgment on the pleadings or summary judgment motion).

[33]*Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011).

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Appeals, over a strong dissent by the Chief Judge,[34] held that defendants could not be held liable for defamation or unfair competition for moving allegedly defamatory posts from one location to another and surrounding the posts with a negative heading, sub-heading and illustration. The Court of Appeals, which declined to "decide whether to apply the Ninth Circuit's relatively broad view of 'development' since, even under that court's analysis, Shiamili's claim fail[ed,]" noted that "[r]eposting content created and initially posted by a third party is well-within 'a publisher's traditional editorial functions . . . .'"[35] The majority conceded that the defendants appeared to be content providers with respect to the heading, subheading and illustration, but since that content was not defamatory as a matter of law they were not actionable. Likewise, unlike *Doctor's Associates, Inc. v. QIP Holder LLC*,[36] there was no allegation that the defamatory comments were posted in response to any specific invitation for users to bash the plaintiff or his business.

Similarly, in *Reit v. Yelp! Inc.*,[37] a lower court in New York dismissed a defamation claim brought against Yelp! by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, in a case where the plaintiff also alleged that the site would remove negative user feedback only if a business subscribed to its services for $300 per month. The court concluded that Yelp's alleged decision to publish only "bad" posts was

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[34]Chief Judge Lippman argued that under *Roommate.com* and *Accusearch*, plaintiff's complaint should not have been dismissed because, according to the complaint, defendants "not only moved defamatory comments to an independent post entitled 'Ardor Reality and Those People,' but embellished the comment thread by attaching a large, doctored photograph of plaintiff depicted as Jesus Christ, with the heading: 'Chris Shiamili: King of the Token Jews.' " In addition, the defamatory statements were preceded by a disparaging editor's note that allegedly was written by one of the defendants, which in the Chief Judge's view was at least sufficient to state a claim.

[35]*Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 289, 929 N.Y.S.2d 19, 25, 952 N.E.2d 1011, 1017 (2011), *citing Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[36]*Doctor's Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010).

[37]*Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010).

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"quintessentially related to a publisher's role" and that Yelp's alleged use of bad posts in its marketing strategy did not change this conclusion.[38] The court held that plaintiff's deceptive acts and practices claim was not preempted by the CDA because it alleged misconduct by the defendant itself,[39] but dismissed that claim on the merits.

In *Levitt v. Yelp! Inc.*,[40] which is discussed more extensively in the preceding subsection,[41] Judge Edward Chen of the Northern District of California, in dismissing plaintiffs' claims for extortion and unfair competition based on the CDA, rejected the argument that plaintiffs' allegation that Yelp manipulated user generated content put it outside the scope of CDA immunity. Judge Chen explained that removing content was immunized by the CDA[42] and, as discussed in section 37.05[3][D][ii], that liability could not be imposed for edits that allegedly manipulated the outcome of a business's rating on the site or which allegedly were undertaken in bad faith.[43] The court held that "the text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith"[44]—noting that, unlike section 230(c)(2),[45] which expressly requires a showing of good faith, the immunity created by section 230(c)(1) "contains no explicit exception

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[38]29 Misc. 3d at 717, 907 N.Y.S.2d at 413-14*, quoting Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003).

[39]The court reasoned that "[t]he CDA protects Yelp from liability for defamation, but does not contemplate protecting Yelp's usage of that speech as leverage in its business model." 29 Misc. 3d at 717, 907 N.Y.S.2d at 414.

[40]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[41]*See supra* § 37.05[3][D][ii].

[42]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[43]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *7-8 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[44]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[45]Section 230(c)(2)(A) provides that

> No provider or user of an interactive computer service shall be held liable on account of—

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for impermissible editorial motive . . . ."[46] Judge Chen also rejected the argument that wrongfully manipulating a business's review page for the purpose of soliciting advertising revenues was distinct from "the traditional editorial functions of a publisher" that are immunized by section 230(c)(1).

Judge Chen wrote that "traditional editorial functions often include subjective judgments informed by political and financial considerations" and that because one purpose of enacting section 230(c) was "to avoid the chilling effect of imposing liability on providers by both safeguarding the 'diversity of political discourse . . . and myriad avenues for intellectual activity' on the one hand, and 'remov[ing] disincentives for the development and utilization of blocking and filtering technologies' on the other hand"[47] that, as Chief Judge Kozinski wrote in *Roommate.com,* "close cases . . . must be resolved in favor of immunity."[48] As Judge Chen explained:

> As illustrated by the case at bar, finding a bad faith exception to immunity under § 230(c)(1) could force Yelp to defend its editorial decisions in the future on a case by case basis and reveal how it decides what to publish and what not to publish. Such exposure could lead Yelp to resist filtering out false/unreliable reviews (as someone could claim an improper motive for its decision), or to immediately remove all negative reviews about which businesses complained (as failure to do so could expose Yelp to a business's claim that Yelp was strong-arming the business for advertising money). The Ninth Circuit has made it clear that the need to defend against a proliferation of lawsuits, regardless of whether the provider ultimately prevails, undermines the purpose of section 230. *See Roommates.com,* 521 F.3d at 1174 (cautioning that section 230 should be "interpreted to protect websites not merely from

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(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 . . . .

47 U.S.C.A. § 230(c)(2)(A); *see generally infra* § 37.05[4].

[46]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMCC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[47]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011) (*quoting* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 86 (1996)), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[48]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011) (*quoting Roommate.com,* 521 F.3d at 1174), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

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> ultimate liability, but from having to fight costly and protracted legal battles"); *Carafano,* 339 F.3d at 1124 ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.") (quotations omitted); *see also Zeran,* 129 F.3d at 331–33 (explaining that even a notice-based standard for defamation liability—as opposed to a strict liability standard—would create a chilling effect on providers).[49]

In contrast to claims based on editing or manipulating user content, Judge Chen noted in *dicta* that claims of "misrepresentation, false advertising or other causes of action based not on Yelp's publishing conduct but on its representations regarding such conduct, would not be immunized . . ." by section 230(c)(1).[50]

Citing the district court opinion in *Levitt v. Yelp! Inc.* with approval, the Ninth Circuit subsequently affirmed dismissal of a different suit against Yelp in *Kimzey v. Yelp! Inc.*,[51] a defamation suit which Judge M. Margaret McKeown, writing on behalf of herself and Judge Michael Daly and Fourth Circuit Senior Circuit Judge Andre M. Davis, sitting by designation, characterized as one that "pushes the envelope of creative pleading in an effort to work around § 230."[52] *Kimzey* was a suit brought over two negative business reviews posted on Yelp about Douglas Kimzey's locksmith business. Kimzey alleged that Yelp was responsible for causing a review from another site to appear on its site, provided a star-rating function that transformed user reviews into Yelp's own content, and promoted negative reviews about his business on Google's search engine. The court observed that "[i]nstead of asserting that Yelp was liable in its well-known capacity as the passive host of a forum for user reviews—a claim without any hope under our precedents, such as *Roommates.Com*—Kimzey cryptically alleged that Yelp in ef-

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[49]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[50]*Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *9 (N.D. Cal. Oct. 26, 2011), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[51]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263 (9th Cir. 2016).

[52]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1265 (9th Cir. 2016).

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fect created and developed content."[53]

In affirming dismissal of plaintiff's claims, the appellate panel wrote that "Kimzey apparently hoped to plead around the CDA to advance the same basic argument that the statute plainly bars: that Yelp published user-generated speech that was harmful to Kimzey."[54] In evaluating whether Yelp had *developed* the content at issue, Judge McKeown explained that a website may lose immunity under the CDA "by making a material contribution to the creation or development of content"[55] which requires courts to "dra[w] the line at the 'crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable.' "[56]

With respect to Yelp's rating system, the Ninth Circuit held that even though it questioned whether a one star rating could be defamatory, since the aggregate rating was determined by user generated reviews, it was merely a "neutral tool" reflecting "user-generated data . . . ."[57]

The court likewise held that republishing content as

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[53]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1265–66 (9th Cir. 2016).

[54]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1266 (9th Cir. 2016). Judge McKeown elaborated:

> We decline to open the door to such artful skirting of the CDA's safe harbor provision. This case is in some sense a simple matter of a complaint that failed to allege facts sufficient to state a claim that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed.2d 868 (2009). But it is also more consequential than that, given congressional recognition that the Internet serves as a "forum for a true diversity of. . . myriad avenues for intellectual activity" and "ha[s] flourished . . . with a minimum of government regulation." 47 U.S.C. § 230(a)(3)–(4).

Id. at 1266.

[55]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1269 (9th Cir. 2016).

[56]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1269 n.4 (9th Cir. 2016), *quoting Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 413–14 (6th Cir. 2014); *and citing Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc*., 591 F.3d 250, 257–58 (4th Cir. 2009) (distinguishing *Roommate.com* on the basis that the content that the website solicited from users was not itself unlawful); *FTC v. Accusearch Inc*., 570 F.3d 1187, 1197-1201 (10th Cir. 2009) (denying immunity where a website intentionally made illegal purchases of confidential consumer information).

[57]*Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1270 (9th Cir. 2016), *citing Gentry v. eBay, Inc.,* 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703, 717 (4th Dist. 2002); Levitt v. Yelp! Inc., Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011) (applying *Gentry* to Yelp

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advertising or promoting it on Google did not amount to development. It explained that "[n]othing in the text of the CDA indicates that immunity turns on how many times an interactive computer service publishes 'information provided by another information content provider.' . . . Just as Yelp is immune from liability under the CDA for posting user-generated content on its own website, Yelp is not liable for disseminating the same content in essentially the same format to a search engine, as this action does not change the origin of the third-party content."[58] Judge McKeown concluded that, "[s]imply put, proliferation and dissemination of content does not equal creation or development of content."[59]

In *Fraley v. Facebook, Inc.*,[60] Judge Lucy Koh, also of the Northern District of California, held that Facebook was not entitled to CDA immunity in a right of publicity case where the plaintiffs alleged that Facebook displayed user images next to brands that users had "liked" as a form of endorsement on their friend's profile pages. Specifically, plaintiffs alleged that Facebook created, rather than merely edited user content by "mistranslating" a member's actions, such as clicking on a "Like" button on a company's Facebook page, into the words "Plaintiff likes [Brand]" and combining that text with plaintiff's photograph, the company's logo and the label "Sponsored Story." In denying Facebook's motion to dismiss, Judge Koh ruled that Facebook's alleged actions in creating Sponsored Stories that went beyond a publisher's traditional editorial functions "such as deciding whether to publish, withdraw, postpone or alter content."[61] Judge Koh emphasized that plaintiffs did not allege merely that Facebook edited user content—"such as by correcting spelling, removing obscenity or trimming for length."[62] She explained:

Plaintiffs allege not only that Facebook rearranged text and

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and concluding that "[s]ince the aggregate rating . . . is likewise based on user-generated data, the Court finds that aspect of *Gentry* persuasive"), *aff'd on other grounds,* 765 F.3d 1123 (9th Cir. 2014).

[58] *Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1270 (9th Cir. 2016).

[59] *Kimzey v. Yelp! Inc.,* 836 F.3d 1263, 1271 (9th Cir. 2016).

[60] *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

[61] *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), *quoting Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003).

[62] *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), *quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (en banc).

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> images provided by members, but moreover that by grouping such content in a particular way with third-party logos, Facebook transformed the character of Plaintiffs' words, photographs, and actions into a commercial endorsement to which they did not consent. Defendant's alleged actions go far beyond simply adding HTML meta tags to make user-provided text more visible, *see Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10–01360–SVW (PJWx), 2011 WL 2469822, at *6–7 (C.D. Cal. May 4, 2011), or simply placing its own watermark on photographs and printing its website address on advertisements created by others and published on its website, *see Ramey v. Darkside Prods., Inc.*, No. 02–730(GK), 2004 WL 5550485, at *6–7 (D.D.C. May 17, 2004).[63]

Even under *Roommate.com*, payment and solicitation alone, or payment and light editing, are not be enough to expose an interactive computer service provider or user to liability as an information content provider.[64]

With respect to payment, *Blumenthal v. Drudge*,[65] which was discussed earlier in this section, underscores that paying for material, like editing it, is a traditional publication function. Payment may be consistent with an agency or employment relationship,[66] which in turn could have bearing on whether particular material was developed by a defendant, or merely reflects the acquisition of content from another information content provider.

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[63]*Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802–03 (N.D. Cal. 2011).

[64]*See supra* § 37.05[3][D][ii]; *see also, e.g., Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 471-76 (E.D.N.Y. 2011) (holding preempted by the CDA plaintiff's claim that the defendant was liable as an information content provider for encouraging negative comments, inviting consumers to post public complaints on its website, displaying those negative posts as prominently as possible, and increasing the prominence of its webpages by various means, including using plaintiff's trademarks); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) ("[T]he fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider 'creates' or 'develops' the content . . ."; *quoting Goddard v. Google,* No. C 08-2738 JF (PVT), 2008 WL 5245490, *3 (N.D. Cal. Dec. 17, 2008)); *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558–63 (N.C. App. 2012) (summarizing case law for the proposition that notice of an unlawful posting, solicitation, earning revenue from allegedly illegal content and reasonable foreseeability or willful blindness are not sufficient to amount to development).

[65]*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

[66]This issue is explored further in connection with blog moderators in section 37.05[3][D][iv].

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Paying someone to write about celebrities, for example, should not expose an interactive computer service provider to liability for developing content, even if the content created turns out to be actionable.[67] By contrast, paying someone specifically to write false things about a particular celebrity—such as that an actor beats his wife—could amount to development in a suit for defamation, at least in the Tenth Circuit. Sites that actively develop actionable content at issue in a given case, such as some commercial gripe sites, may not be able to hide behind the CDA to avoid liability *for their own* conduct and content, at least in the Ninth and Tenth Circuits.

Outside the Ninth and Tenth Circuits, courts may find parsing for *responsibility* for *development* a slippery slope that, as the Fourth Circuit noted in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,[68] may undermine the benefit of the exemption by requiring interactive computer services to litigate—and perhaps even go to trial—to prove their entitlement to the exemption. Moreover, as the dissent in *Roommate.com* underscored, evaluating development cannot take place without consideration of the underlying merits of a case to determine if the development is material to CDA analysis.

Given the policy objectives of section 230—to insulate interactive computer service providers and users from liability for screening or deleting third-party content (and thereby avoid results such as in *Stratton Oakmont*)—courts in close cases should err in favor of finding that aggregating, compiling or making even substantial editorial changes to third party material constitutes exempted activity. As Chief Judge Kozinski wrote in *Roommate.com*, courts "must keep firmly in mind that this is an immunity statute we are expounding . . . and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut

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[67] *See Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding AOL exempt from liability for defamation for comments in the Drudge Report despite the fact that AOL had editorial discretion and paid Drudge in connection with his political writings).

[68] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

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the heart out of section 230."[69]

37.05[3][D][iv] Blog and Forum Moderators

Many blog forums use moderators who may be employees, but often are merely unpaid volunteers, who help keep blog discussions focused on a given topic and try to deter aggressive or anti-social behavior. It is the very fact of CDA protection that allows websites and blogs to use moderators to deter harassing or objectionable content. Indeed, the CDA was specifically enacted to overrule *Stratton Oakmont v. Prodigy Services, Inc.*,[1] a case which had held an interactive computer service provider subject to the liability standards imposed on a publisher for, among other things, the conduct of its board operators in seeking to deter harassing or otherwise objectionable content. Accordingly, although few courts have had occasion to rule on the issue to date, blog owners generally should not be denied CDA immunity for moderator edits or comments.

There have not been a lot of cases[2] to date that address the issue of CDA preemption for claims based on moderator content. In *Cornelius v. Deluca*,[3] however, the court denied Bodybuilding.com's motion to dismiss where the plaintiff alleged that it appointed moderators to act as representatives of the company to control and edit content on the forum mes-

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[69]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc) (emphasis in original).

[Section 37.05[3][D][iv]]

[1]*Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995); *see generally supra* § 37.04[3] (analyzing the case).

[2]*See Cornelius v. Bodybuilding.com, LLC,* No. 1:10-cv-027-BLW, 2011 WL 2160358, at *5–6 (D. Idaho June 1, 2011) (granting summary judgment in favor of a defendant operator of an online forum sued for unfair competition under the Lanham Act based on a post by a forum moderator who lacked authority to speak on the defendant's behalf); *see also Higher Balance, LLC v. Quantum Future Group, Inc.,* No. 08-233-HA, 2008 WL 5281487, at *7 (D. Or. Dec. 18, 2008) (granting defendants' motion under Oregon's anti-SLAPP statute to strike claims for libel, false light, intentional interference with business relationships/prospective economic advantage that stemmed from postings by Internet forum moderators, concluding that moderators were not employees or agents of the defendant website operators, and defendants were therefore "immunized by the CDA from postings made by forum moderators because they are 'another information content provider' ").

[3]*Cornelius v. DeLuca*, 709 F. Supp. 2d 1003 (D. Idaho 2010).

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sage board and that the person who posted the messages at issue was a moderator acting within the scope of her representation.[4]

The court ultimately granted summary judgment for the defendant,[5] holding that it was undisputed that the forum moderator lacked authority to speak on the defendant's behalf.

In *Huon v. Denton*,[6] the Seventh Circuit reversed and remanded the lower court's order dismissing defamation and

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[4]The court and parties litigated the CDA issue on the incorrect assumption that plaintiff's Lanham Act claim could be preempted by the CDA. *See* 47 U.S.C.A. § 230(e)(2); *see generally infra* § 37.05[5][B].

[5]*See Cornelius v. Bodybuilding.com, LLC,* No. 1:10-cv-027-BLW, 2011 WL 2160358, at *5–6 (D. Idaho June 1, 2011) (granting summary judgment in favor of a defendant operator of an online forum sued for unfair competition under the Lanham Act based on a post by a forum moderator who lacked authority to speak on the defendant's behalf).

In *Bodybuilding.com*, forum moderators were enlisted by the defendant to "aid in directing conversations on the forum." *Id.* at *1. Its moderators were allowed to "edit and delete posts, move threads, and ban forum users for violations of the forum's terms and conditions." *Id.* Bodybuilding.com's moderators "self-select by nominating themselves on a designated topic board in the online forum," "[o]ther forum members then vote on the nomination," and "[i]f confirmed, the nominated forum member is given the moderator title after Bodybuilding.com approves the application." *Id.* "Bodybuilding.com does not pay the moderators a salary, and they are not considered employees," although moderators receive a discount on purchases from the website and a free trip to an industry expo. *Id.*

In asserting a Lanham Act claim for a post made by the defendant's moderator, the plaintiff argued that the defendant "gives its moderators actual and express authority to delete posts of forum users and to ban forum users for violations of the terms and conditions of forum us, and thus moderators are agents of Bodybuilding.com." *Id.* at *5. However, the court concluded that plaintiff's argument "misse[d] the mark"—"[m]oderators are agents for the limited purposes of moderating discussions, but this does not make them all-purpose agents." *Id.* Moderators therefore lacked authority to bind the forum operator when expressing their own views on a forum:

> At most, Bodybuilding.com represented to the public that moderators had the authority to oversee and edit forum discussions. This does not translate into a representation that forum moderators represent Bodybuilding.com when stating personal opinions on a forum. Rather, a close link between an agent's tortious conduct and the agent's apparent authority must exist in order for the principal to be liable. Restatement (Third) of Agency § 7.08, cmt. a (2006). Here, this close link does not exist.

Id. at *6.

[6]*Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016).

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false light claims asserted by an accused rapist against Gawker over user comments posted on Gawker's website, where the plaintiff alleged that some of the allegedly defamatory comments had been authored by Gawker employees, allegedly to generate revenue.[7] The court conceded that plaintiff's allegations might not be true, and therefore might not survive summary judgment,[8] but stated a claim by alleging that at least some "defamatory comments were authored by Gawker employees—thus making Gawker an 'information content provider' under § 230(f)."[9]

Whether a site or service could be held accountable for a moderator's actionable comments ultimately may turn on agency law principles.

In *Enigma Software Group USA, LLC v. Bleeping Computer LLC*,[10] Enigma had sued Bleeping for libel, alleging that the poster of the allegedly libelous statements, Quietman7, was acting as Bleeping's agent when he posted them. Enigma alleged that Quietman7 was a "Global Moderator" four Bleeping, who was touted as an expert who could be relied upon to provide correct and understandable answers. In denying Bleeping's motion to dismiss, the court emphasized that Bleeping was not being sued merely because Quietman7 was a forum moderator. Rather, the court emphasized in a footnote that Quietman7 had been designated as a staff member with special privileges.

Similarly, while employees may engage in the traditional editorial functions of newspapers, new posts or content potentially could be actionable if attributable to the site owner or service provider.

37.05[3][D][v] Providing Platform Tools

The provision of neutral tools, even when used for allegedly improper purposes, generally has been held not to amount to development.[1] Among other things, courts have rejected the argument that platform providers *developed* ter-

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[7] *Huon v. Denton*, 841 F.3d 733, 741-43 (7th Cir. 2016).

[8] *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016).

[9] *Huon v. Denton*, 841 F.3d 733, 743 (7th Cir. 2016).

[10] *Enigma Software Group USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 273-76 (S.D.N.Y. 2016).

[Section 37.05[3][D][v]]

[1] *See, e.g., Force v. Facebook*, 934 F.3d 53, 66 (2d Cir. 2019) (rejecting

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the argument that Facebook's use of algorithms to match content to a user's interests rendered it a non-publisher; "Accepting plaintiffs' argument would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties."), *cert. denied*, 140 S. Ct. 2761 (2020); *Herrick v. Grindr, LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (affirming dismissal under section 230(c)(1) of product liability and other claims alleging that Grindr's mobile app was a defectively designed and manufactured product because it lacked built-in safety features; "the manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred by § 230."); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-1101 (9th Cir. 2019) (affirming dismissal of claims against a social network for providing neutral suggestion tools that encouraged users to join various groups, including one that promoted the use of heroin (where the plaintiff's son met a dealer who sold him fentanyl-laced heroin, which killed plaintiff's son) and which notified users by email when new posts were made to the group, because the service had a "blank box" approach to user content, which was created and posted exclusively by users, not the service; "Ultimate Software used features and functions, including algorithms, to analyze user posts on Experience Project and recommended other user groups. This includes the heroin-related discussion group to which Greer posted and (through its emails and push notifications) to the drug dealer who sold him the fentanyl-laced heroin. Plaintiff, however, cannot plead around Section 230 immunity by framing these website features as content. . . . By recommending user groups and sending email notifications, Ultimate Software, through its Experience Project website, was acting as a publisher of others' content. These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves."); *Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Sherman Act I (conspiracy) and II (monopolization) and Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's non-constitutional

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rorist content and therefore should be held liable as information content providers, for providing social media tools, such as access to Twitter and YouTube, because the provision of neutral tools, including targeted advertising, does not equate to content development.[2] In the words of one court, the argu-

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federal and state claims, including for damages under the California Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1164-75 (N.D. Cal. 2018) (rejecting the argument that allegedly "actively" recommending ISIS videos to YouTube users constituted development), *aff'd*, 2 F.4th 871, 892-97 (9th Cir. 2021) (holding the recommendation algorithms to be neutral tools).

[2]*See Force v. Facebook, Inc.*, 934 F.3d 53, 69-71 (2d Cir. 2019) (rejecting the argument that *Roommate.com* held that "requiring or encouraging users to provide any particular information whatsoever to the interactive computer service transforms a defendant into a developer of that information. The *Roommates.Com* holding, however, was not so broad; it concluded only that the site's conduct in requiring users to select from 'a limited set of pre-populated answers' to respond to particular 'discriminatory questions' had a content-development effect that was actionable in the context of the Fair Housing Act."), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 890-92 (N.D. Cal. 2017); *Gonzalez v. Google, Inc*., 282 F. Supp. 3d 1150, 1168-69 (N.D. Cal. 2017).

Some courts have dismissed claims against platforms for liability for terrorist acts based on lack of proximate causation, without even reaching the potential applicability of the CDA. *See, e.g., Crosby v. Twitter, Inc.,* 921 F.3d 617, 623-27 & n.7 (6th Cir. 2019) (affirming dismissal with prejudice of federal and state claims by victims of the Pulse Night Club terrorist attack in Orlando, against Facebook, Google, and Twitter, for, among other things, supporting terrorism, conspiracy, and aiding and abetting under the Justice Against Sponsors of Terrorism Act of 2016, where plaintiffs could not establish proximate causation and the defendants were not secondarily liable for aiding and abetting, noting that "[e]ven if ISIS 'committed, planned, or authorized' the Pulse Night club shooting, Plaintiffs would still have to overcome 47 U.S.C. § 230, which provides broad immunity to 'interactive computer services.' "); *Fields v. Twitter,* 881 F.3d 739, 743-50 (9th Cir. 2018) (holding that plaintiffs could not allege proximate causation in an ATA suit under 18 U.S.C.A. § 2333(a), alleging

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that Twitter knowingly provided material assistance to ISIS, because they could not plead "that Twitter's provision of communication equipment to ISIS, in the form of Twitter accounts and direct messaging services, had any direct relationship with the injuries that Plaintiffs–Appellants suffered."); *Retana v. Twitter, Inc.*, 419 F. Supp. 3d 989 (N.D. Tex. 2019) (dismissing with prejudice plaintiffs' claims against Twitter, Facebook, and Google, arising out of a shooting in Dallas, because they could not plausibly allege that the social media platforms contributed to radicalizing the perpetrator of the shooting); *Palmucci v. Twitter Inc*., Case No. 18-cv-03947-WHO, 2019 WL 1676079, at *3-4 (N.D. Cal. Apr, 17, 2019) (dismissing with prejudice claims against Twitter, Facebook, and Google under the Anti-Terrorism Act, based on injuries sustained in a terrorist attack in Paris; "the allegations in this case are materially similar to the allegations regarding ISIS's general use of defendants' social media platforms to radicalize and promote attacks on civilians. Numerous courts have found similar allegations insufficient to state claims for direct or indirect liability under the ATA and under state law. In addition, the lack of plausible allegations that the terrorists used defendants' social media platforms to plan or carry out the Paris Attacks, much less that defendants had some knowledge of that specific use, is fatal to Palmucci's attempt to allege her claims."); *Clayborn v. Twitter, Inc*., 17-CV-06894-LB, 2018 WL 6839754, at *7-9 (N.D. Cal. Dec. 31, 2018) (dismissing with prejudice the Anti-Terrorism Act claims of victims and family members of victims of a 2015 mass shooting in San Bernardino, brought under 18 U.S.C.A. §§ 2333(a), 2333(d), 2339A, 2339B, and 2339C, against Twitter, Facebook, and Google, where (1) the plaintiffs' direct liability claims failed because they did not plausibly allege proximate cause where the "alleged links between ISIS and the shooting . . . [–] ISIS's allegedly claiming credit after the fact, Malik's pledging allegiance to ISIS leader Abu Bakr al-Baghdadi, and Farook's and Malik's alleged radicalization after they were exposed to ISIS content on the defendants' online platforms . . . [– did] not establish a direct relationship between the defendants acts and the plaintiffs' injuries."; and (2) the plaintiffs' secondary liability claims failed because they did not plausibly allege that ISIS committed, planned, or authorized the San Bernardino shootings or that the defendants knowingly aided or abetted the shootings or conspired with anyone involved in the attack; plaintiffs alleged "only that the defendants were generally aware that ISIS used their services. There are no allegations that they intended to further ISIS's activities."), *aff'd sub nom. Gonzalez v. Google LLC*, 2 F.4th 871, 910-12 (9th Cir. 2021) (holding that plaintiffs failed to plead a claim for aiding and abetting liability); *Copeland v. Twitter, Inc*., 352 F. Supp. 3d 965, 973-76 (N.D. Cal. 2018) (dismissing with prejudice the direct and indirect ATA liability and state law claims of a family member of people killed in Nice, France, by an ISIS terrorist, who alleged that Twitter, Google, and Facebook failed to prevent foreign terrorist organizations and specially designated global terrorist groups from using their social media platforms, in alleged violation of the Anti-Terrorism Act, for lack of proximate causation); *Taamneh v. Twitter, Inc*., 343 F. Supp. 3d 904, 909-19 (N.D. Cal. 2018) (dismissing with prejudice the claims of relatives of a deceased Jordanian citizen, who was killed by ISIS in Turkey, against Twitter, Google and Facebook, because plaintiffs failed to adequately

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ment that a social media platform provided personnel and

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plead proximate cause between the attack and the defendants, as required to state claims that a party allegedly provided material support to a terrorist organization in violation of the ATA; plaintiffs failed to adequately allege that the defendants were generally aware that, through their actions, they were playing or assuming a role in a terrorist organization's activities, or that companies provided substantial assistance to a terrorist organization, as required to state an aiding and abetting indirect liability claim under JASTA; and plaintiffs failed to adequately allege proximate cause between the terrorist attack and the defendants, as required to state claims for negligent infliction of emotional distress and wrongful-death under state law; "Plaintiffs allege that [the shooter] was 'radicalized by ISIS's use of social media.' However, this conclusory allegation is insufficient to support a plausible claim of proximate causation."), *rev'd in part sub nom. Gonzalez v. Google LLC*, 2 F.4th 871, 907-10 (9th Cir. 2021) (holding that plaintiffs adequately pled a claim for aiding and abetting liability without addressing plaintiffs' other claims below, which were not appealed, or the potential applicability of the CDA); *Cain v. Twitter Inc.*, No. 17-cv-02506, 2018 WL 4657275, at *2 (N.D. Cal. Sept. 24, 2018) (dismissing plaintiffs' ATA claim as failing to satisfy the causation element in section 2333(a) and plaintiffs' declining to exercise supplemental jurisdiction over plaintiffs' state law claims; "the direct relationship link is missing. Most of the allegations are about ISIS's use of Twitter in general. The relatively few allegations involving Twitter that are specific to the attacks that killed plaintiffs' family members also provide little more than generic statements that some of alleged perpetrators of the attacks were 'active' Twitter users who used the platform to follow [ISIS.]"); *Godwin v. Facebook, Inc.*, 160 N.E.3d 372 (Ohio App. 8th Dist. 2020) (dismissing claims for negligence and failure to report a crime where the decedent was shot by a stranger who had posted vague threats of murder on his Facebook page minutes before the murder).

As the Sixth Circuit explained in *Crosby*,

> [T]here is not a sufficient link between Defendants' conduct (of allegedly providing social media platforms to ISIS) and Plaintiffs' injuries suffered at the Pulse Night Club (at the hands of Mateen). Plaintiffs' only allegation that connects Mateen and Defendants is that, at some point before the Pulse Night Club shooting, Mateen viewed online content from ISIS and became "self-radicalized." But this is a tenuous connection at best. With the "highly interconnected" nature of social media, the internet, and "modern economic and social life"—we expect Defendants' websites to cause some "ripples of harm" that would "flow far beyond the defendant's misconduct." *Fields*, 881 F.3d at 749. But without more, Defendants do not proximately cause all these potential ripples. The content did not compel Mateen's actions.
>
> Indeed, if we accepted Plaintiffs' argument, Defendants would become liable for seemingly endless acts of modern violence simply because the individual viewed relevant social media content before deciding to commit the violence. For example, . . . third parties upload 300 hours of content to YouTube every minute. Laurie Segall, *These Ads Ran Before ISIS Videos* (Mar. 3, 2015 7:09 PM), https://money.cnn.com/2015/03/03/technology/isis-ads-youtube/. And "Twitter, for example, boasts hundreds of millions of users . . . with over 500 million tweets per day. That is 6,000 tweets per second." Nina I. Brown, *Fight Terror, Not Twitter: Insulating Soc. Media from Material Support Claims*, 37 Loy. L.A. Ent. L. Rev. 1, 13 (2017). Defendants do not proximately cause everything

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expert services to terrorism amounts to little more than the allegation that the service "violated a duty to prevent certain users from accessing and using its platform."[3] Recommending a video likewise has been found to not amount to development.[4]

37.05[4] Subpart 230(c)(2): Filtering and Voluntary Actions Undertaken in Good Faith to Restrict Objectionable Material

37.05[4][A] In General

Subpart 230(c)(2) of the Good Samaritan exemption was intended by Congress to encourage, but not require, providers and users of interactive computer services[1] to take actions voluntarily and in good faith that they are not otherwise required to undertake, to restrict access to or the availability of (and thus also implicitly to monitor) material that they consider to be *objectionable* (or more specifically "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable") on their sites and services (or to make available to third parties the technical means to do so), among other things. Subpart 230(c)(2) provides optional protection for providers or users of interactive computer services (including potentially employers)[2] that *voluntarily* take any action not otherwise required of them or

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that an individual may do after viewing this endless content. Nor can Defendants foresee how every viewer will react to third party content on their platforms. This is especially true where independent criminal acts, like Mateen's, are involved. *See Kemper*, 911 F.3d at 393.

Crosby v. Twitter, Inc., 921 F.3d 617, 625-26 (6th Cir. 2019) (footnote omitted).

[3]*Force v. Facebook, Inc.,* 304 F. Supp. 3d 315, 329 (E.D.N.Y. 2018) (denying a motion for leave to file an amended complaint in a case brought by victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas), *aff'd in part*, 934 F.3d 53 (2d Cir. 2019) (affirming dismissal of some claims and dismissing foreign law claims), *cert. denied*, 140 S. Ct. 2761 (2020).

[4]*See Gonzalez v. Google LLC,* 2 F.4th 871, 892-97 (9th Cir. 2021) (rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools).

[Section 37.05[4][A]]

[1]*See supra* § 37.05[2] (defining *interactive computer service*).

[2]*See, e.g.*, *Davis v. Motiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. Apr. 2, 2015) (holding, in an unreported opinion, that the CDA barred the plaintiff's negligent entrustment,

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mandated by law, and shields them from liability "on account of" having acted like a Good Samaritan.[3] In the words of Judge Easterbrook of the Seventh Circuit, "[s]ection 230(c)(2) tackles this problem [of web hosts or other intermediaries providing service to people who use the service for illegal purposes] not with a sword, but with a safety net. Removing the risk of civil liability may induce web hosts and other informational intermediaries to take more care to protect the privacy and sensibilities of third parties."[4] As explained by the Third Circuit, "Section 230(c)(2) does not *require* [a party] to restrict speech; rather it allows [it] to establish standards of decency without risking liability for doing so."[5] In short, its "principal purpose . . . is to encourage ISPs [and other interactive computer service providers] to engage in effective self-regulation of certain content."[6]

Subpart 230(c)(2)(A) provides that no liability may be imposed on account of "any action voluntarily taken in good faith to restrict access to or [the] availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objec-

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negligent supervision, and negligent undertaking claims against an employer arising out of its alleged failure to prevent one of its employees from using its technology to post sexual advertisements; the plaintiff had alleged that the employer had actual or constructive knowledge of its employee's activity but the court ruled that subpart 230(c)(2) of the CDA immunized the employer from liability for its good faith efforts to restrict access to certain materials through its monitoring and logging policies); *see generally supra* § 37.05[2](analyzing the entitlement of employers to claim immunity as interactive computer service providers).

[3]In an opinion subsequently withdrawn, the Second Circuit observed, quite correctly, that "[n]otably, the provision explicitly provides protection from suit for restricting access to content that providers '*consider*[ ] . . . otherwise objectionable,' even if the material would otherwise be constitutionally protected, granting some degree of subjective discretion to service providers who restrict the availability of content in good faith." *Domen v. Vimeo, Inc.*, 6 F.4th 245, 251 (2d Cir. 2021) (quoting 47 U.S.C.A. § 230(c)(2) (emphasis in the opinion)), *op. withdrawn*, 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021). The Second Circuit ultimately affirmed the district court's order dismissing plaintiff's claims for failure to state a claim, obviating the need to address the CDA. *See Domen v. Vimeo, Inc.*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

[4]*Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003).

[5]*Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003).

[6]*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

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tionable, whether or not such material is constitutionally protected . . . .” Subpart 230(c)(2)(B) in turn exempts liability for any action taken to enable or make available to information content providers or others the technical means to restrict strict access to the material described in section 230(c)(2)(A). Subpart (c)(2)(B) is more limited in scope—applying only where action is taken to enable or make available technical means to restrict access—whereas subpart (c)(2)(A) potentially immunizes a broad range of Internet activities. Both subparts, by their terms, require *action*, although *any action* will suffice. To benefit from the broad exemption created by subpart (c)(2)(A), the action must be “voluntarily taken in good faith,” whereas subpart (c)(2)(B) merely requires that the action be taken (whether or not it was undertaken voluntarily or in good faith).

Although section 230(c)(2)(A) was primarily intended to encourage interactive computer service providers (and users) to monitor their services and restrict access to or the availability of “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”[7] *content*, the exemption by its terms applies to causes of action based on a provider (or user)’s *conduct* in monitoring online content, not the content itself. Indeed, the nature of networked computers is such that *conduct* that occurs online frequently is manifested in the form of *content*. Thus, an interactive computer service or user who screens, edits or otherwise monitors its site or service for the purpose of restricting objectionable material should not be held liable for *any* claim (subject to the exceptions for federal criminal law, laws pertaining to intellectual property, and the Electronic Communications Privacy Act or equivalent state laws)[8] based on a duty that otherwise could be inferred by its conduct.

While section 230(c)(1) provides immunity based on the nature of the claim asserted and the conduct of a provider or user of an interactive computer service in speaking or publishing information that originated with a third party (and is self-executing), section 230(c)(2)(A) provides the same exemption for publishing or speaking, failing to block publi-

[7]To maximize the protection available under this statute, providers and users should track the language of the statute in Terms of Use or other online documents so that the purpose can clearly be shown in the event of litigation. *See supra* § 22.05[2][B].

[8]*See supra* § 37.05[1][A].

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cation or speech or intentionally blocking publication or speech, all of which could otherwise result in liability in the physical world based on monitoring or screening content[9]—but only where action is taken, in good faith, to restrict access to or the availability of certain material considered by the interactive computer service provider or user to be objectionable, as discussed in greater detail in this section 37.05[4]. As explained by the Ninth Circuit:

> [T]he persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider [or user] of an interactive computer service. *See* § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, *see Roommates*, 521 F.3d at 1162–63, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers [sic][10] from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.[11]

Congress, in 2018, created new incentives for interactive computer service providers to seek to benefit from the "safe harbor"-like voluntary measures outlined by section 230(c)(2)(A) by providing explicitly that the sex trafficking

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[9]Stated differently,

> subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection (c)(2), for its part, provides an additional shield from liability, but only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable."

Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105 (9th Cir. 2009).

[10]The Good Samaritan exemption applies to interactive computer service providers and users, not Internet service providers, which is the term that the *Barnes* court mistakenly uses.

[11]*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009). As one court noted in a suit brought by groups whose material had been taken down by various social media platforms for alleged hate speech:

> Facebook, YouTube, and Twitter may be host to a mélange of cat videos, musings from long-lost cousins, and odes to Beyoncé, but not all content is welcome on these social-media platforms. Pursuant to their private terms of service, the companies have repeatedly taken down some of Plaintiffs' posts criticizing Islam.

American Freedom Defense Initiative v. Lynch, 217 F. Supp. 3d 100, 101 (D.D.C. 2016) (dismissing plaintiffs' suit for lack of Article III standing).

Section 230(c)(2), in addition to contractual restrictions, allows interactive computer service providers and users to remove material which they deem to be harassing or objectionable.

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exclusions enacted at that time—which preclude CDA protection under section 230(c)(1) or 230(c)(2)(B) in connection with civil claims (including claims based on accepting advertisements that further sex traffic)—are not applicable to section 230(c)(2)(A).[12] In other words, interactive computer service providers and users stripped of CDA protection under section 230(c)(1) (which is the immunity relied upon most frequently in litigation) can avoid the liability for federal civil claims and state criminal charges otherwise created by the exclusion set forth in section 230(e) for sex trafficking and related advertising by affirmatively complying with section 230(c)(2)(A)[13]—most typically by declining to host websites for adult escort or similar services or accept advertising for those types of businesses.[14]

37.05[4][B] Threshold Entitlement to Section 230(c)(2)(A) Exemption—Any Action Voluntary Undertaken in Good Faith

Section 230(c)(2) provides that:

> 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 . . . .

As noted earlier in section 37.05, subpart (c)(2)(A) inverts the common law rules on distributor and publisher liability[1] by immunizing conduct undertaken to monitor or screen content. Traditionally, the more editorial control exerted, the more likely it was that a company would be subject to the greater potential liability of a publisher, rather than the lower exposure to defamation claims faced by distributors, such as newspaper vendors and bookstores.[2]

The Ninth Circuit, in *Enigma Software Group USA, LLC*

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[12] *See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the interplay between sections 230(e) and 230(c)(2)(A)).

[13] *See* 47 U.S.C.A. § 230(e)(5).

[14] *See infra* § 37.05[5][C] (analyzing the interplay between sections 230(e) and 230(c)(2)(A)).

[Section 37.05[4][B]]

[1] *See generally supra* § 37.04 (discussing traditional publisher and distributor liability).

[2] *See, e.g.,* Restatement (Second) of Torts § 581, at 231 (1977); *supra*

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v. Malwarebytes, Inc.,[3] held that section 230(c)(2)(A) imposes a *subjective,* rather than objective standard of "material that the provider or user considers to be . . . otherwise objectionable . . . ."[4] By implication, this same subjective, good faith standard would apply to what constitutes "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, [or] harassing . . . ,"[5] which is also part of the same statutory clause.

By its terms, the threshold for entitlement for Good Samaritan protection is low—*any action* (by a provider or user of an interactive computer service)[6] is sufficient, so long as it is undertaken voluntarily (and therefore will benefit the public as a deed not otherwise required) and in good faith, to restrict access to or the availability of content that the interactive computer service provider or user subjectively considers to fall within certain enumerated categories.[7]

Section 230(c)(2) affords interactive computer service providers subjective discretion to take *any* action in response to what they believe to be objectionable content within the terms of the statute. In *Domen v. Vimeo, Inc.*,[8] for example, Southern District of New York Magistrate Judge Stewart Aaron dismissed plaintiff's California and New York anti-discrimination claims based on section 230(c)(2)(A) (in addi-

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§§ 37.03[3], 37.04.

[3]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019).

[4]*See Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1044 (9th Cir. 2019) (citing *Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1173 (9th Cir. 2009)), *cert. denied*, 141 S. Ct. 13 (2020).

[5]47 U.S.C.A. § 230(c)(2)(A).

[6]An *interactive computer service* is defined under the Act as "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 . . . ." 47 U.S.C.A. § 230(f)(2). An *access software provider* is defined as "a provider of software . . . or enabling tools that do any 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, or translate content." 47 U.S.C.A. § 230(f)(4); *see generally supra* § 37.05[2] (defining *interactive computer service*).

[7]The specific categories of covered material are discussed below in section 37.05[4][C].

[8]*Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 603-04 (S.D.N.Y. 2020), *aff'd on other grounds,* No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

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tion to section 230(c)(1)) where Vimeo had deleted plaintiffs' account in response to a policy violation. Key to the court's ruling was the fact that Vimeo had adopted a specific policy, consistent with section 230(c)(2), and sought to implement it. Before plaintiffs had created their account, Vimeo had adopted a policy prohibiting users from posting videos promoting sexual orientation change efforts, which it had incorporated by reference in its Terms of Service. Plaintiffs, like all users, were required to assent to Vimeo's ToS in order to establish an account. When a moderator reported that plaintiffs had posted videos that violated the policy, Vimeo notified plaintiffs that they should remove the videos within 24 hours or else Vimeo might remove the videos or the entire account. When no action was taken, Vimeo, approximately two weeks later, deleted plaintiffs' account.

In dismissing plaintiffs' claims, the district court did not credit the statement in their Complaint that Vimeo "failed to act in good faith," which the court characterized as an unsubstantiated conclusory allegation because plaintiffs had not alleged any facts to support the bald assertion.[9]

On appeal, the Second Circuit issued and then withdrew two separate opinions affirming dismissal under section 230(c)(2) before ultimately affirming on unrelated grounds.[10]

Merely alleging bad faith, without facts to support it,

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[9]*Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 604 (S.D.N.Y. 2020), *aff'd on other grounds,* No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

[10]The Second Circuit, in an opinion subsequently withdrawn, had held that conclusory allegations of bad faith made in plaintiff's Complaint were insufficient to defeat Vimeo's motion to dismiss, explaining that "Vimeo's deletion of Appellants' account was not anti-competitive or self-serving behavior done in the name of content regulation. Instead, it was a straightforward consequence of Vimeo's content policies, which Vimeo communicated to Church United prior to deleting its account. Indeed, the policy was communicated to Church United before it even joined the platform." *Domen v. Vimeo, Inc.*, 6 F.4th 245, 252 (2d Cir. 2021), *op. withdrawn*, 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021).

In the same withdrawn opinion, the Second Circuit likewise had rejected plaintiffs' argument that Vimeo acted in bad faith because it allegedly left up similar videos to the ones in plaintiffs' account, writing that "[g]iven the massive amount of user-generated content available on interactive platforms, imperfect exercise of content-policing discretion does not, without more, suggest that enforcement of content policies was not done in good faith." 6 F.4th at 253.

The district court's order dismissing plaintiffs' claims as preempted by sections 230(c)(1) and 230(c)(2) initially was affirmed by the Second

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likewise did not prevent dismissal of plaintiff's claim under section 230(c)(2) in *Daniels v. Alphabet Inc*.[11] In that case, Northern District of California Magistrate Judge Virginia K. Demarchi dismissed rapper Young Pharaoh's breach of contract claim against YouTube, Google and Alphabet, pursuant to section 230(c)(2), in a suit alleging that videos he had uploaded to YouTube were removed for violating YouTube's community guidelines or policy on harassment and bullying. The court rejected plaintiff's bald assertion of bad faith on the part of the defendants, where plaintiff's own allegations suggested that YouTube was acting pursuant to its policies and in good faith. Judge Demarchi wrote:

> Mr. Daniels acknowledges that defendants removed the Fauci video because that video purportedly violates YouTube's Community Guidelines and removed the George Floyd video that video purportedly violates YouTube's policy on harassment and bullying. He even concedes that the George Floyd video contained language that could be considered offensive. . . . The complaint contains no plausible factual allegations suggesting that YouTube did not consider the content of the Fauci and George Floyd videos objectionable and/or contrary to its stated policies and guidelines, or that it removed, restricted access to, or demonetized the videos in bad faith. Mr. Daniels relies solely on conclusory assertions that YouTube acted in bad faith . . . ."[12]

Section 230(c)(2) was used offensively in another case, in which a district court in Florida enjoined enforcement of Flo-

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Circuit under section 230(c)(2) on March 11, 2021, but the appellate court subsequently vacated its opinion and reinstated the district court's order, in response to a motion for reconsideration, on July 15, 2021. *See Domen v. Vimeo, Inc.*, 991 F.3d 66 (2d Cir. 2021), *vacated,* 2 F.4th 1002 (2d Cir. 2021). Thereafter, on July 21, 2021, the Second Circuit issued a new opinion, which was, like the first one, based on section 230(c)(2), but employed more guarded language and included a more explicit discussion of the extent to which plaintiffs' conduct violated Vimeo's Terms of Service. *See Domen v. Vimeo, Inc.*, 6 F.4th 245 (2d Cir. 2021), *op. withdrawn*, 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021). It also provided an alternative ground for affirmance—that plaintiffs failed to state a claim. *Id.* The Second Circuit ultimately sidestepped section 230(c)(2) entirely, affirming dismissal for failure to state a claim based on the substantive elements of the claims alleged, in a third (this time, unreported) opinion. *See Domen v. Vimeo, Inc.*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

[11] *Daniels v. Alphabet Inc*., Case No. 20-cv-04687-VKD, 2021 WL 1222166, at *12-13 (N.D. Cal. Mar. 31, 2021).

[12] *Daniels v. Alphabet Inc*., Case No. 20-cv-04687-VKD, 2021 WL 1222166, at *12 (N.D. Cal. Mar. 31, 2021).

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rida's social media platform law in part because plaintiffs showed they were likely to prevail on their claim that the statute was preempted by section 230(c)(2) to the extent it purported to prohibit deplatforming a political candidate in good faith, to restrict access to material the platform considered objectionable, or for other decisions to remove or restrict access to content.[13]

While subjective good faith is the standard, section 230(c)(2) also requires that some *action* be taken in subjective good faith to benefit from the good Samaritan provision.

Mere inaction would be insufficient. The statute expressly is phrased in terms of "any action taken . . . ." or "any action voluntarily taken . . . ."[14] A provider or user who makes no effort to restrict or to enable restriction of access to objectionable material, therefore should be unable to benefit from subpart (c)(2) of the Good Samaritan exemption (and potentially could be exposed to greater liability than a provider or user who takes at least some *action*), depending

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[13]*See NetChoice, LLC v. Moody,* __ F. Supp. 3d __, 2021 WL 2690876, at *5-6 (N.D. Fla. June 30, 2021) (preliminarily enjoining enforcement of Florida Senate Bill 7072, which sought to regulate social media companies, finding that plaintiffs were likely to succeed on the merits of showing that the law was unconstitutional under the First Amendment and that (1) Fla. Stat. Ann. § 106.072, which purported to prohibit a social media platform from deplatforming a candidate for office, was preempted by 47 U.S.C.A. § 230(c)(2) because "deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2). If this is done in good faith—as can happen—the Florida provision imposing daily fines is preempted by § 230(e)(3). Good faith, for this purpose, is determined by federal law, not state law. Removing a candidate from a platform based on otherwise-legitimate, generally applicable standards—those applicable to individuals who are not candidates—easily meets the good-faith requirement. Indeed, even a mistaken application of standards may occur in good faith" and (2) parts of Fla. Stat. Ann. § 501.2041 that purport to impose liability for certain decisions to remove or restrict access to content were preempted—specifically Fla. Stat. Ann. §§ 501.2041(6) (creating a private right of action for damages for violations of § 501.2041(2)(b) and (2)(d)1), 501.2041(2)(b) (requiring a social media platform to apply censorship, deplatforming, and shadow banning standards in a consistent manner), 501.2041(2)(d) 1 (prohibiting a social media platform from deplatforming a user or censoring or shadow banning a user's content without notifying the user), 501.2041(2) (making any violation of that subsection an unfair or deceptive act or practice within the meaning of § 501.204—and thus providing a private right of action for damages under § 501.211); *see also infra* § 39.02[1] (analyzing the First Amendment aspects of the case).

[14]47 U.S.C.A. § 230(c)(2)(A), 230(c)(2)(B).

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upon whether immunity under subpart (c)(1) otherwise was available for the same content.[15] Although an interactive computer service provider or user who takes *no action* would be unable to benefit from the exemption provided by section 230(c)(2), taking *no action* would not limit the potential reach of section 230(c)(1) since it is self-executing and, by its plain terms, no action is required.

To be effective under section 230(c)(2)(A), "any action" undertaken by an interactive computer service or user must have been undertaken *voluntarily* and *in good faith*. Presumably, actions required by law or otherwise compelled would not apply.

Similarly, good faith, not merely voluntary action, is required. In an early unreported opinion from an intermediate appellate court in Ohio—*Sabbato v. Hardy*[16]—Judge Sheila G. Farmer of Stark County held that the availability of the exemption created by section 230(c)(2)(A) is not automatic and depends on "some evidence" of good faith. She therefore ruled under the facts of that case that a website designer and operator could not prevail on his motion to dismiss plaintiff's defamation complaint simply by interposing the exemption, but rather would have to convert his motion into one for summary judgment by introducing evidence of his good faith.[17]

The requirement of good faith in section 230(c)(2)(A)[18] ensures that "any action" that qualifies under the statute will not merely be a cosmetic gesture intended solely to insulate an interactive computer service from liability. It also means that a service provider (or user) cannot benefit from the exemption if it acts willfully or maliciously.

Nevertheless, the threshold for proving subjective good

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[15]Service provider liability is addressed more extensively in chapters 49 and 50.

[16]*Sabbato v. Hardy*, 29 Media L. Rep. (BNA) 1860, 2000 WL 33594542 (Ohio Ct. App. Dec. 18, 2000).

[17]In that case, the defendant presumably alternatively could have asserted the exemption created by section 230(c)(1).

[18]The broad exemption provided by section 230(c)(2)(A) requires "any action voluntarily taken in good faith" to restrict access to or the availability of particular content. The more limited exemption created by section 230(c)(2)(B) for action to enable or make available the technical means to restrict access to objectionable material merely requires "any action," rather than "any action voluntarily taken in good faith." *See infra* § 37.05[4][D].

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faith is low. In *Vimeo,* it was established because Vimeo had adopted a policy prohibiting "hateful, harassing, defamatory, and discriminatory content" and expressly defined videos that promoted sexual orientation change efforts as falling within that category. Vimeo's enforcement of that policy—first with a warning letter, which went unheeded, and then by deleting plaintiffs' account—was therefore, in the absence of contrary evidence, presumptively adopted in good faith, based on content that Vimeo considered to be harassing or otherwise objectionable.

A good example of a case where section 230(c)(2)(A) might have applied had it been raised by the parties is *Barnes v. Yahoo!, Inc.*[19] In that case, a woman whose former boyfriend created phony profiles of her containing naked pictures that had been taken of her without her knowledge, invitations to engage in sexual intercourse and her real work address, phone number and email account, sued Yahoo! for failing to take down the phony profiles. In response to the profiles, men who the plaintiff did not know were "peppering her office with emails, phone calls, and personal visits, all in the expectation of sex."[20] Barnes sent multiple take down requests to Yahoo!, but also spoke to Yahoo!'s Director of Communications, who called her and promised to "personally walk" her statement over to the division responsible for removing unauthorized profiles and that Yahoo! would take care of it. The Ninth Circuit concluded that plaintiff's negligent undertaking claim was preempted by section 230(c)(1), but ruled that her quasi-contractual promissory estoppel claim, based on the representations of the Director of Communications which plaintiff alleged she relied on to her detriment, was not similarly preempted because it was not premised on publication or speaking. As the court explained, "Barnes does not seek to hold Yahoo! liable as a publisher or speaker of third-party content, but rather as

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[19]*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). *Barnes v Yahoo* was decided on a motion to dismiss, which assumes as true the allegations of the plaintiff's Complaint. While preemption under section 230(c)(1) frequently can be addressed on a motion to dismiss, the immunity provided by subpart 230(c)(2)—which is dependent on an interactive computer service provider or use undertaking action in good faith—may not be apparent from the allegations of a Complaint or those facts which a court may take judicial notice of in considering a motion to dismiss. *See generally infra* § 37.05[7] (analyzing procedural issues in connection with raising the CDA).

[20]*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009).

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the counter-party to a contract, as a promisor who has breached."[21] In so ruling, the Ninth Circuit was careful to explain that it was not opining on whether the claim might be preempted by section 230(c)(2)(A), which Yahoo! had not raised in its appeal.[22]

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[21]*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009); *see also Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 WL 6540452, at *7-8 (N.D. Cal. Nov. 2, 2016) (holding plaintiff's claim for intentional interference preempted by the CDA, but allowing its claim for breach of the implied covenant of good faith and fair dealing to proceed under *Barnes v. Yahoo*). A district court in New York had reached the opposite conclusion, finding a quasi-contract claim preempted by section 230(c)(1). Relying on *Zeran*, the court held that Ask.com, a search engine, could not be held liable for failing to keep an alleged promise to remove a site allegedly including false information from its directory because "[d]eciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity." *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (holding preempted by the CDA a claim by the Independent party candidate for governor to compel Ask.com to block from its search engine a page that listed him in close proximity to others identified with the Communist Party, such that when a search result snippet was viewed it appeared to falsely identify him as a Communist Party member). Although the court in *Pataki* also cited the lower court's decision in *Barnes v. Yahoo!*, which was reversed on appeal, it is not clear that the *Pataki* court would have ruled differently had it had the benefit of the Ninth Circuit's subsequent opinion. *See Murawski v. Pataki*, 514 F. Supp. 2d 577 (S.D.N.Y. 2007)*, citing Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding that the CDA immunized AOL from liability for failing to remove a defamatory post), *cert. denied*, 524 U.S. 937 (1998).

In *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009), the court declined to extend *Barnes* to plaintiff's claim that she was a third party beneficiary of Google's contracts with its advertisers, writing that "[r]ead as broadly as possible, Barnes stands for the proposition that when a party engages in conduct giving rise to an independent and enforceable contractual obligation, that party may be 'h[eld] . . . liable [not] as a publisher or speaker of third-party content, but rather as a counterparty to a contract, as a promisor who has breached.' " *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1200 (N.D. Cal. 2009)*, quoting Barnes*, 570 F.3d at 1107. In *Goddard, by contrast*, there was "no allegation that Google ever promised Plaintiff or anyone else, in any form or manner, that it would enforce its Content Policy." 640 F. Supp. 2d at 1200.

Similarly, although the court didn't mention *Barnes*, in *Obado v. Magedson*, 612 F. App'x 90, 94 (3d Cir. 2015), a Third Circuit panel, in an unreported decision, rejected the plaintiff's claim of promissory estoppel brought against various service providers because "[a]n email from an interactive computer service provider indicating that a complaint by a defamed user will be investigated is not a clear and definite promise to actually remove the content."

[22]*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1109 (9th Cir. 2009).

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In *Barnes*, if the conduct of the Director of Communications were deemed to constitute "any action voluntarily taken in good faith" to restrict access to or the availability of objectionable content then plaintiff's promissory estoppel claim certainly would be preempted by section 230(c)(2)(A). *Barnes* was decided on a Rule 12(b)(6) motion, so plaintiff's allegations were assumed to be true for purposes of deciding the motion. Ultimately, it was unclear whether the defendant undertook *any action,* even if it was not successful, or whether it took no action, in which case section 230(c)(2)(A) would not apply. If *any action* indeed had been undertaken, plaintiff's claim would be preempted. The Good Samaritan exemption was created expressly to encourage interactive computer service providers and users to act as Good Samaritans, free from the liability that in the physical world otherwise might attach when a Good Samaritan attempts to help but fails to do so or even makes matters worse.

Based on the Ninth Circuit's ruling in *Enigma Software Group* and subsequent district court case law, legitimate interactive computer service providers and users should be able to obtain dismissal of claims under section 230(c)(2) where the facts alleged are consistent with subjective good faith and the plaintiff cannot plead facts to suggest bad faith (rather than having to affirmatively come forward with evidence on summary judgment or at trial).[23] Where good faith is not apparent from a plaintiff's allegations, however, relief under section 230(c)(2) may be difficult to obtain on a motion to dismiss.[24]

While some claims potentially may be barred by both sec-

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[23]Procedural aspects of raising the CDA defense are analyzed in section 37.05[7].

[24]*See, e.g., West v. Shea*, 500 F. Supp. 3d 1079, 1088 (C.D. Cal. 2020) (denying the defendant's motion to dismiss plaintiff's claims under the California Constitution and 42 U.S.C.A. § 1983 (alleging First Amendment violations), where the defendant, Irvine, California Mayor Christina Shea, had deleted plaintiff's comments and blocked him from viewing her Facebook page, rejecting her argument that she did so because she had a good faith belief that plaintiff's posts were harassing and otherwise objectionable within the meaning of section 230(c)(2)(A); "[A]ccepting Plaintiff's allegations as true, as the Court must at this stage, Defendant intentionally blocked Plaintiff from a Profile where she interacted with her constituents as mayor solely because Plaintiff expressed a viewpoint she disagreed with. To grant Defendant's motion to dismiss based on CDA immunity, then, the Court would have to believe that Congress intended CDA immunity to immunize viewpoint discrimination. The Court is not so persuaded.").

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tion 230(c)(1) and 230(c)(2)(A), the latter provision potentially affords broader relief in some cases where immunity under section 230(c)(1) may be unavailable. While section 230(c)(1) deals with speech or publication of third party conduct, section 230(c)(2) immunizes a service provider's own actions. Section 230(c)(2) may provide immunity, for example, in cases where a plaintiff, to get past a motion to dismiss, alleges conduct by an interactive computer service provider outside the scope of section 230(c)(1) preemption, where, with evidence, an interactive computer service provider may be able to show good faith action subject to section 230(c)(2) at a later state in the proceedings, depending on the facts of the given case.[25]

Courts previously were more reticent about granting relief under section 230(c)(2)(A) at the outset of a case, in response to a motion to dismiss or for judgment on the pleadings (which assume, as true, plaintiff's allegations and do not consider evidence that a defendant might want to present at a later point in the case).[26] For example, in *Smith v. Trusted*

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[25]*See, e.g.*, *Spy Phone Labs LLC v. Google Inc.*, Case No. 15-cv-03756-KAW, 2016 WL 6025469, at *8 (N.D. Cal. Oct. 14, 2016) (denying defendant's motion to dismiss state claims arising out of Google's decision to suspend plaintiff's app for violating its anti-spyware policy and requiring plaintiff to rename its app, as outside the scope of section 230(c)(1) immunity, at least based on the facts alleged in plaintiff's complaint).

[26]*See, e.g.*, *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 WL 6540452, at *8-9 (N.D. Cal. Nov. 2, 2016) (denying defendant's motion to dismiss plaintiff's claims arising from YouTube's removal of plaintiff's video for allegedly inflated view counts under section 230(c)(2) because plaintiff pled "marginally sufficient" allegations of bad faith); *e-ventures Worldwide, LLC v. Google Inc.*, 188 F. Supp. 3d 1265, 1273 (M.D. Fla. 2016) (denying defendant's motion to dismiss claims by a search engine optimization company alleging that Google had improperly classified its business as "pure spam" because the plaintiff alleged bad faith in connection with the removal of its websites from Google's search results); *Moving & Storage, Inc. v. Panayotov*, Civil Action No. 12-12262-GAO, 2014 WL 949830, at *2 (D. Mass. Mar. 12, 2014) (denying the defendant's motion to dismiss plaintiff's claims arising out of the defendants' operation of the *MyMovingReviews.com* website and alleged practice of deleting positive reviews about plaintiffs' moving business and posting positive reviews about a competing business owned by one of the defendants, pursuant to section 230(c)(2), because "[a]s the plaintiffs have sufficiently alleged bad faith, the issue cannot be appropriately decided at this stage. It is better resolved on a developed factual record."); *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*, Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010) (denying motion to dismiss).

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Universal Standards in Electronic Transactions, Inc.,[27] an unreported decision, the court denied defendants' motion to dismiss various claims brought by a *pro se* plaintiff arising out of his Comcast email account having been blocked when his IP address was included on a list of notorious spammers by Spamhaus, where the plaintiff alleged that defendants acted in bad faith in blacklisting his IP address. The plaintiff had alleged that after his account was first blocked, he called Comcast and was told that he would not need to worry about being blocked again if he upgraded to a higher level of service. Assuming as true plaintiff's allegations, the court noted that this explanation "seems to suggest that Comcast was not concerned that people were receiving large quantities of emails, or concerned about the content of the emails, but rather was concerned that Plaintiff had not purchased a sufficient level of service. This is not a good faith belief that the emails were objectionable, but rather a belief that they violated a service agreement."[28] In cases such as *Smith*, an interactive computer service provider ultimately may prevail—just not at the outset of the case.

Smith reflects the potential difficulty associated with obtaining dismissal of a claim pursuant to section 230(c)(2)(A), which requires a showing of good faith, voluntary action, which usually requires evidence from the defendant, either in support of a motion for summary judgment or, if controverted by evidence presented by the plaintiff, at trial.[29]

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[27]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

[28]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

[29]*See infra* § 37.05[7] (procedural issues about when to raise the CDA defense). In a later ruling in the case, Judge Kugler denied summary judgment to Comcast on its CDA defense because the issue of its good or bad faith was disputed based on its failure to respond to plaintiff's requests for information about why its IP address was being blocked, but Judge Kugler granted summary judgment for Cisco and Microsoft, which merely provided spam filtering services. *See Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2011 WL 900096, at *8-9 (D.N.J. Mar. 15, 2011). Despite the lack of CDA protection, the court granted summary judgment for Comcast on other grounds.

The court likewise denied summary judgment on the defendant's section 230(c)(2) defense where the plaintiff contested good faith, but

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On the other hand, courts, in recent years, have become more willing to apply section 230(c)(2) in connection with preliminary motions and the Ninth Circuit, in *Enigma Software Group,* and district court opinions such as *Domen v. Vimeo, Inc.* and *Daniels v. Alphabet Inc*., have made it easier to do by clarifying that (1) subjective good faith is all that is required of an interactive computer service provider and (2) merely alleging bad faith without supporting facts should not be enough to defeat a motion to dismiss.

Some older cases are consistent with the more modern trend. In *Holomaxx Technologies Corp. v. Microsoft Corp.*,[30] for example, Judge Jeremy Fogel of the Northern District of California dismissed with leave to amend claims brought by an email marketing service against an interactive computer service for allegedly filtering and blocking its communications to Microsoft users. In dismissing claims under the Computer Fraud and Abuse Act[31] and for intentional interference with contract, intentional interference with prospective business advantage and alleged violations of California's wiretapping/eavesdropping statute,[32] the court concluded that it was clear from the face of plaintiff's complaint that Microsoft reasonably could have concluded that "Holomaxx's emails were 'harassing' and thus 'otherwise objectionable.' " In that case, Holomaxx admitted sending approximately three million emails per day through Microsoft's servers and that at least 0.5% of these were sent to an invalid address or resulted in an opt-out request. As the court noted, on an annual basis this amounted to more than five million invalid or unwanted email messages.

Judge Fogel rejected Holomaxx's conclusory allegation that Microsoft acted in bad faith, holding that the appropriate question was whether Holomaxx had pled facts to show an

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granted summary judgment on other grounds, in *e-ventures Worldwide, LLC v. Google, Inc.,* Case No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *2-3 (M.D. Fla. Feb. 8, 2017). In *e-ventures*, the court ruled that Google's decision to remove plaintiff's websites from search results for alleged search engine manipulation was protected by the First Amendment. *See id.* at *4; *see generally supra* § 9.09 (analyzing First Amendment protections for search engine results).

[30]*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

[31]18 U.S.C.A. § 1030; *see generally infra* § 44.08.

[32]Cal. Penal Code §§ 630 *et seq*.

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absence of good faith.[33] Although the court conceded that other aspects of Microsoft's affirmative defense might be contested, Judge Fogel ruled that before that became relevant Holomaxx would have to plead facts to show an absence of good faith. Accordingly, the court dismissed Holomaxx's claims with leave to amend if it was able to do so.

Judge Fogel also entered equivalent relief in Holomaxx's virtually identical suit against Yahoo!.[34]

Likewise, in an unreported state court opinion from an intermediate appellate court in Texas, *Davis v. Motiva Enterprises, LLC*,[35] the court similarly held that section 230(c)(2) barred the plaintiff's negligent entrustment, negligent supervision, and negligent undertaking claims against an employer arising out of its alleged failure to prevent one of its employees from using its technology to post sexual advertisements, despite the plaintiff's allegation that the employer had actual or constructive knowledge of its employee's activity, because the court ruled that subpart 230(c)(2) of the CDA immunized the employer from liability for its good faith efforts to restrict access to certain materials through its monitoring and logging policies.

37.05[4][C] Harassing and Otherwise Objectionable Content under Section 230(c)(2)(A)

Subpart 230(c)(2)(A) provides that no liability may be imposed on account of "any action voluntarily taken in good faith to restrict access to or [the] 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* . . . ." According to the Ninth Circuit, "access to pornography" was "Congress's motivating concern" in enacting section 230(c)(2), but "the language used in § 230 included much more, covering any online material considered

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[33] *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011), *quoting e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008).

[34] *See Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011); *see also Holomaxx Technologies v. Yahoo!, Inc.,* No. CV-10-4926-JF, 2011 WL 2011 WL 3740827 (N.D. Cal. Aug. 23, 2011) (dismissing plaintiff's amended complaint with prejudice).

[35] *Davis v. Motiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. Apr. 2, 2015).

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to be 'excessively violent, harassing, or otherwise objectionable.' "[1]

While most of the terms referenced in subpart (c)(2)(A) address adult content, companies seeking to benefit from the exemption should, at a minimum, take "any action . . . to restrict access to or [the] availability of material that the provider or user considers to be . . . harassing, or otherwise objectionable . . . ."[2]

The terms *harassing* and *otherwise objectionable* are not defined in the statute. In the policy objectives enumerated in the statute, the term *harassment* is used in the context of criminal laws,[3] while *objectionable* is used in terms of a form of content that parents might want to restrict.[4] The legislative history, however, speaks broadly in terms of "objectionable online material" and also states that the provision is intended to further "the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."[5]

The Ninth Circuit, in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*,[6] construed the term *objectionable* as not limited to just adult content, but emphasized that its reach was not "unbounded" and carved out an exception under section 230(c)(2)(B)—which presumably would also apply under section 230(c)(2)(A)—where the interactive computer service provider is a competitor of the third party whose content is restricted.[7] This judge-made exception is not apparent from the face of the statute, however.

With respect to the various elements enumerated in the statute—"material that the provider or user considers to be

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[Section 37.05[4][C]]

[1]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1046 (9th Cir. 2019) (quoting the statute), *cert. denied*, 141 S. Ct. 13 (2020).

[2]47 U.S.C.A. § 230(c)(2).

[3]*See* 47 U.S.C.A. § 230(b)(5).

[4]*See* 47 U.S.C.A. § 230(b)(4).

[5]Conference Report 104-458, 104th Cong. 2d Sess. 194 (1996).

[6]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[7]*See Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1049–52 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020); *see generally infra* § 37.05[4][D] (analyzing the case).

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obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable"[8]—the Ninth Circuit panel in *Enigma Software v. Malwarebytes* acknowledged that Congress's primary concern was adult material, but it declined, as some district courts had previously done, to read the list as narrowly focusing exclusively on that material. The appellate panel explained:

> The history of § 230(c)(2) shows that access to pornography was Congress's motivating concern, but the language used in § 230 included much more, covering any online material considered to be "excessively violent, harassing, or otherwise objectionable." *See* 47 U.S.C. § 230(c)(2)(A)–(B). Perhaps to guide the interpretation of this broad language, Congress took the rather unusual step of setting forth policy goals in the immediately preceding paragraph of the statute. *See id*. § 230(b). Of the five goals, three are particularly relevant here. These goals were "to encourage the development of technologies which maximize user control"; "to empower parents to restrict their children's access to objectionable or inappropriate online content"; and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." *See id.* § 230(b)(2)–(4).[9]

Following the Ninth Circuit, the Second Circuit, in *Domen v. Vimeo, Inc.*,[10] likewise rejected the argument that the categories set forth in subpart 230(c)(2) were limited to salacious material, in an opinion which subsequently was withdrawn and ultimately replaced with an opinion affirming the district court's order of dismissal on grounds unrelated to section 230.[11] Although the Second Circuit's withdrawn opinion has no precedential value, the panel's analysis nonetheless provides a persuasive argument in further support of the Ninth Circuit's holding in *Enigma Software Group*.

In the withdrawn opinion, the Second Circuit panel emphasized that the list of terms in section 230(c)(2) was modified by the word *consider*, which provides "protection from suit for restricting access to content that providers '*consider*[ ] . . . otherwise objectionable,' even if the material

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[8] 47 U.S.C.A. § 230(c)(2)(A).

[9] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1047 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[10] *Domen v. Vimeo, Inc.*, 6 F.4th 245 (2d Cir. 2021), *op. withdrawn*, 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021).

[11] *See Domen v. Vimeo, Inc.*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

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would otherwise be constitutionally protected, granting some degree of subjective discretion to service providers who restrict the availability of content in good faith."[12] The court in *Vimeo* deemed the material at issue in that case to be both *harassing* and *otherwise objectionable* where Vimeo had adopted a policy on "hateful, harassing, defamatory, and discriminatory content"—which prohibited users from posting videos promoting sexual orientation change efforts—which Vimeo had incorporated by reference in its Terms of Service, which users like the plaintiffs were required to assent to, in order to establish an account. The Second Circuit panel concluded:

> Vimeo determined that pro-SOCE material is "harassing"—one of the categories expressly enumerated in Section 230(c)(2). *See Domen*, 433 F. Supp. 3d at 599. The prohibition on pro-SOCE content is contained within a section of the Guidelines entitled "How does Vimeo define hateful, ***harassing***, defamatory, and discriminatory content?" *See id*. (quoting Vimeo's Guidelines) (emphasis added). That Vimeo "considers" the removed content "harassing," and by implication "objectionable," as those terms are used in Section 230(c)(2), is clear on the face of the record. *See* 47 U.S.C § 230(c)(2).[13]

Thus, framing a policy in terms of the plain text of section 230(c)(2), as long recommended in this treatise,[14] may help a provider obtain the protection of section 230(c)(2) in the event of litigation.

What constitutes material that is *otherwise objectionable* is still unfolding in case law. In its withdrawn opinion in *Vimeo,* the Second Circuit had declined to "define the outer reaches of the phrase 'otherwise objectionable,' " since it concluded that "Vimeo's removal of Appellants' videos and account for posting pro-SOCE content in violation of the Terms of Service [wa]s well within the scope of Section 230(c)(2)'s protection from suit."[15]

Some earlier district court decisions had read the elements of the statute—"material that the provider or user considers

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[12]*Domen v. Vimeo, Inc.*, 6 F.4th 245, 251 (2d Cir. 2021), *op. withdrawn*, 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021).

[13]*Domen v. Vimeo, Inc.*, 6 F.4th 245, 252 (2d Cir. 2021) (emphasis in original), *op. withdrawn*, 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021).

[14]*See supra* §§ 22.02, 22.05[2][B].

[15]*Domen v. Vimeo, Inc.*, 6 F.4th 245, 251-52 (2d Cir. 2021), *op. withdrawn*, 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021).

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to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable"[16]—as more narrowly tied to adult material, even though a cardinal principle of statutory construction is that every word in a statute is to be given independent meaning.[17] As noted above, however, this narrow reading to the types of content covered by section 230(c)(2) has since been rejected by the Ninth Circuit.

In *National Numismatic Certification, LLC v. eBay, Inc.*,[18] for example, Judge Patricia Fawsett of the Middle District of Florida, in an unreported decision, construed the term *objectionable* narrowly. She wrote that "[w]hen a general term follows specific terms, courts presume that the general term is limited by the preceding terms."[19] Applying the cannon of *ejusdem generis,* Judge Fawsett wrote:

> One may find an array of items objectionable . . . However, Congress provided guidance on the term "objectionable" by providing a list of seven examples and a statement of the policy behind section 230. Accordingly, the Court concludes that "objectionable" content must, at a minimum, involve or be similar to pornography, graphic violence, obscenity, or harassment.[20]

Accordingly, the court held that eBay's removal of listings for allegedly counterfeit coins was *not* preempted by section 230. In evaluating the level of involvement of an interactive computer service provider or user, however, the court conflated the standards under section 230(c)(1) and (c)(2)(A), interpreting the availability of the exemption created by section (c)(1) as dependent on a defendant's entitlement to qualify for section (c)(2)(A), which was plainly a legal error.

Agreeing with *National Numismatic Certification*, the

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[16]47 U.S.C.A. § 230(c)(2)(A).

[17]*See Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 197 (1985).

[18]*National Numismatic Certification, LLC. v. eBay, Inc.,* No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008).

[19]*National Numismatic Certification, LLC. v. eBay, Inc.,* No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008)*, citing Begay v. U.S.*, 553 U.S. 137, 140–41 (2008); and *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("Under [the cannon of ejusdem generis], when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.").

[20]*National Numismatic Certification, LLC. v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404, at *25 (M.D. Fla. July 8, 2008) *, citing* 47 U.S.C.A. § 230(c)(1).

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court in *Goddard v. Google, Inc.*,[21] also in an unreported decision, wrote in *dicta* that Google's content policy requiring mobile advertisers to provide pricing and cancellation information in connection with advertisements, would not be subject to the Good Samaritan exemption because it could not be characterized as addressing objectionable content. According to the court, the policy requirements related "to business norms of fair play and transparency and are beyond the scope of § 230(c)(2)."[22]

Other courts have similarly construed what is *otherwise objectionable* narrowly.[23]

Judge Fogel of the Northern District of California, who authored the opinion in *Goddard v. Google*, adopted the same interpretation of the statute in a later reported decision, *Holomaxx Technologies Corp. v. Microsoft Corp.*,[24] although in that case, as discussed below, he dismissed various federal and state claims pursuant to section 230(c)(2), with leave to amend, based on his finding that the conduct at issue in *Holomaxx* on its face seemed objectionable.[25]

By contrast, in *Langdon v. Google, Inc.*,[26] which is a reported decision, the court held that defendant-search engines could not be held liable for not carrying plaintiff's

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[21]*Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008).

[22]*Goddard v. Google, Inc.*, No. C 08–2738 (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008). The court ultimately dismissed plaintiff's amended complaint with prejudice pursuant to section 230(c)(1). *See Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).

[23]*See Song Fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 882–84 (N.D. Cal. 2015) (denying Google's motion to dismiss plaintiffs' claims arising out of YouTube's decision to remove plaintiffs' video from the publicly accessible part of YouTube's website for an inflated view count; "Given the list preceding 'otherwise objectionable, '—'obscene, lewd, lascivious, filthy, excessively violent, [and] harassing . . . '—it is hard to imagine that the phrase includes, as YouTube urges, the allegedly artificially inflated view count associated with" plaintiffs' video); *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014) (declining "to broadly interpret 'otherwise objectionable' material to include any or all information or content.").

[24]*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

[25]*See Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating Holomaxx's virtually identical complaint against Yahoo!).

[26]*Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

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advertisements—advertisements that Google described as "advocat[ing] against an individual, group [or] organization"[27]—based on a finding that the advertisements were "otherwise objectionable" within the meaning of section 230(c)(2)(A).

Likewise, in *e360Insight, LLC v. Comcast Corp.*,[28] the court ruled that commercial email sent by a bulk emailer could be deemed objectionable under section 230(c)(2)(A). In that case, e360 had sued Comcast for using filters to block email sent to Comcast customers by e360, which e360 argued fully complied with the CAN-SPAM Act[29] and therefore was lawful commercial email, not spam. The court rejected this argument, writing that "compliance with CAN-SPAM . . . does not evict the right of the provider to make its own good faith judgment to block mailings."[30] To force a provider like Comcast to litigate the question of whether what it blocked was or was not spam would render § 230(c)(2) nearly meaningless."[31] Section 230(c)(2), the court wrote, insulates a provider from "blocking too much, or even too little . . ."[32] The court also emphasized that section 230(c)(2)(A) insulates an interactive computer service provider from liability for blocking content that it subjectively views as objectionable. The court held that "a mistaken choice to block, if made in good faith, cannot be the basis of liability under federal or state law."[33]

Following *e360,* Judge Jeremy Fogel of the Northern District of California, in *Holomaxx Technologies Corp. v.*

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[27]*Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 626, (D. Del. 2007). The court in *National Numismatic Certification, LLC v. eBay, Inc.*, sought to harmonize its ruling with that case by noting that advocating "against a group" was similar to "harassment." 2008 WL 2704404, at *25 n.35.

[28]*e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008).

[29]15 U.S.C.A. §§ 7701 to 7713; *see supra* § 29.03 (the CAN-SPAM Act), 29.08[2] (the use of blocking and screening software).

[30]546 F. Supp. 2d at 609.

[31]546 F. Supp. 2d at 609.

[32]546 F. Supp. 2d at 607.

[33]546 F. Supp. 2d at 609. In *e360*, the court granted judgment on the pleadings in favor of Comcast on e360's claims for violations of the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030, infringement of free speech, tortious interference with prospective economic advantage and deceptive or unfair practices barred by the Illinois Consumer Fraud Act. *See generally supra* § 29.08[2].

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Microsoft Corp.,[34] dismissed with leave to amend claims brought by an email marketing service against an interactive computer service for allegedly filtering and blocking its communications to Microsoft users. In dismissing claims under the Computer Fraud and Abuse Act[35] and for intentional interference with contract, intentional interference with prospective business advantage and alleged violations of California's wiretapping/eavesdropping statute,[36] the court concluded that it was clear from the face of plaintiff's complaint that Microsoft reasonably could have concluded that "Holomaxx's emails were 'harassing' and thus 'otherwise objectionable' " where Holomaxx admitted sending approximately three million emails per day through Microsoft's servers and that at least 0.5% of these were sent to an invalid address or resulted in an opt-out request. As the court noted, on an annual basis this amounted to more than five million invalid or unwanted email messages.[37]

Judge Fogel also granted equivalent relief to Yahoo! in Holomaxx's virtually identical suit against that company.[38]

A different court applied similar reasoning in *Smith v. Trusted Universal Standards in Electronic Transactions, Inc.*,[39] which also was brought by an accused spammer over a blocked email account. In *Smith*, the court rejected the argument that blocked material must be "obscene, lewd, filthy, excessively violent, or harassing" to come within the scope of section 230(c)(2)(A), holding that "nothing about the context before or after" the term *otherwise objectionable* "limits it to just patently offensive items."[40] In a subsequent ruling in that case, the court clarified that because section 230(c)(2)(A)

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[34]*Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011).

[35]18 U.S.C.A. § 1030; *see generally infra* § 44.08.

[36]Cal. Penal Code §§ 630 *et seq*.

[37]*See supra* § 37.05[4][B] (discussing the case further).

[38]*See Holomaxx Technologies v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011).

[39]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

[40]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010). As discussed in the preceding sub-section, because the issue of immunity was raised in a motion to dismiss and the question of good faith was disputed, the court in *Smith* denied defendants' motion to dismiss.

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"protects material that the user or provider *considers* to be objectionable" it "[i]mportantly . . . does not require the user or provider of an interactive computer service to demonstrate that the otherwise 'objectionable' material is actually objectionable."[41] In granting partial summary judgment for Microsoft and Cisco in that case, the court concluded that "[u]sers or providers of an interactive computer service may determine that spam is material that is harassing or otherwise objectionable under Section 230(c)(2)(A)."[42]

Similarly, in *Blumenthal v. Drudge*,[43] Judge Paul Friedman of the District of Columbia wrote in *dicta* in a footnote that material referenced in subpart (c)(2) as *otherwise objectionable* encompassed "a broad . . . category . . . ." (construed in that case to extend to a claim based on defamation).[44]

At least in the Ninth Circuit, *Enigma Software v. Malwarebytes* makes clear that *objectionable* content is not limited to adult material and includes content that allows users to exercise content controls (except between competitors), although the precise contours of the term remain unclear. In reversing the trial court, Ninth Circuit Judge Mary Schroeder disagreed with district court opinions that had dismissed similar suits brought against Malwarebytes, by plaintiffs who had alleged that their software had been improperly characterized as a PUP by Malwarebytes, based on these courts' reading of the Ninth Circuit's earlier decision in *Zango*.[45] By contrast, the Ninth Circuit panel cited approvingly other district court cases for the proposition that there

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See generally infra § 37.05[7] (procedural issues associated with when to raise the defense).

[41]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2011 WL 900096, at *5 (D.N.J. Mar. 15, 2011) (emphasis added) (granting summary judgment to Cisco and Microsoft but denying summary judgment to Comcast pursuant to subpart 230(c)(2)).

[42]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2011 WL 900096, at *5 (D.N.J. Mar. 15, 2011)*, citing Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456, at *6 (D.N.J. May 4, 2010).

[43]*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

[44]*Blumenthal v. Drudge*, 992 F. Supp. 44, 52 n.13 (D.D.C. 1998).

[45]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1049–50 (9th Cir. 2019) (citing *PC Drivers Headquarters, LP v.*

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were limits on the scope of what could be deemed objectionable. Judge Schroeder wrote:

> Other district courts have viewed our holding in *Zango* to be less expansive. *See Song fi Inc. v. Google*, *Inc*., 108 F. Supp. 3d 876, 884 (N.D. Cal. 2015) (noting that just because "the statute requires the user or service provider to subjectively believe the blocked or screened material is objectionable does not mean anything or everything YouTube finds subjectively objectionable is within the scope of Section 230(c)," and concluding that, "[o]n the contrary such an 'unbounded' reading . . . would enable content providers to 'block content for anticompetitive reasons[.]' ") (quoting Judge Fisher's concurrence in *Zango*); *Sherman v. Yahoo! Inc*., 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014) (same); *see also Holomaxx Techs. v. Microsoft Corp*., 783 F. Supp. 2d 1097, 1104 (N.D. Cal. Mar. 11, 2011) (acknowledging that a provider's subjective determination of what constitutes objectionable material under § 230(c)(2) is not limitless, but finding that the harassing emails in that case were reasonably objectionable).[46]

In *Malwarebytes,* the Ninth Circuit conflated section 230(c)(2)(A)—which includes a limitation that any action to restrict content be undertaken "voluntarily" and "in good faith"—with section 230(c)(2)(B), which does not include a similar restriction, in addressing more generally section 230(c)(2) and narrowing the construction of what is *objectionable* between direct competitors.[47] One could argue that the requirement of good faith under section 230(c)(2)(A) obviates the need to impose any judge-made restriction on the definition of what is *objectionable,* at least under section 230(c)(2)(A).

It remains to be seen how other circuits and district courts will read *Malwarebytes*—although this may take some time because the volume of litigation under section 230(c)(2) overall is much lower than under section 230(c)(1).

Malwarebytes Inc., 371 F. Supp. 3d 652 (N.D. Cal. 2019); *PC Drivers Headquarters, LP v. Malwarebytes, Inc.,* No. 1:18-CV-234-RP, 2018 WL 2996897, at *1 (W.D. Tex. Apr. 23, 2018)), *cert. denied*, 141 S. Ct. 13 (2020). In light of the Ninth Circuit's decision in *Enigma Software v. Malwarebytes,* the Northern District of California's ruling in *PC Drivers Headquarters, LP v. Malwarebytes Inc.,* 371 F. Supp. 3d 652 (N.D. Cal. 2019) is not good law.

[46]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1050 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[47]*See* 47 U.S.C.A. § 230(c)(2).

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37.05[4][D] Enabling or Making Available the Technical Means to Restrict Access under Section 230(c)(2)(B)

Section 230(c)(2)(B) provides that no provider or user of an interactive computer service[1] shall be held liable on account of "any action taken to enable or make available to information content providers[2] or others[3] the technical means to restrict access to the material described in section 230(c)(2)(A)[4]

[Section 37.05[4][D]]

[1]An *interactive computer service* is defined under the Act as "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 . . . ." 47 U.S.C.A. § 230(f)(2). An *access software provider* is defined as "a provider of software . . . or enabling tools that do any 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, or translate content." 47 U.S.C.A. § 230(f)(4); *see generally supra* § 37.05[2] (defining *interactive computer service*).

[2]An *information content provider* is defined as "any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C.A. 230(f)(3).

[3]The scope of protection under subpart 230(c)(2)(B) is not restricted to tools provided to information content providers. By using the term "information content providers or others" the statute plainly reaches broadly to third parties.

[4]The statute literally refers to subpart (1) but there is no subpart (1) and it is clear from the statute that Congress intended to refer to subpart 230(c)(2)(A). *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 n.5 (9th Cir. 2009) ("We take it that the reference to the 'material described in paragraph (1)' is a typographical error, and that instead the reference should be to paragraph (A), i.e., § 230(c)(2)(A) . . . . Paragraph (1) pertains to the treatment of a publisher or speaker and has nothing to do with 'material,' whereas subparagraph (A) pertains to and describes material.").

The casual reference in section 230(c)(2)(B) to "material described" in section 230(c)(2)(A) could mean (1) narrowly, material that is, in fact, "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . ," (2) more broadly "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . ," or (3) most expansively, "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . " and which has been restricted in good faith. 47 U.S.C.A. § 230(c)(2)(A). The Ninth Circuit, in *Zango,* assumed that subsection 230(c)(2)(B) incorporated "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . ,"

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which, as noted above in section 37.05[4][C], is 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 . . . ."[5] Cases construing those specific terms are separately considered in section 37.05[4][C].

Very few courts have construed section 230(c)(2)(B), which on its face provides broad immunity for any action taken to enable or make available to others, filtering or other technologies. In *Zango, Inc. v. Kaspersky Lab, Inc.*,[6] the Ninth Circuit ruled that section 230(c)(2)(B) extended protection to *Kaspersky Lab*, a distributor of Internet security software that filtered adware and malware. In that case, *Zango*, an Internet company that provided access to a catalog of online videos, games, music, tools and utilities to consumers who agreed to view advertisements while they browsed the Internet, sued Kaspersky, alleging that its software improperly blocked Zango's software.

Judge Pamela Ann Rymer, writing for herself and Judge Betty B. Fletcher, and ruling on a motion for summary judgment, held that a provider of software or enabling tools that filter, screen, allow, or disallow content that the provider or user considers obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable may not be held liable for any action taken to make available the technical means to restrict access by multiple users to a computer server.[7]

In so ruling the court rejected plaintiff's argument that

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but did not address, because it had not properly raised on appeal, whether the express requirement of *good faith* under section 230(c)(2)(A) implied by implication under section 230(c)(2)(B). *See* 568 F.3d at 1173. Given that section 230(c)(2)(B) incorporates *material* described in the earlier subsection, rather than the restrictions imposed on that material or the interactive computer service provider or user's motivations, the better view is that the good faith requirement of section 230(c)(2)(A) is not incorporated by reference into section 230(c)(2)(B), which on its face does not require action undertaken in good faith. The inclusion in section 230(c)(2)(A) and omission in section 230(c)(2)(B) of a requirement of good faith is strong evidence that Congress did not intend to incorporate by reference a requirement of good faith in subsection 230(c)(2)(B).

[5]47 U.S.C.A. § 230(c)(2)(A).

[6]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

[7]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 (9th Cir. 2009).

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the court's holding in *Zango* would open the door to provide immunity to all software providers.

Judge Rymer explained that the immunity afforded by section 230(c)(2)(B), by its terms, only applies to technical means to restrict access to objectionable material. "Thus, non-filtering programs such as word processors or video games would not be subject to the good [S]amaritan immunity."[8] In addition, the court wrote that "[t]he universe is further limited by the definition of 'interactive computer service,' which includes only 'information, service[s], system[s], or access software providers."[9] The appellate panel reiterated that the reason Kaspersky came within the definition of an *access software provider* is "that it is a provider of software that permits users to 'filter, screen, allow, or disallow content."[10]

In his concurring opinion, Judge Fisher suggested that Zango's software might not qualify as "otherwise objectionable" under section 230(c)(2), but noted that Zango had waived that argument before the appellate court. While Kaspersky was entitled to immunity in his view "given the way Zango . . . framed its appeal . . . ," Judge Fisher cautioned that " extending immunity beyond the facts of this case could pose serious problems if providers of blocking software were to be given free license to *unilaterally* block the dissemination of material by content providers under the literal terms of § 230(c)(2)(A)."[11] He explained that "[t]he risk inheres in the disjunctive language of the statute—which permits blocking 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"—and the unbounded catchall phrase, 'otherwise objectionable.' "[12]

Ten years later, the Ninth Circuit, relying on Judge

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[8]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 (9th Cir. 2009).

[9]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 (9th Cir. 2009), *citing* 47 U.S.C.A. § 230(f)(2).

[10]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 (9th Cir. 2009), *citing* 47 U.S.C.A. § 230(f)(4)(A).

[11]*Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1178 (9th Cir. 2009) (Fisher, J. concurring) (emphasis in original).

[12]*Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1178 (9th Cir. 2009) (Fisher, J. concurring), *citing* 47 U.S.C.A. § 230(c)(2) (emphasis in original).

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Fisher's earlier concurrence, narrowed the scope of *Zango* in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*,[13] holding that the term *otherwise objectionable* does not give an interactive computer service provider the unfettered discretion to select what criteria makes a software program "objectionable" under section 230. Although the court carved out an exception for direct competitors, it provided a middle-ground articulation of the proper scope of what constitutes material that is *otherwise objectionable*, citing with approval some district court opinions that had held that the term does not allow for unbounded discretion by an interactive computer service provider, while also acknowledging that the term should not be limited to just adult material.

In *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*,[14] the Ninth Circuit, following reconsideration,[15] reversed and remanded the lower court's ruling that the plaintiff had failed to state claims for New York state unfair competition claims and false advertising under the federal Lanham Act, based on section 230(c)(2)(B). In that case, both parties were competitive providers of proprietary filtering software that allowed users to block malware and other potentially unwanted content. Enigma Software alleged that after many years of competition, Malwarebytes, in 2016, began classifying Enigma Software's most popular programs (RegHunter and SpyHunter) as "Potentially Unwanted Programs" or PUPs, which Enigma alleged blocked Malwarebytes customers from downloading these products.

The district court had dismissed Enigma Software's complaint, relying on the Ninth Circuit's earlier decision in *Zango, Inc. v. Kaspersky Lab, Inc.*,[16] in which the appellate court had affirmed a summary judgment ruling (based on undisputed evidence) that a filtering software provider was entitled to immunity under section 230(c)(2)(B), for blocking access to plaintiff's software, where the plaintiff had waived, on appeal, the issue of whether Kaspersky in fact considered

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[13]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[14]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[15]An earlier opinion—*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 938 F.3d 1026 (9th Cir. 2019)—was withdrawn and replaced on the last day of the year, December 31, 2019.

[16]*Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169 (9th Cir. 2009).

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Zango's software to be "otherwise objectionable."[17] *Enigma Software v. Malwarebytes*, by contrast, was a suit between competitors, in which Enigma Software alleged that Malwarebytes blocked its competing products for unfair competitive purposes, and based on false advertising.

The *Enigma Software v. Malwarebytes* panel began by stating that the Ninth Circuit in *Zango v. Kaspersky* previously recognized that section 230(c)(2) establishes what it characterized as "a subjective standard" for evaluating if material is *objectionable* (or, by extension, if any of the other elements in subsection A—material that the provider or user considers to be "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing . . ."—apply).[18]

In construing the various types of content that could justify immunity under section 230(c)(2), the Ninth Circuit panel in *Enigma Software v. Malwarebytes* acknowledged that Congress's primary concern was with adult material, but declined, as some district courts had previously done, to read the list narrowly as focusing exclusively on that material. The court explained:

The history of § 230(c)(2) shows that access to pornography

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[17]*See Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1176-77 (9th Cir. 2009).

[18]*See Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1044 (9th Cir. 2019) (citing *Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1173 (9th Cir. 2009)), *cert. denied*, 141 S. Ct. 13 (2020). The court in *Zango,* construing section 230(c)(2)(B), read the cross reference to "paragraph (1)" to refer to "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . ," from subsection 230(c)(2)(A), but given its focus on section 230(c)(2)(B) did not construe the requirement in section 230(c)(2)(A) for acting voluntarily and in good faith in implementing any restrictive action taken based on this consideration, which is a further constraint on section 230(c)(2)(A). Because the appellate panel in *Zango* found grounds for affirming the district court's holding that the defendant was entitled to immunity under section 230(c)(2)(B), it declined to address the argument, raised only in a reply brief, that good faith, which is expressly required to support immunity under section 230(c)(2)(A), is required implicitly by section 230(c)(2)(B)'s reference to "material described in paragraph (1)." 47 U.S.C.A. § 230(c)(2)(B).

Filtering tool providers may move to dismiss under section 230(c)(2)(B) but not section 230(c)(2)(A) because good faith may be more difficult to establish at the pleadings stage, where a plaintiff need only allege sufficient facts to get past a motion to dismiss, than on summary judgment, which is decided based on evidence, not mere allegations. *See generally infra* § 37.05[7] (addressing procedural issues in connection with when, during a court case, CDA issues are litigated).

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> was Congress's motivating concern, but the language used in § 230 included much more, covering any online material considered to be "excessively violent, harassing, or otherwise objectionable." *See* 47 U.S.C. § 230(c)(2)(A)–(B). Perhaps to guide the interpretation of this broad language, Congress took the rather unusual step of setting forth policy goals in the immediately preceding paragraph of the statute. *See id*. § 230(b). Of the five goals, three are particularly relevant here. These goals were "to encourage the development of technologies which maximize user control"; "to empower parents to restrict their children's access to objectionable or inappropriate online content"; and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." *See id.* § 230(b)(2)–(4).[19]

Judge Mary M. Schroeder, on behalf of the panel in *Enigma Software v. Malwarebytes,* wrote that the statute's language, legislative history, and case law construing it, led to the conclusion that "providers do not have unfettered discretion to declare online content 'objectionable' . . . ."[20] She elaborated that "blocking and filtering decisions that are driven by anticompetitive animus are not entitled to immunity under section 230(c)(2)."[21] The panel referred back to Judge Fisher's concurring opinion in *Zango,* where he raised concern (in a case decided without reference to whether the defendant in fact considered plaintiff's material to be objectionable, because it had not been raised on appeal) that an "unbounded" reading of the phrase *otherwise objectionable* could allow an interactive computer service provider or user to "block content for anticompetitive purposes or merely at its malicious whim."[22]

In reversing the lower court, the Ninth Circuit panel in *Enigma Software v. Malwarebytes* disagreed with two district court opinions that had dismissed similar suits brought against Malwarebytes by plaintiffs who alleged that their software had been improperly characterized as a PUP by Malwarebytes, based on these district courts' reading of the

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[19]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1047 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[20]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1047 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[21]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1047 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[22]*Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1178 (9th Cir. 2009).

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Ninth Circuit's earlier decision in *Zango*.[23] By contrast, Judge Schroeder cited approvingly other district court opinions for the proposition that there were limits on the scope of what could be deemed objectionable. She wrote:

> Other district courts have viewed our holding in *Zango* to be less expansive. *See Song fi Inc. v. Google*, *Inc*., 108 F. Supp. 3d 876, 884 (N.D. Cal. 2015) (noting that just because "the statute requires the user or service provider to subjectively believe the blocked or screened material is objectionable does not mean anything or everything YouTube finds subjectively objectionable is within the scope of Section 230(c)," and concluding that, "[o]n the contrary such an 'unbounded' reading . . . would enable content providers to 'block content for anticompetitive reasons[.]' ") (quoting Judge Fisher's concurrence in *Zango*); *Sherman v. Yahoo! Inc*., 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014) (same); *see also Holomaxx Techs. v. Microsoft Corp*., 783 F. Supp. 2d 1097, 1104 (N.D. Cal. Mar. 11, 2011) (acknowledging that a provider's subjective determination of what constitutes objectionable material under § 230(c)(2) is not limitless, but finding that the harassing emails in that case were reasonably objectionable).[24]

Judge Schroeder concluded that "[i]n the infancy of the internet, the unwillingness of Congress to spell out the meaning of 'otherwise objectionable' was understandable."[25] By contrast, almost 24 years later, Judge Schroeder explained that "[w]e must today recognize that interpreting the statute to give providers unbridled discretion to block online content would, as Judge Fisher warned [in *Zango*], enable and potentially motivate internet-service providers to act for their own, and not the public, benefit."[26] While one may quibble with the argument that a statute should be

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[23] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1049–50 (9th Cir. 2019) (citing *PC Drivers Headquarters, LP v. Malwarebytes Inc.,* 371 F. Supp. 3d 652 (N.D. Cal. 2019); *PC Drivers Headquarters, LP v. Malwarebytes, Inc.,* No. 1:18-CV-234-RP, 2018 WL 2996897, at *1 (W.D. Tex. Apr. 23, 2018)), *cert. denied*, 141 S. Ct. 13 (2020). In light of the Ninth Circuit's decision in *Enigma Software v. Malwarebytes,* the Northern District of California's ruling in *PC Drivers Headquarters, LP v. Malwarebytes Inc.,* 371 F. Supp. 3d 652 (N.D. Cal. 2019) is not good law.

[24] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1050 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[25] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1051 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[26] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1051 (9th Cir. 2019) (citing *Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1178 (9th Cir. 2009) (Fisher, J. concurring)), *cert. denied*, 141 S. Ct. 13 (2020).

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construed differently than as originally intended with the passage of time, Judge Schroder also framed the court's decision in terms of the policy objectives set forth in the statute. She wrote that:

> Immunity for filtering practices aimed at suppressing competition, rather than protecting internet users, would lessen user control over what information they receive, contrary to Congress's stated policy. *See* § 230(b)(3) (to maximize user control over what content they view). Indeed, users selecting a security software provider must trust that the provider will block material consistent with that user's desires. Users would not reasonably anticipate providers blocking valuable online content in order to stifle competition. Immunizing anticompetitive blocking would, therefore, be contrary to another of the statute's express policies: "removing disincentives for the utilization of blocking and filtering technologies." *Id*. § 230(b)(4).[27]

In limiting the definition of *objectionable* based on the origin of third party content coming from a direct competitor, the Ninth Circuit reached a decision that is hard to reconcile with the plain terms of the statute. Whether something is or is not objectionable could be determined at a later stage—on summary judgment or at trial—if the facts alleged in a plaintiff's complaint, and the inferences reasonably drawn from them, leaves the question unanswered.

Following *Enigma*, courts have dismissed claims pursuant to section 230(c)(2)(B).[28]

In an earlier unreported opinion, *Smith v. Trusted Univer-*

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[27]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1051 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[28]*See, e.g.*, *Asurvio LP v. Malwarebytes Inc.*, Case No. 5:18-cv-05409-EJD, 2020 WL 1478345, at *3-6 (N.D. Cal. Mar. 26, 2020) (dismissing (without leave to amend) claims of Lanham Act false advertising, business disparagement, tortious interference with contractual relations, common law unfair competition, and violations of the Texas Theft Liability Act, in a suit alleging that Malwarebytes wrongfully categorized Asurvio's software as malware or a "Potentially Unwanted Program," holding that Malwarebytes was immune under both 47 U.S.C.A. § 230(c)(1) and (c)(2)(B), for allegedly wrongly filtering and characterizing plaintiff's software as a potentially unwanted program).

In *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209 (N.D. Cal. Aug. 14, 2020), the court held that plaintiff negated the defendant's section 230(c)(2) defense by alleging bad faith, without much discussion of the issue, in an opinion that didn't address *Enigma*, where the issue of 230(c)(2) preemption was not material because the court dismissed plaintiff's Complaint in its entirely on other grounds, including dismissing (with prejudice) plaintiff's Lanham Act and

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sal Standards in Electronic Transactions, Inc.,[29] the court denied motions to dismiss filed by Cisco and Microsoft because they alleged but did not support allegations that they qualified as access software providers within the meaning of section 230(c)(2)(B). Specifically, the court found lacking any assertion that they provided access by multiple users to a computer server. *Smith* was brought by a *pro se* plaintiff. The court's analysis on this point may simply reflect the court's discomfort with disposing of a claim on a motion to dismiss, rather than at a later stage in the proceedings in a motion supported by evidence.

In *PC Drivers Headquarters, LP v. Malwarebytes, Inc.*,[30] a court in West Texas denied a preliminary injunction sought by PC Drivers Headquarters, a company that offered software designed to help customers optimize the processing speed of their computers and identify drivers ready to be updated, against Malwarebytes, a vendor of software that blocked programs on customers' computers, including software deemed malicious or potentially unwanted, in a suit brought over Malwarebytes' characterization of one or more of the plaintiff's programs as potentially unwanted. In denying preliminary injunctive relief on plaintiff's non-IP claims and concluding that the plaintiff had not shown it was likely to prevail on the merits, the court found persuasive Malwarebytes' argument that it was immune to those claims under section 230(c)(2)(B), based on *Zango, Inc. v. Kaspersky Lab, Inc*.[31] As noted earlier, the Ninth Circuit, in *Enigma Software v. Malwarebytes,* subsequently disagreed with the district court's analysis on this point in *PC Drivers*,[32] although the *PC Drivers* opinion may continue to be persuasive authority elsewhere in the Fifth Circuit or in other courts outside the Ninth Circuit, where *Enigma Software v. Malwarebytes* is not controlling.

California unfair competition claims and claim for declaratory relief, as barred by section 230(c)(1).

[29]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

[30]*PC Drivers Headquarters, LP v. Malwarebytes, Inc.*, 1:18-CV-234-RP, 2018 WL 2996897, at *2-4 (W.D. Tex. Apr. 23, 2018).

[31]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009).

[32]*See Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040, 1049–50 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

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37.05[5] Statutory Exclusions for Certain Intellectual Property, Sex Trafficking, Federal Criminal, and Other Claims

37.05[5][A] In General

Section 230(e) sets forth five separate provisions that address the effect of the Good Samaritan exemption on other laws, including four categories of exclusions from the CDA's broad immunity from liability and one provision that addresses the scope of CDA preemption of state law claims.

Where applicable, the Good Samaritan exemption expressly preempts inconsistent state laws[1] (but it does not preempt those state laws that are "consistent" with its provisions).[2]

Of the four categories of exclusions, three – for "[f]ederal criminal statute[s,]"[3] "any law pertaining to intellectual prop-

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[Section 37.05[5][A]]

[1]47 U.S.C.A. § 230(e)(3) ("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.").

[2]The statute does not "prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C.A. § 230(e)(3); *see generally supra* § 37.05[1] (discussing Virginia, California and other state statutory provisions that create equivalent exemptions under state law); *infra* § 51.04[2][A] (addressing revenge porn statutes enacted in Arizona, Colorado, Florida, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, and Wisconsin, which contain CDA-like protections for interactive computer service providers).

As stated in the statute, the purpose of 47 U.S.C.A. § 230 is to promote the development of the Internet and other interactive computer services and media, preserve the free market for the Internet and online services without state or federal government regulation, encourage the development of technologies that maximize user control over what information is received by users, remove disincentives for the development and use of blocking and filtering technologies that parents may use to restrict children's access to objectionable or inappropriate online material, and ensure the enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer. 47 U.S.C.A. § 230(b).

[3]47 U.S.C.A. § 230(e)(1). The exclusion set forth in section 230(e)(1), which provides that section 230 shall not be construed to impair enforcement of any federal criminal statute, has been construed to apply to criminal prosecutions, not civil claims brought under federal criminal statutes. *See, e.g.*, *Doe No. 1 v. Backpage.com, LLC,* 817 F.3d 12, 23 (1st Cir. 2016)

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erty,"[4] and the federal Electronic Communications Privacy Act[5] "or any similar State law"[6] – were included in the statute as originally enacted. The fourth category of exclusions, which only applies to some of the immunity sections of the CDA, was added by amendment in 2018 through enactment of the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) (referred to by some as "FOSTA-SESTA"), and excludes certain federal civil and state law criminal sex trafficking (and related advertising) claims.[7]

The exclusions for laws pertaining to intellectual property and sex trafficking require the most detailed explanations. What constitutes "any law pertaining to intellectual property" is subject to potentially differing interpretations. Federal intellectual property claims (except under the Defend Trade Secrets Act) are excluded from CDA protection.[8] With respect to state law, courts have come to different conclusions in evaluating whether section 230 preempts *all* inconsistent state laws—including state intellectual property claims—or literally excludes "any law pertaining to intellectual property" even if it arises under state law.[9] This issue is analyzed below in section 37.05[5][B].

(construing section 230(e)(1) to apply to federal criminal statutes but not civil claims brought under federal criminal statutes); *Force v. Facebook, Inc.,* 934 F.3d 53, 71-72 (2d Cir. 2019) (holding section 230(e)(1) inapplicable in a civil action), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 890 (9th Cir. 2021) ("We agree with the First and Second Circuits, and hold that § 230(e)(1) is limited to criminal prosecutions.").

[4]47 U.S.C.A. § 230(e)(2).

[5]47 U.S.C.A. § 230(e)(4). The Electronic Communications Privacy Act is comprised of two separate titles. Title I (18 U.S.C.A. §§ 2510 to 2521) proscribes the intentional interception of electronic communications, while Title II (18 U.S.C.A. §§ 2701 to 2711) prohibits unauthorized, intentional access to stored electronic communications. *See generally infra* §§ 44.06, 44.07.

[6]47 U.S.C.A. § 230(e)(4).

[7]47 U.S.C.A. § 230(e)(5).

[8]*See infra* § 37.05[5][B].

[9]*Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007) (holding that the CDA preempted a state right of publicity claim); *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052-54 (9th Cir. 2019) (holding that a false advertising claim under the Lanham Act was not a law "pertaining to intellectual property" under section 230(e)), *cert. denied*, 141 S. Ct. 13

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The sex trafficking provisions consist of three separate exclusions to subsections 230(c)(1) (for republication of third party content)[10] and 230(c)(2)(B) (for enabling or making available content filters)[11]of the CDA (which do not apply to subsection 230(c)(2)(A) (for voluntary, good faith action to restrict access to or the availability of certain adult content).[12] These exclusions are analyzed in much greater depth in section 37.05[5][C] but in general summary terms, where applicable, cover: (A) any civil claim brought in federal court under 18 U.S.C.A. § 1595 (which authorizes private claims brought by victims under a number of statutory provisions), if the conduct underlying the claim constitutes a violation of 18 U.S.C.A. § 1591 (which penalizes sex trafficking of children, or by force, fraud, or coercion, or benefitting financially, including by advertising); (B) any state law criminal charge, if the conduct underlying the charge would constitute a violation of 18 U.S.C.A. § 1591 (which penalizes sex trafficking of children, or by force, fraud, or coercion, or benefitting financially, including by advertising); or (C) any state law criminal charge, if the conduct underlying a charge would constitute a violation of 18 U.S.C.A. § 2421A (which criminal-

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(2020); *with Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-15 (3d Cir. 2021) (disagreeing with the Ninth Circuit and broadly construing the exclusion in section 230(e) for *any law pertaining to intellectual property*, in a 2-1 ruling issued over a strong dissent, holding that plaintiff's state law right of publicity claim was not preempted by the CDA because "Section 230 does not preclude claims based on state intellectual property laws."); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 298-304 (D.N.H. 2008) (declining to dismiss plaintiff's right of publicity claim under New Hampshire law, holding that the plain text of the statute excludes any claim pertaining to intellectual property and severely criticizing the Ninth Circuit's ruling in *Perfect 10*); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 702-04 (S.D.N.Y. 2009) (construing section 230(e) narrowly like *Doe* and allowing a common law copyright claim under New York law to proceed); *see generally infra* § 37.05[5][B] (analyzing this issue in depth).

[10]*See generally supra* § 37.05[3].

[11]*See generally supra* § 37.05[4].

[12]*See* 47 U.S.C.A. § 230(e)(5); *see generally infra* § 37.05[5][C] (analyzing section 230(e)(5)); *supra* § 37.05[4] (analyzing the safe harbors created by section 230(c)(2). Section 230(c)(2)(A) provides that no provider or user of an interactive computer service shall be held liable on account of—

> 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 . . . .

47 U.S.C.A. § 230(c)(2)(A); *supra* § 37.05[4].

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izes promotion or facilitation of prostitution and reckless disregard of sex trafficking—which potentially includes advertising), if promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.[13] Interactive computer service providers and users that seek to avoid liability pursuant to these exclusions may do so by complying with the Good Samaritan provision of section 230(c)(2)(A).[14]

The exclusions set forth in section 230(e) do not reach state law civil claims for sex trafficking or civil claims brought under other provisions of law besides 18 U.S.C.A. §§ 1951 and 1595, which presumably could still be subject to immunity under all the Good Samaritan provisions, including section 230(c)(1),[15] which is the exemption most commonly litigated.

CDA defenses based on section 230(c)(1) (for republication of third party content)[16] or section 230(c)(2)(B) (for enabling or making available content filters)[17] are unavailable for claims that fall into these three sex trafficking categories. By contrast, the CDA defense created by section 230(c)(2)(A) (for voluntary, good faith action to restrict access to or the availability of certain adult content)[18] would insulate an interactive computer service provider or user from liability even under these exclusions if the requirements for section 230(c)(2)(A) have been met. The obvious intent of the new provisions is to discourage interactive computer service providers from accepting adult classified ads and encourage

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[13]47 U.S.C.A. § 230(e)(5).

[14]*See* 47 U.S.C.A. § 230(e)(5); *see generally infra* § 37.05[5][C] (analyzing section 230(e)(5)); *supra* § 37.05[4] (analyzing the safe harbors created by section 230(c)(2).

[15]*See, e.g.*, *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal, pursuant to section 230(c)(1), of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by 47 U.S.C.A. § 230(c)(1), in an opinion that was subsequently abrogated with respect to the federal trafficking claim, by the enactment of 47 U.S.C.A. § 230(e)(5)).

[16]*See generally supra* § 37.05[3].

[17]*See generally supra* § 37.05[4].

[18]*See* 47 U.S.C.A. § 230(e)(5); *see generally infra* § 37.05[5][C] (analyzing section 230(e)(5)); *supra* § 37.05[4] (analyzing section 230(c)(2) immunity).

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them to take advantage of the exemption created by subpart 230(c)(2)(A), by taking any action to restrict access to or the availability of objectionable material.

These provisions are analyzed in section 37.05[5][C].

State law claims excluded from CDA preemption by virtue of the provisions of section 230(e) nevertheless may not be actionable in litigation against an interactive computer service provider (or user) if brought under Virginia law, which enacted a "mini" CDA provision without parallel exclusions like the ones set forth in section 230(e),[19] or in narrow circumstances under a limited number of specific state statutes that, by their terms, exclude liability for interactive computer service providers.[20]

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[19]*See* Va. Code Ann. § 8.01-49.1. The Virginia statute provides, in relevant part:

> No provider or user of an interactive computer service on the Internet shall be treated as the publisher or speaker of any information provided to it by another information content provider. No provider or user of an interactive computer service shall be liable for (i) any action voluntarily taken by it in good faith to restrict access to, or availability of, material that the provider or user considers to be obscene, lewd, lascivious, excessively violent, harassing, or intended to incite hatred on the basis of race, religious conviction, color, or national origin, whether or not such material is constitutionally protected, or (ii) any action taken to enable, or make available to information content providers or others, the technical means to restrict access to information provided by another information content provider.

Id.

[20]*See supra* § 37.05[1][A] (discussing state law exclusions). As detailed in section 51.04[2][A], the revenge porn statutes enacted in Arizona, Colorado, Florida, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, and Wisconsin, contain express carve outs for claims against interactive computer service providers (which otherwise potentially could have been preempted by the CDA). Section 8 of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act likewise provides that the Act should be construed consistently with the CDA. *See infra* § 51.04[2][A]. In addition, California Penal Code § 530.50(f), which creates criminal penalties for unauthorized use of personal identifying information to attempt to obtain credit or for other purposes, includes an express exemption modeled on the CDA. *See* Cal. Penal Code § 530.5(f) ("An interactive computer service or access software provider, as defined in subsection (f) of Section 230 of Title 47 of the United States Code, shall not be liable under this section unless the service or provider acquires, transfers, sells, conveys, or retains possession of personal information with the intent to defraud.").

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37.05[5][B] The Exclusion for "Any Law Pertaining to Intellectual Property"

Section 230(e)(2) provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."[1] In 2016, Congress enacted the Defend Trade Secrets Act (DTSA),[2] providing expressly that provisions of that federal law "shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress."[3] Thus, section 230(e)'s exclusion from CDA immunity for *any law pertaining to intellectual property* does not apply to any claim brought under the DTSA. A suit under the DTSA against an interactive computer service provider or user therefore may be preempted to the same extent as any other legal claim that is not excluded from the CDA's reach by section 230(e).

By contrast, when Congress extended the protections of most aspects of the federal Copyright Act to sound recordings fixed prior to February 15,1972 (which previously were

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[Section 37.05[5][B]]

[1]47 U.S.C.A. § 230(e)(2). Intellectual property laws are separately addressed in the following chapters: 4 (Copyright Protection in Cyberspace), 5 (Database Protection), 6 (Trademark, Service Mark, Trade Name and Trade Dress Protection in Cyberspace), 7 (Rights in Internet Domain Names), 8 (Internet Patents), 9 (Intellectual Property Aspects of Information Distribution Systems on the World Wide Web: Caching, Linking and Framing Websites, Content Aggregation, Search Engine Indexing Practices, Key Words and Metatags), 10 (Misappropriation of Trade Secrets in Cyberspace), 11 (Employer Rights in the Creation and Protection of Internet-Related Intellectual Property), 12 (Privacy and Publicity Rights of Celebrities and Others in Cyberspace) and 13 (Idea Misappropriation).

[2]8 U.S.C.A. §§ 1830 to 1839; *see generally supra* § 10.12[2] (analyzing the statute).

[3]18 U.S.C.A. §§ 1833 note, 1836 note, 1839 note; Pub L. 114-153 § 2(g), 130 Stat. 376, 382 (May 11, 2016) ("This section and the amendments made by this section shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress."). This specific provision of the DTSA was codified as a note to sections 1833, 1836 and 1839. At least one court has concurred. *See Craft Beer Stellar, LLC v. Glassdoor, Inc.*, Civil Action No. 18-10510-FDS, 2018 WL 5505247, at *3 (D. Mass. Oct. 17, 2018) (dismissing plaintiff's DTSA claim against Glassdoor for material posted by a user; "Because Congress has clearly dictated that the DTSA should *not* be construed to be a law 'pertaining to intellectual property' for the purposes of *any* other Act of Congress, the DTSA is clearly not such a law for the purposes of § 230(e)(2). The DTSA claim is thus subject to the immunity provisions of § 230, and accordingly that claim will be dismissed.").

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protected, if at all, by state common law or statutes[4]), in the Classics Protection and Access Act (Title II of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018),[5] Congress made clear that the provisions of 17 U.S.C.A. § 1401(a), which effectuated this change in the law, are to be considered a "law pertaining to intellectual property" within the meaning of 47 U.S.C.A. § 230(e)(2).[6] At the same time, the statute provides that the provisions of the Digital Millennium Copyright Act apply to the protections afforded by section 1401(a).[7] Thus, claims under federal law are excluded from CDA immunity, while common law and state statutory copyright claims were and (to the limited extent that they may still be asserted and are not preempted by the Copyright Act[8]) are subject to CDA preemption in some jurisdictions but not others, as discussed later in this subsection.

For claims arising under other intellectual property laws, there is general agreement that federal intellectual property claims (other than those brought under the DTSA) are excluded, but there is disagreement between the Ninth and Third Circuits (and district court opinions in the First and Second Circuit) over whether state laws pertaining to intellectual property are excluded from the scope of CDA immunity.

Federal intellectual property law claims under any federal law other than the DTSA— such as the Copyright Act, Lanham Act and Patent Act[9] plainly are excluded from the scope of section 230 preemption.[10] The applicability of the CDA's Good Samaritan exemption to state intellectual prop-

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[4]*See supra* § 4.18[2].

[5]The Orrin G. Hatch–Bob Goodlatte Music Modernization Act, PL 115-264, 2018 H.R. 1551, 132 Stat. 3676 (Oct. 11, 2018).

[6]17 U.S.C.A. § 1401(g).

[7]17 U.S.C.A. §§ 512, 1401(f)(3); *supra* § 4.12.

[8]The scope of preemption of state law claims after enactment of the Music Modernization Act is analyzed in section 4.18[2] in chapter 4.

[9]Federal copyright, trademark and patent laws are addressed in, respectively, chapters 4, 6 and 8. The federal Anti-Cybersquatting Consumer Protection Act, which is largely codified as part of the Lanham Act at 15 U.S.C.A. § 1125(d), is analyzed in chapter 7.

[10]*See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006) (*dicta*); *Ford Motor Co. v. GreatDomains.com, Inc.*, 60 U.S.P.Q.2d 1446, 2001 WL 1176319 (E.D. Mich. Sept. 25, 2001); *Gucci America, Inc. v. Hall & Associates*, 135 F. Supp. 2d 409, 412–13 (S.D.N.Y. 2001) (domain names).

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erty law claims (such as those arising under state common law and statutory trade secret,[11] right of publicity,[12] copyright,[13] and trademark[14] laws), however, is subject to conflicting judicial interpretations.

The Ninth Circuit[15] and various district courts[16] have nar-

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[11]*See supra* § 10.12[3] (discussing state law trade secret claims). State and federal trade secret law is analyzed in chapter 10.

[12]State common law and statutory right of publicity laws are analyzed in chapter 12 along with claims under the federal Lanham Act, which generally are excluded from the scope of CDA preemption (except for false advertising claims not based on federal trademark law). *SeeEnigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052-54 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[13]*See supra* § 4.18[2] (outlining state common law and statutory copyright claims that are viable in light of the 1976 Copyright Act's broad preemption provision set forth in 17 U.S.C.A. § 301 and the preemption provision of the Music Modernization Act, which is codified at 17 U.S.C.A. § 1401(e)).

[14]State trademark claims are addressed in chapter 6.

[15]*See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007) (holding that the CDA preempted a state right of publicity claim); *see also Enigma Software Group USA, LLC v. Malwarebytes, Inc*., 946 F.3d 1040, 1052-54 (9th Cir. 2019) (applying and expanding on the rationale for *Perfect 10*), *cert. denied*, 141 S. Ct. 13 (2020).

[16]*See, e.g.*, *Callahan v. Ancestry.com, Inc*., Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California right of publicity claim under Cal. Civ. Code § 3344, and claims for intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200, arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity pursuant to 47 U.S.C.A. § 230(c)(1)); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4-5 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's right of publicity claim under Cal. Civ. Code § 3344, and unfair competition, false light invasion of privacy, and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website, where "[a]ll of Morton's non-copyright claims attempt[ed] to treat Twitter as being equivalent to SpyIRL for purposes of considering liability for the latter's tweets."); *Ripple Labs Inc. v. YouTube LLC*, Case No. 20-cv-02747-LB, 2020 WL 6822891, at *6-7 (N.D. Cal. Nov. 20, 2020) (dismissing right of publicity and unfair competition claims arising out of YouTube's alleged failure to remove impersonations of Ripple's cryptocurrency enterprise from its video-sharing platform); *Parker v. Paypal, Inc*., No. 16-cv-04786, 2017 WL 3508759, at *6-7 (E.D. Pa. Aug. 16, 2017) (dismissing plaintiff's claims for

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rowly construed the exclusion in section 230(e)(2) for "any law pertaining to intellectual property" to not reach claims arising under state law and the Ninth Circuit has further held that a false advertising claim under the federal Lanham Act is not a law "pertaining to intellectual property" if the claim at issue is not based on a trademark or other federal intellectual property law.[17] By contrast, the Third Circuit (in a split opinion over a strong dissent) and some district courts outside the Ninth Circuit have held that state IP claims are

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unjust enrichment and violations of California's right of publicity and Pennsylvania's right to privacy, brought against Amazon.com, and premised on the sale of unauthorized copies of plaintiff's book on the Kindle store, as barred by the CDA); *Joude v. WordPress Foundation*, No. C 14–01656 LB, 2014 WL 3107441, at *7 (N.D. Cal. July 3, 2014) (applying *Perfect 10* in granting judgment on the pleadings for Automattic on plaintiff's right of publicity claim arising from user content); *Perfect 10, Inc. v. Giganews, Inc*., CV11-07098 AHM SHX, 2013 WL 2109963, at *15-16 (C.D. Cal. Mar. 8, 2013) (dismissing with leave to amend plaintiff's California right of publicity and unfair competition claims as barred by the CDA because the pornographic images found on defendant's website that were at issue in the case originated with third parties). A more complete list is provided later in this subsection.

[17]*See Enigma Software Group USA, LLC v. Malwarebytes, Inc*., 946 F.3d 1040, 1052–54 (9th Cir. 2019) (holding that a false advertising claim under the Lanham Act was not a law "pertaining to intellectual property" under section 230(e); "even though the Lanham Act is known as the federal trademark statute, not all claims brought under the statute involve trademarks."), *cert. denied*, 141 S. Ct. 13 (2020); *see also Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located, in an opinion that did not address the exclusion for matters "pertaining to intellectual property" set forth in section 230(e)(2)); *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209, at *2-4 (N.D. Cal. Aug. 14, 2020) (applying *Enigma Software* in dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims, as barred by the CDA, because they arose out of defendant's removal of third party fitness and health videos); *Corker v. Costco Wholesale Corp.*, No. C19-0290RSL, 2019 WL 5895430, at *6 (W.D. Wash. Nov. 12, 2019) (applying *Enigma Software* in dismissing plaintiff's section 43(a)(1)(A) false association claim against the retailer defendants as "barred by the CDA to the extent their conduct is limited to making a product available for sale on a website.").

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laws "pertaining to intellectual property" and, therefore, the CDA does not insulate interactive computer service providers or users for claims brought under those laws, even if they otherwise might be entitled to its protections for other claims.[18]

The Ninth Circuit approach construes section 230(e)(2) narrowly as an exception to a provision granting broad immunity, and relies on one of the stated policy objectives codified in section 230(b). Courts that have expressly declined to follow the Ninth Circuit, by contrast, focused on the language and structure of section 230(e) to reach the opposite conclusion.[19]

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[18]*See Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-15 (3d Cir. 2021) (rejecting the Ninth Circuit's analysis by a 2-1 majority over a strong dissent, holding that plaintiff's state law right of publicity claim was not preempted by the CDA because "Section 230 does not preclude claims based on state intellectual property laws."); *Doe v. Friendfinder Network, Inc.,* 540 F. Supp. 2d 288, 298-304 (D.N.H. 2008) (declining to dismiss plaintiff's right of publicity claim under New Hampshire law, holding that the plain text of the statute excludes any claim pertaining to intellectual property and severely criticizing the Ninth Circuit's ruling in *Perfect 10*); *Atlantic Recording Corp. v. Project Playlist, Inc.,* 603 F. Supp. 2d 690, 702-04 (S.D.N.Y. 2009) (construing the language of the statute the same way as the court in *Doe* and allowing a common law copyright claim under New York law to proceed); *see also Universal Communication Systems, Inc. v. Lycos, Inc.,* 478 F.3d 413, 422–23 (1st Cir. 2007) (holding, without much analysis, that a claim for trademark infringement under Florida state law, Fla. Stat. § 495.151, was "not subject to section 230 immunity."); *Ohio State Univ. v. Skreened Ltd*., 16 F. Supp. 3d 905, 918 (S.D. Ohio 2014) (holding, without much analysis, that the CDA did not preempt plaintiff's Ohio right of publicity claim).

[19]*Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007) (holding that the CDA preempted a state right of publicity claim); *Enigma Software Group USA, LLC v. Malwarebytes, Inc*., 946 F.3d 1040, 1052–54 (9th Cir. 2019) (holding that a false advertising claim under the Lanham Act was not a law "pertaining to intellectual property" under section 230(e)), *cert. denied*, 141 S. Ct. 13 (2020); *with Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-12 (3d Cir. 2021) (rejecting the Ninth Circuit's analysis, holding, in a 2-1 ruling over a strong dissent, that plaintiff's state law right of publicity claim was not preempted by the CDA; "Facebook and its amici offer arguments based on the statute's text and policy considerations. But there are strong textual and policy arguments to the contrary. Because we adhere to the most natural reading of § 230(e)(2)'s text, we hold that § 230(e)(2) is not limited to federal laws. Simply put, a state law can be a "law pertaining to intellectual property," too."); *Doe v. Friendfinder Network, Inc*., 540 F. Supp. 2d 288, 298-304 (D.N.H. 2008) (declining to dismiss plaintiff's right of publicity claim under New Hampshire law, holding that the plain text of the

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Section 230(e), as originally enacted, set out four separate provisions (which remain part of the statute today along with a fifth provision that subsequently was added as part of FOSTA/SESTA to address sex trafficking), which address the effect of the Good Samaritan exemption on other laws.[20] The immunity created by section 230 does not apply to "[f]ederal criminal statute[s,]"[21] "any law[s] pertaining to intellectual property,"[22] or the federal Electronic Communications Privacy Act[23] "or any similar State law."[24] Section 230(e) also provides that where applicable, the Good Samaritan exemption expressly preempts inconsistent state laws[25] (although it does not preempt those state laws that are "consistent" with its provisions).[26]

The CDA excludes "*any law* pertaining to intellectual prop-

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statute excludes any claim pertaining to intellectual property and severely criticizing the Ninth Circuit's ruling in *Perfect 10*); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 702-04 (S.D.N.Y. 2009) (construing the literal language of the statute the same way as the court in *Doe* and allowing a common law copyright claim under New York law to proceed).

[20]Section 230(e)(5), which was added just over 22 years later, in 2018, creates specific exclusions from some but not all of the immunities created by section 230(c), for certain federal civil claims and state law criminal charges relating to sex trafficking. *See infra* § 37.05[5][C]. While section 230(e)(2), which excludes any law pertaining to intellectual property, and section 230(e)(3), which provides that the CDA preempts inconsistent state laws, arguably leave unclear which of those two provisions should take precedence with respect to state laws pertaining to intellectual property, the exclusions relating to sex trafficking laws that are set forth in section 230(e)(5) specify that the immunity created by section 230(c)(2)(A) (for good faith actions undertaken to restrict access to certain adult material) may provide a defense for interactive computer service providers and users for the enumerated civil federal and state criminal sex trafficking claims listed in section 230(e)(5), but the defenses created by other sections of the CDA (such as the immunity for republication in section 230(c)(1) and for blocking and filtering technologies in section 230(c)(2)(B)) are inapplicable. *See* 47 U.S.C.A. § 230(e).

[21]47 U.S.C.A. § 230(e)(1).

[22]47 U.S.C.A. § 230(e)(2).

[23]47 U.S.C.A. § 230(e)(4); *see generally supra* § 37.05[1][A].

[24]47 U.S.C.A. § 230(e)(4).

[25]47 U.S.C.A. § 230(e)(3) ("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.").

[26]The statute does not "prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C.A. § 230(e)(3); *see generally supra* § 37.05[1] (discussing Virginia, California and other state statu-

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erty,"[27] which on its face suggests that the Good Samaritan exemption does not apply to either federal *or* state IP laws. The word *any* suggests a broad interpretation, as does the term *pertaining to* intellectual property, rather than simply intellectual property laws or more narrowly *federal* intellectual property laws (or even the Copyright Act, Lanham Act and Patent Act). This view is bolstered by Congress's use of the term "federal" in discussing other exclusions under the statute. Subpart 230(e)(1) makes clear that the exemption has no effect on any "Federal criminal statute." Had Congress intended to exclude only federal intellectual property claims presumably it would have used the same language in subpart (e)(2) that it did in subpart (e)(1), rather than more expansively excluding "*any* law pertaining to intellectual property."

The structure and language of section 230(e) likewise arguably suggests that Congress intended to exclude *any* law pertaining to intellectual property (both federal and state), and not merely *federal* intellectual property laws. As previously noted, section 230(e) originally contained only the first

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tory provisions that create equivalent exemptions under state law); *infra* § 51.04[2][A] (addressing revenge porn statutes enacted in Arizona, Colorado, Florida, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, and Wisconsin, which contain CDA-like protections for interactive computer service providers).

As stated in the statute, the purpose of 47 U.S.C.A. § 230 is to promote the development of the Internet and other interactive computer services and media, preserve the free market for the Internet and online services without state or federal government regulation, encourage the development of technologies that maximize user control over what information is received by users, remove disincentives for the development and use of blocking and filtering technologies that parents may use to restrict children's access to objectionable or inappropriate online material and ensure the enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer. 47 U.S.C.A. § 230(b).

[27]47 U.S.C.A. § 230(e)(2) (emphasis added). As noted earlier in this subsection, Congress, in 2016, in the Defend Trade Secrets Act, and in 2018, in the Music Modernization Act, made express determinations about whether those laws should (in the case of the Music Modernization Act) or should not (in the case of the Defend Trade Secrets Act) be construed under section 230(e) as laws "pertaining to intellectual property." The discussion here focuses on what Congress intended with respect to other state and federal laws arguably pertaining to intellectual property, when the law was first enacted in 1996.

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four sub-parts (which, along with a fifth subpart added in 2018 to address sex trafficking claims, remain part of the statute today). Subpart (e)(1) excludes federal criminal laws, while subpart (e)(3) provides that inconsistent state laws are preempted but consistent state laws are not. Subpart (e)(4) refers to both federal and state laws in providing that "[n]othing in this section shall be construed to limit the application of the Electronic Communications Privacy Act . . . or any similar State law." Viewed in this context—where each of the other three subparts expressly refer to state or federal law—or both—the use in section 230(e)(2) of "*any law* pertaining to intellectual property" without reference to either state or federal law strongly suggests that Congress intended to exclude all intellectual property laws, and not merely federal ones. Subpart 230(e)(5), which was added in 2018, likewise delineates its application to certain federal civil claims (in section 230(e)(5)(A)) and certain state criminal law charges (in sections 230(e)(5)(B) and 230(e)(5)(C)).

An analysis based only the text of section 230(e), without regard to the policy goals enacted as part of section 230(b), requires consideration of whether the subparts of section 230(e), captioned "[e]ffect on other laws," constitute independent provisions, or whether they modify one another. If they are independent, the Good Samaritan exemption has no effect on federal criminal laws (subpart (1)), no effect on any law pertaining to intellectual property (subpart (2)), no effect on claims under the Electronic Communications Privacy Act or similar state laws (subpart (4)) and no effect on state laws that are consistent with the exemption (subpart (3)), but otherwise preempts all other state law civil and criminal provisions (i.e., state law claims other than IP claims, provisions consistent with the Good Samaritan exemption and state laws similar to the ECPA) and provides immunity in federal civil cases other than those arising under the ECPA. This possible interpretation is also consistent with the 2018 amendment to section 230, which creates exclusions for certain federal civil claims and state criminal charges relating to sex trafficking (although only for some parts of section 230—unlike the original four exclusions, subpart 230(e)(5) does not create an exclusion for the immunity created by section 230(c)(2)(A) (for actions undertaken in good faith to restrict access to or the availability of certain adult

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content)).[28]

The Ninth Circuit has held that, to effectuate the CDA's "express policy of providing broad immunity . . . ," the exclusion in section 230(e)(2) should be construed narrowly.[29]

Section 230, after all, codifies particular policy objectives in subsection 230(b) to guide its construction by courts.

In *Perfect 10, Inc. v. CCBill, Inc.*,[30] the Ninth Circuit construed the term "intellectual property" to mean "federal intellectual property" (which was prior to the enactment of the DTSA, a federal law that (as previously noted) is expressly exempted from section 230(e)'s exclusion, and thus potentially subject to CDA immunity) and ruled that the plaintiff's California right of publicity claim against an Internet payment processor was preempted.[31] Consequently, in the Ninth Circuit (and district courts that follow this approach) the CDA will be construed to preempt state law intellectual property claims, including right of publicity, common law trademark infringement and dilution and state trade secret misappropriation claims, among others,[32] provided the content originated with a third party information content

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[28]*See* 47 U.S.C.A. § 230(e)(5); *see generally infra* § 37.05[5][C].

[29]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[30]*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007).

[31]*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007).

[32]*See, e.g.*, *Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California right of publicity claim under Cal. Civ. Code § 3344, and claims for intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200, arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity pursuant to 47 U.S.C.A. § 230(c)(1)); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4-5 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's right of publicity claim under Cal. Civ. Code § 3344, and unfair competition, false light invasion of privacy, and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images without authorization in Tweets soliciting subscriptions to its website); *Ripple Labs Inc. v. YouTube LLC*, Case No. 20-cv-02747-LB, 2020 WL 6822891, at *6-7 (N.D. Cal. Nov. 20, 2020) (dismissing right of publicity and unfair competition claims arising out of YouTube's alleged failure to remove impersonations of Ripple's cryptocurrency enterprise from its video-sharing platform); *Lasoff v.*

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Amazon.com Inc., Case No. C-151 BJR, 2017 WL 372948, at *3-4 (W.D. Wash. Jan. 26, 2017) (granting summary judgment for the defendant on plaintiff's New Jersey state law claims for, among other things, statutory and common law unfair competition and statutory trademark infringement, based on CDA preemption, in a case arising out of Amazon.com's alleged use of his mark in sponsored links advertisements), *aff'd on other grounds*, 741 F. App'x 400 (9th Cir. 2018); *Free Kick Master LLC v. Apple Inc.*, 140 F. Supp. 3d 975, 982-83 (N.D. Cal. 2015) (dismissing plaintiff's common law trademark infringement claim against Google Play and the Amazon AppStore, arising out of free apps they made available, as preempted by the CDA, where plaintiff did not allege that "either of them had any role whatsoever in the creation of the apps at issue, the choice of name for those apps, or any other action that would place either defendant in the role of speaker or author of the accused products."); *Parker v. Paypal, Inc.*, No. 16-cv-04786, 2017 WL 3508759, at *6-7 (E.D. Pa. Aug. 16, 2017) (dismissing plaintiff's claims for unjust enrichment and violations of California's right of publicity and Pennsylvania's right to privacy, brought against Amazon.com, and premised on the sale of unauthorized copies of plaintiff's book on the Kindle store, as barred by the CDA); *Joude v. WordPress Foundation*, No. C 14–01656 LB, 2014 WL 3107441, at *7 (N.D. Cal. July 3, 2014) (applying *Perfect 10* in granting judgment on the pleadings for Automattic on plaintiff's right of publicity claim arising from user content); *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–39 (S.D. Cal. 2013) (dismissing with prejudice state law claims for trademark infringement and dilution and unfair competition as preempted by the CDA); *Evans v. Hewlett-Packard Co.,* C 13-02477 WHA, 2013 WL 4426359, at *2-3 (N.D. Cal. Aug. 15, 2013) (dismissing Pennsylvania unfair competition and trademark infringement and Pennsylvania and California right of publicity claims brought against the operators of the HP App Catalogue, an App store for Palm devices, as preempted by the CDA, because, although "cleverly-worded," the complaint did "not allege that defendants created the app at issue here. Rather, it appears that the app was created entirely by third parties."); *Evans v. Hewlett-Packard Co.*, No. C 13-02477, 2013 WL 5594717 (N.D. Cal. Oct. 10, 2013) (denying plaintiffs' motion to amend the complaint to "plead around the CDA" by alleging that the defendants did not merely operate an App store for apps used on Palm devices but actually developed the allegedly infringing "Chubby Checker" App, holding that plaintiffs' proposed, amended California and Pennsylvania state law trademark, unfair competition, right of publicity, and emotional distress claims were preempted by section 230); *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1128 (D. Nev. 2013) (holding that a sports betting website operator was immune from state law claims for misappropriation of trade secrets, misappropriation of licensable commercial property, civil theft, and tortious interference with contractual relations, because it was not a "developer" of user-generated content under the CDA, even though it awarded loyalty points for user posts); *Perfect 10, Inc. v. Giganews, Inc.,* CV11-07098 AHM SHX, 2013 WL 2109963, at *15–16 (C.D. Cal. Mar. 8, 2013) (applying *CCBill* in dismissing with leave to amend plaintiff's California right of publicity and unfair competition claims as barred by the CDA because the pornographic images found on defendant's website originated with third parties). *But see Cybersitter,*

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provider and was not created or developed by the defendant itself.[33]

In *CCBill,* the Ninth Circuit spent most of the opinion on issues of first impression under the Digital Millennium Copyright Act,[34] giving short shrift to its holding that the plaintiff's California right of publicity claim was preempted by the Good Samaritan exemption. Judge Milan Smith, Jr., writing for the panel, explained that:

> While the scope of federal intellectual property law is relatively well-established, state laws protecting 'intellectual property,' however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the

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LLC v. Google, Inc., 905 F. Supp. 2d 1080, 1086–87 (C.D. Cal. 2012) (narrowly applying the CDA without much analysis in denying in part the defendant's motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not claims arising out of the alleged sale of plaintiff's "Cybersitter" mark as a key word to trigger sponsored link advertisements).

[33]*See, e.g.*, *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090-91 (D. Nev. 2013) (denying the defendant's motion to dismiss plaintiff's amended complaint where plaintiff alleged that the website provider "acted as a 'developer' within the meaning of the CDA by promoting the publication of protected 'service plays' and thereby contributing to the misappropriation of Plaintiffs' trade secrets and commercial property."); *Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086–87 (C.D. Cal. 2012) (denying in part the defendant's motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not claims arising out of the alleged sale of plaintiff's "Cybersitter" mark as a key word to trigger sponsored link advertisements); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801-02 (N.D. Cal. 2011) (denying Facebook's motion to dismiss plaintiff's right of publicity claim arising out of the use of user names and images in connection with advertisements for pages that users "liked" on Facebook because the court concluded that the advertisements, which were comprised of user content, had been developed by Facebook).

[34]17 U.S.C.A. § 512(c); *see generally supra* § 4.12 (analyzing the statute and discussing the case).

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development of the Internet from the various state-law regimes.[35]

More than a decade later, in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*,[36] the Ninth Circuit held that "the intellectual property exception contained in § 230(e)(2) encompasses claims pertaining to an established intellectual property right under federal law, like those inherent in a patent, copyright, or trademark."[37] Accordingly, the panel held that the exception does not apply "to false advertising claims brought under § 1125(a) of the Lanham Act, unless the claim itself involves intellectual property."[38] The D.C. Circuit, in a different case, also found plaintiffs' Lanham Act false advertising claim precluded by the CDA, albeit in an opinion that did not address the exclusion created by section 230(e)(2).[39]

In *Enigma Software,* the Ninth Circuit explained its analysis as follows:

> We have observed before that because Congress did not define the term "intellectual property law," it should be construed narrowly to advance the CDA's express policy of providing broad immunity. *See Perfect 10*, 488 F.3d at 1119. One of these express policy reasons for providing immunity was, as Congress stated in § 230(b)(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 regulation." 47 U.S.C. § 230(b)(2). The intellectual property exception is a limitation on immunity, and the CDA's

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[35]*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007).

[36]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[37]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[38]*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[39]*See Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located, in an opinion that did not discuss or consider the exclusion in section 230(e)(2) for claims "pertaining to intellectual property").

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> stated congressional purpose counsels against an expansive interpretation of the exception that would diminish the scope of immunity. If the intellectual property law exception were to encompass any claim raised under the Lanham Act—including false advertising claims that do not directly involve intellectual property rights—it would create a potential for new liability that would upset, rather than "preserve" the vibrant culture of innovation on the internet that Congress envisioned.[40]

Subsequent district court opinions have also applied *Enigma Software* to hold interactive computer service providers immune under the CDA from false advertising claims that are not premised on federal trademark infringement.[41] A district court within the Ninth Circuit also held that a plaintiff's section 43(a)(1)(A) Lanham Act false association claim against retailer defendants was barred by the CDA to the extent their conduct was limited to making a product available for sale on a website (but not for certain acts undertaken by them in the physical world).[42]

While other courts have not challenged the Ninth Circuit's analysis of the CDA's potential applicability to Lanham Act false advertising claims that are not based on use of a trademark, the Third Circuit, in a 2-1 ruling over a vigorous dissent, disagreed with the Ninth Circuit's holding in *Perfect 10* that CDA immunity potentially applies to state IP claims,

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[40] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020).

[41] *See, e.g.*, *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209, at *2-4 (N.D. Cal. Aug. 14, 2020) (dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims, as barred by the CDA, because they arose out of defendant's removal of fitness and health videos containing information about unregulated substances that had not yet been approved by the FDA).

[42] *See Corker v. Costco Wholesale Corp.*, No. C19-0290RSL, 2019 WL 5895430, at *6 (W.D. Wash. Nov. 12, 2019) (dismissing plaintiff's section 43(a)(1)(A) false association claim against the retailer defendants as "barred by the CDA to the extent their conduct is limited to making a product available for sale on a website."). As the court explained,

> plaintiffs' claims in this case do not involve an intellectual property right or trademark: the false association claim that survives this motion to dismiss does not, therefore, fall within the CDA's intellectual property exception to immunity under the analysis recently adopted by the Ninth Circuit in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 938 F.3d 1026, 1038-39 (9th Cir. 2019) (noting that Section 43(a) is one of the few provisions of the Lanham Act that goes beyond trademark protection and holding that a claim of false advertising is barred by the CDA unless it involves an intellectual property right).

2019 WL 5895430, at *6.

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holding, in *Hepp v. Facebook, Inc.*[43] that a Pennsylvania state law right of publicity claim was not preempted by the CDA because "Section 230 does not preclude claims based on state intellectual property laws."[44] The majority in *Hepp* characterized *Perfect 10* as resting on "the statute's text and policy considerations. But there are strong textual and policy arguments to the contrary. Because we adhere to the most natural reading of § 230(e)(2)'s text, we hold that § 230(e)(2) is not limited to federal laws. Simply put, a state law can be a 'law pertaining to intellectual property,' too."[45] Judge Robert Cowen, dissenting in relevant part, wrote that section 230(e)(2) is best understood as excluding from the CDA's reach only federal intellectual property claims (or, at most, state law claims that are co-extensive with federal claims, such as state trademark law causes of action) based on the Congressional findings and policy objectives expressly set forth in the statute itself, in sections 230(a) and 230(b).[46] Judge Cowen observed that state IP laws vary from state to state and what even constitutes an IP claim under state law is not always clear. He elaborated that "[t]he application of § 230(e)(2) to various state 'intellectual property' laws would be inconsistent with the objectives of § 230. . . . 'state laws protecting "intellectual property," however defined, are by no means uniform,' with such laws bearing various names (e.g., trademark, unfair competition, dilution, and right of publicity), legal elements, remedies, and purposes. . . . Such confusion is only magnified by the fact that 'material on a website may be viewed across the Internet, and thus in more than one state at a time,' and 'defendants that are otherwise entitled to CDA immunity will usually be subject to the law of numerous states.' "[47] Judge Cowen wrote that "[t]his web of inconsistent state laws is the very definition of the 'fetter-

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[43]*Hepp v. Facebook, Inc.*, 14 F.4th 204 (3d Cir. 2021).

[44]*Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-15 (3d Cir. 2021).

[45]*Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-15 (3d Cir. 2021).

[46]*Hepp v. Facebook, Inc.*, 14 F.4th 204, 216-26 (3d Cir. 2021) (Cowen, J. dissenting in relevant part). Judge Cowen's reference to federal claims tracks the Ninth Circuit's analysis in *Perfect* 10 and should be understood as referencing federal claims other than the Defend Trade Secrets Act. *Perfect 10* was decided before Congress enacted the DTSA, which expressly provides for CDA immunity to DTSA claims, where applicable.

[47]*Hepp v. Facebook, Inc.*, 14 F.4th 204, 222 (3d Cir. 2021) (Cowen, J. dissenting in relevant part), *quoting Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 & n.5 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007).

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ing' state regulation that Congress sought to avoid in enacting Section 230."[48] Nevertheless, the two judge majority prevailed (although, as of the time this update went to press, the opinion potentially could be subject to *en banc* review or a petition for *certiorari* to the U.S. Supreme Court).

Between 2007, when *CCBill* was decided, and 2021, when the Third Circuit issued its opinion in *Hepp,* no other circuit court had ruled on the CDA's potential applicability to state IP claims. *CCBill*, however, had been criticized in two district opinions from outside the Ninth Circuit for ignoring the structure of section 230(e). In *Doe v. Friendfinder Network, Inc.*,[49] a district court opinion from New Hampshire, Judge Joseph N. LaPlante denied the defendant's motion to dismiss claims for false advertising and false designation of origin under the Lanham Act and violations of the plaintiff's right of publicity under New Hampshire law, but dismissed plaintiff's other state law claims under the Good Samaritan exemption. He ruled that the language of section 230(e)(2) was clear and did not suggest any limitation to *federal* intellectual property law. In addition, the use of the expansive modifier *any* offered no indication that Congress intended a limiting construction of the statute.[50]

Judge LaPlante wrote that "[t]he Ninth Circuit made no attempt to reckon with the presence of the term 'any'—or for that matter, the absence of the term 'federal'—in section 230(e)(2) when limiting it to federal intellectual property laws."[51] He further criticized the Ninth Circuit for failing to "make any effort to reconcile its reading of section 230(e)(2) with other limiting provisions of section 230 which specifically identify federal or state law as such . . . . The content of these provisions indicates that, where Congress wished to

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[48]*Hepp v. Facebook, Inc.*, 14 F.4th 204, 222 (3d Cir. 2021) (Cowen, J. dissenting in relevant part) (quoting Facebook's Brief and 47 U.S.C.A. § 230(b)(2)).

[49]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

[50]*See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008). He wrote that "[s]tatutory interpretation begins with the language of the statute. Where . . . that language is clear and ambiguous, the inquiry is at an end." *Id. quoting Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007)*, citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

[51]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008).

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distinguish between state and federal law in section 230, it knew how to do so."[52] Judge LaPlante explained:

> [T]he use of "any" in § 230(e)(2), in contrast to the use of "federal" elsewhere in the CDA, suggests that Congress did not intend the terms to be read interchangeably. "It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Duncan v. Walker, 533 U.S. 167, 173, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (internal quotation marks and bracketing omitted) (declining to read "federal" into section of statute where it did not appear because Congress had "denominat[ed] expressly both 'State' and 'Federal' . . . in other parts of the same statute") . . . .[53]

Finally, Judge LaPlante criticized the Ninth Circuit's rationale for construing "intellectual property" to mean "federal intellectual property"—Congress's expressed goal of insulating the development of the Internet from the various state-law regimes—writing that "[h]owever salutary this 'goal' might be on its own merits, it is not among those 'expressed' in § 230."[54]

Other cases had previously discussed[55] the issue or held without specifically analyzing that state intellectual prop-

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[52]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299–300 (D.N.H. 2008).

[53]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 300 (D.N.H. 2008).

[54]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 300 (D.N.H. 2008).. He explained that:

> While the text of § 230 identifies one of its purposes as freeing the Internet from "government regulation," 47 U.S.C.A. § 230(a)(4), this plain language restricts regulation by any government, not just those of the states. One of § 230's announced policies, in fact, is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2) (emphasis added) . . . . As the presence of § 230(e)(2) indicates, however, Congress also believed that laws protecting intellectual property rights should nevertheless remain in effect—that the potential costs to those rights, in essence, outweighed the benefits of the alternative.

Id. The court further wrote that "while Congress often acts to protect interstate commerce from the burden of nonuniform state laws, there is nothing in the language of section 230 effecting that protection here. 'Courts are not free to disregard the plain language of a statute and, instead, conjure up legislative purposes and intent out of thin air' under the guise of statutory interpretation." *Id.*, *quoting Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007) (footnote omitted).

[55]*See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320–24 (11th Cir.

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erty claims, like federal intellectual property claims, are excluded from section 230 and are not preempted.[56]

In *Atlantic Recording Corp. v. Project Playlist, Inc.*,[57] Second Circuit Judge Denny Chin, while he was still a Southern District of New York district court judge, reached the same conclusion as Judge LaPlante, in denying defendant's motion to dismiss state law claims for common law copyright infringement and unfair competition under New York law. Project Playlist, a site that created links to music files found on the Internet, had been sued by major record labels for copyright infringement and state law claims.

Judge Chin held that the plain text of section 230(e) was clear in excluding *any* law pertaining to intellectual property and characterized the Ninth Circuit's ruling in *Perfect 10* as rooted "not in the text of the statute but the public policy underlying it."[58] He explained:

> The problem with Playlist's argument is that it lacks any support in the plain language of the CDA. In four different points in section 230(e), Congress specified whether it intended a subsection to apply to local, state, or federal law. *See* 47 U.S.C. § 230(e)(1) ("any other *Federal* criminal statute"), (3) ("any *State* law" and "any *State* or *local* law"), (4) ("any similar *State* law") (emphasis added in all). It is therefore clear from the statute that if Congress wanted the phrase "any law pertaining to intellectual property" to actually mean "any *federal* law pertaining to intellectual property," it knew how to make that clear, but chose not to.[59]

By contrast, he noted that "[t]he Ninth Circuit did not

2006) (suggesting in *dicta* that section 230(e)(2) would not preempt a right of publicity claim). The court's discussion in *Almeida*, however, was based in part on the lower court opinion in *Perfect 10* that was subsequently reversed on this very point by the Ninth Circuit and therefore has little value even as *dictum*.

[56]*See Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23 (1st Cir. 2007) (holding a claim for trademark infringement under Florida state law, Fla. Stat. § 495.151, "not subject to section 230 immunity.").

[57]*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

[58]*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) (characterizing Project Playlist's argument, which "relie[d] heavily" on *Perfect 10*).

[59]*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) (footnote omitted; emphasis in original).

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engage in a textual analysis in *Perfect 10*."[60]

Judge Chin explained that "the modifier 'any' in section 230(e)(2), employed without any limiting language, 'amounts to' expansive language [that] offers no indication whatsoever that Congress intended [a] limiting construction."[61] Further, he wrote that this conclusion was "bolstered by the fact that . . . the 'surrounding statutory language' [discussed above] supports the conclusion that Congress intended the word 'any' to mean any state or federal law pertaining to intellectual property."[62] Because "the plain language of the CDA Is clear, as 'any law' means both state and federal law," Judge Chin concluded, "the Court need not engage in an analysis of the CDA's legislative history or purpose."[63]

Judge Chin's analysis was subsequently followed by a state court trial judge in New York, in granting the plaintiff's motion to dismiss the defendant's CDA affirmative defense in a common law copyright infringement suit.[64] Other courts have similarly held that the CDA does not preempt state law IP claims.[65]

Given the sharp divergence of views on the proper scope of section 230(e)'s exclusion for any law pertaining to intellectual property, some courts have been disinclined to find right of publicity or other state I.P. claims necessarily preempted, at least at an early stage in the proceedings, and have found ways to decide pending motions without having

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[60] *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 n.11 (S.D.N.Y. 2009).

[61] *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009), *quoting Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008), *quoting Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980).

[62] *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009), *quoting American Civil Liberties Union v. Department of Defense*, 543 F.3d 59, 69 (2d Cir. 2008) (holding that the word any in a statute "deserves an expansive application where the surrounding statutory language and other relevant legislative context support it.").

[63] *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009).

[64] *See UMG Recordings, Inc. v. Escape Media Group, Inc.*, 948 N.Y.S. 881, 888-89 (N.Y. Sup. Ct. 2012), *rev'd on other grounds*, 107 A.D.3d 51, 964 N.Y.S.2d 106 (N.Y. App. 2013).

[65] *See, e.g.*, *Ohio State Univ. v. Skreened Ltd.*, 16 F. Supp. 3d 905, 918 (S.D. Ohio 2014) (holding, without much analysis, that the CDA did not preempt plaintiff's Ohio right of publicity claim).

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to reach the issue.[66]

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[66]*See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26-27 & n.9 (1st Cir. 2016) (affirming dismissal of plaintiff's Massachusetts and Rhode Island right of publicity claims because there was no basis to infer that Backpage appropriated the commercial value of underage girls whose images were displayed in sex trafficking ads found on the site, where a publisher is merely a conduit and the party who actually benefits from the misappropriation was the advertiser, but noting the split of authority over whether the CDA preempts right of publicity claims and plaintiff's argument that a right of publicity claim properly should not be thought of as an intellectual property claim); *Obado v. Magedson,* Civil No. 13-2382 (JAP), 2014 WL 3778261, at *7 & n.5 (D.N.J. July 31, 2014) (noting the Ninth Circuit's position but finding that the plaintiff failed to state a claim for a right of publicity violation and therefore it was unnecessary to decide whether the claim was excluded from CDA preemption), *aff'd on other grounds*, 612 F. App'x 90, 92 (3d Cir. 2015); *Nieman v. Versuslaw, Inc.,* No. 12-3104, 2012 WL 3201931, at *8 (C.D. Ill. Aug. 3, 2012) (writing in *dicta* that plaintiff's right of publicity claim would not be barred by the CDA, but granting defendant's motion on other grounds), *aff'd*, 512 F. App'x 635 (7th Cir. 2013); *Amerigas Propane, L.P. v. Opinion Corp.,* Civil Action No. 12-713, 2012 WL 2327788, at *13 n.10 (E.D. Pa. June 19, 2012) (declining to consider whether plaintiff's claims arose from laws that pertain to intellectual property and were therefore excluded from CDA preemption because the court found that plaintiff adequately alleged that the claims arose from the defendant's own conduct to justify denying defendant's motion to dismiss); *Gauck v. Karamian*, 805 F. Supp. 2d 495 (W.D. Tenn. 2011) (assuming, for purposes of plaintiff's motion for preliminary injunction, that plaintiff's publicity rights claim fell within the CDA's statutory exclusion for claims that arise "from any law pertaining to intellectual property"); *Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (declining "to extend the scope of the CDA immunity as far as the Ninth Circuit . . . ," but nonetheless dismissing plaintiff's right of publicity claim as barred by the newsworthiness exception analyzed in section 12.05[4][B]), *appeal dismissed*, Appeal No. 11–7077, 2012 WL 3068437 (D.C. Cir. 2012); *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873 (E.D. Wis. 2009) (declining to exercise supplementary jurisdiction over state law claims and explaining in *dicta* the split of authority on the issue of whether a right of publicity claim based on third party content is preempted by the CDA), *aff'd on other grounds,* 623 F.3d 436 (7th Cir. 2010).

Stayart involved claims brought under Wisconsin law, which recognizes a common law tort for appropriation of a person's name or likeness and a statutory right based on "use, for advertising purposes or purposes of trade, of the name, portrait, or picture of any living person, without having first obtained the written consent of the person." 651 F. Supp. 2d at 887*, quoting* Wis. Stat. Ann. § 995.50(2)(b). Chief Judge Rudolph Rada noted that a right of publicity claim "is really an offshoot of the more general 'appropriation' tort, which compensates "bruised feelings" or other injuries to the "psyche," whereas the right of publicity "takes the next logical step" and gives individuals the "right of control over commercial use of one's identity . . . regardless of the infliction of emotional distress." 651 F. Supp. 2d at 887*, quoting* J. Thomas McCarthy, The Rights of Public-

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Even under the narrow (Ninth Circuit) view of the exclusion for "any law pertaining to intellectual property," CDA immunity will only apply where third party content is at issue and the other elements of section 230(c) have been met. Thus, in *Fraley v. Facebook, Inc.*,[67] Judge Lucy Koh of the Northern District of California, applying Ninth Circuit law, held that Facebook was not entitled to CDA immunity in a right of publicity case where the plaintiffs alleged that Facebook displayed user images next to brands that users had "liked" as a form of endorsement on their friend's profile pages and that Facebook itself had created this content, rather than merely editing user submissions. In that case, when plaintiffs clicked on a "Like" button on a company's Facebook page, Facebook allegedly translated this act into the words "Plaintiff likes [Brand]" and combined that text with plaintiff's photograph, the company's logo and the label "Sponsored Story" in an advertisement. In denying Facebook's motion to dismiss, Judge Koh ruled that Facebook's alleged actions in creating Sponsored Stories went beyond a publisher's traditional editorial functions "such as deciding whether to publish, withdraw, postpone or alter content."[68] She emphasized that plaintiffs did not allege merely that Facebook edited user content—"such as by correcting spelling, removing obscenity or trimming for length."[69] Judge Koh concluded that "Facebook transformed the character of Plaintiffs' words, photographs, and actions into a commercial endorsement to which they did not consent."[70] As explained by Judge Alsup in a later district court opinion that applied *CCBill* to hold common law trademark infringement and right of publicity claims preempted by the CDA, "Facebook

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ity and Privacy §§ 5.60, 5.67 (2d ed. 2008). Writing in *dicta*, Judge Rada explained that "the distinction between an appropriation theory and a right of publicity theory is . . . relevant to CDA immunity." 651 F. Supp. 2d at 887.

Even though Judge Rada previously had ruled that Yahoo! was entitled to CDA immunity, he wrote that a right of publicity claim "is generally considered an intellectual property claim, . . . which implicates that exception in § 230(e)(2)." 651 F. Supp. 2d at 887–88.

[67] *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

[68] *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), *quoting Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003).

[69] *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011), *quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (en banc).

[70] *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011).

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created new content with information that it took from plaintiffs without their consent—Facebook was therefore a content provider as well as a service provider, and thus not entitled to immunity under Section 230."[71] Had the court concluded that sponsored ads merely involved republication of user content, plaintiffs' right of publicity claims would have been preempted in the Ninth Circuit under *CCBill*.

Subsequently, in *Perkins v. LinkedIn Corp.*,[72] Judge Koh denied LinkedIn's motion to dismiss plaintiffs' right of publicity claim based on CDA preemption in a case brought over reminder emails sent by LinkedIn after plaintiffs initially sent their friends invitations to join LinkedIn. LinkedIn had argued that because plaintiffs provided the substantive content for the initial invitation emails, and consented to those emails being sent, LinkedIn merely was republishing that content in the reminder emails. Judge Koh held, however, that plaintiffs plausibly alleged development. Judge Koh wrote that "[t]he mere fact that Plaintiffs provided their names, photographs, and email contacts for purposes of the initial invitation email, does not confer blanket CDA immunity on LinkedIn for the alleged harm caused by LinkedIn's unilateral decision to send subsequent reminder emails."[73] This narrow view of CDA immunity could be challenged given that the statute preempts claims based on republishing information that originated with another information content provider—and the decision to republish does not change the essential nature of the act of republication.[74] Plaintiffs alleged that the emails were "written, designed, and formatted" in whole or in part by LinkedIn, but design and formatting are traditional editorial functions immunized by the CDA and the content of the emails largely republished plaintiffs' own material.

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[71] *Evans v. Hewlett-Packard Co.,* C 13-02477 WHA, 2013 WL 4426359, at *3 (N.D. Cal. Aug. 15, 2013) (dismissing Pennsylvania unfair competition and trademark infringement and Pennsylvania and California right of publicity claims brought against the operators of the HP App Catalogue, an app store for Palm devices, as preempted by the CDA, because, although "cleverly-worded," the complaint did "not allege that defendants created the app at issue here. Rather, it appears that the app was created entirely by third parties.").

[72] *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1246-49 (N.D. Cal. 2014).

[73] *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1248 (N.D. Cal. 2014).

[74] *See supra* § 37.05[3] (analyzing publication and development).

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Judge Koh also based her ruling on her conclusion that the reminder emails were not "substantively identical to the initial invitation email."[75] Specifically, the initial invitation email, written in the first person, read: "I'd like to add you to my professional network." The first reminder email, written in the third person, stated: "This is a reminder that on [date of initial email], [LinkedIn user] sent you an invitation to become part of their professional network at LinkedIn." The second reminder email, also written in the third person, read: "[LinkedIn user] would like to connect on LinkedIn. How would you like to respond?" Judge Koh explained:

> Contrary to Defendant's assertions, then, the first reminder email appears to transform the substance of the initial invitation email from "Do you want to connect with me?" to "You never responded to the user's first invitation so let us ask you again, do you want to connect with her?" The second reminder email is arguably more transformative still, as the substance changes from "Do you want to connect with me?" to "You never responded to the user's first invitation or to our reminder concerning that invitation, so let us ask you for a third time, do you want to connect with her?" It is precisely this changed character of the reminder emails—from invitation at first to potentially annoying by the end—that the Court found could contribute to the additional harm the reminder emails allegedly caused. First MTD Order at 31 (noting that "individuals who receive second and third email invitations to join LinkedIn after declining one or two previous email invitations to join LinkedIn from the same sender may become annoyed at the sender"); *see also Fraley*, 830 F. Supp. 2d at 802 (rejecting CDA immunity where Facebook allegedly "transformed the character" of Plaintiffs' submissions). For these reasons, the Court rejects LinkedIn's claim that the reminder emails are substantively identical to the initial invitation email.[76]

Identicality, however, should not be the relevant test, given that the CDA broadly immunizes traditional editorial functions,[77] including editing, which involves some rewriting and reorganization of material, as anyone who has ever

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[75] *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1248 (N.D. Cal. 2014).

[76] *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1248 (N.D. Cal. 2014) (footnote omitted).

[77] *See, e.g.*, *Green v. America Online (AOL)*, 318 F.3d 465, 470-71 (3d Cir.) (holding that section 230 "bars 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"), *cert. denied*, 540 U.S. 877 (2003); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Jones*

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worked on a publication or published an article can attest.

Judge Koh also focused on the fact that LinkedIn decided whether when and how many reminder emails to send and added a photo to the last one. Here again, these are the type of decisions traditionally made by publishers who decide whether to publish an article once in a morning edition or in multiple editions of a newspaper and may change the heading, title, photograph or prominence when the article is republished.

Ultimately, it is likely that other judges—especially in the Fourth or Sixth Circuits—would have viewed LinkedIn's changes as editorial in nature, not amounting to development.[78] Outside the Ninth Circuit, however, a right of publicity claim may be found excluded from CDA protection, depending which interpretation a court chooses to follow, as previously discussed in this subsection.

In *Cybersitter, LLC v. Google, Inc.*,[79] Central District of California Senior Judge Lew narrowly applied the CDA without much analysis in denying in part the defendant's motion to dismiss and holding that the CDA preempted claims for state law trademark infringement, contributory infringement pursuant to Cal. Bus. & Prof. Code § 14245(a)(3) and unfair competition under Cal. Bus. & Prof. Code § 17200, based on the contents of advertisements, to the extent not developed by the defendant, but not claims arising out of the alleged sale of plaintiff's "Cybersitter" mark as a key word to trigger sponsored link advertisements.

In defense of the Ninth Circuit's rule from *CCBill*, it could be argued that Congress had not considered state intellectual property claims in articulating two bright line rules—a general rule preempting most state law claims (in section 230(e)(3)) and a general exclusion from preemption for intellectual property claims (in section 230(e)(2))—and thus

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v. Dirty World Entertainment Recordings, LLC, 755 F.3d 398, 407 (6th Cir. 2014) (holding that traditional editorial functions are immunized under the CDA); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (holding that, in enacting the CDA, Congress sought to protect the exercise of a publisher's "editorial and self-regulatory functions."); *see generally supra* § 37.05[3].

[78] *See supra* § 37.05[3] (analyzing CDA case law, its development and nuanced differences in how CDA law is applied in different jurisdictions).

[79] *Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086-87 (C.D. Cal. 2012).

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intended that the exclusion for intellectual property claims not impact the general rule of preemption of state law claims.[80] When Congress passed the CDA in 1995 (prior to the time it was signed into law in January 1996), it was primarily focused on the risks to the development of Internet commerce posed by secondary copyright infringement (which eventually was addressed by the Digital Millennium Copyright Act[81]) and liability for defamation. Federal copyright law and state tort claims for defamation were viewed as posing potential impediments to the development of internet businesses. A court therefore could conclude that laws "pertaining to intellectual property" are necessarily federal laws, because state IP claims typically are tort or tort-like claims.[82] Congress's subsequent decision, in 2016, when the Defend Trade Secrets Act was adopted, to expressly treat trade secret misappropriation as outside the CDA's exclusion for laws *pertaining to intellectual property*, supports this view, and the Ninth Circuit's holding in *Perfect 10*. Prior to that time, trade secret claims could only be brought under state law. Specifying that a trade secret claim under the DTSA is not excluded from the potential preclusive effect of the Good Samaritan provision is consistent with a reading of section 230(e)(2) that considers any law *pertaining to intellectual property* to mean any law that in 1995, when the CDA was enacted, was a federal law pertaining to intellectual property—namely the Copyright Act, the Lanham

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[80]The statute treats preemption of state causes of action in a separate clause from the provision stating that the Act is intended to have no effect on any law pertaining to intellectual property. The other two subsections of section 230(e) both primarily address issues of federal law. Section 230(e)(1), captioned "No Effect on Criminal Law," expressly is limited to federal criminal statutes. Subsection 230(e)(4), captioned "No Effect on Communications Privacy Law," refers to a specific federal statute, although it also states that the Act is not intended to affect any similar state laws. Thus, it could be argued that 47 U.S.C.A. § 230(e)(3), which addresses and is captioned "State Law" and itself does not expressly exclude intellectual property claims, states an absolute rule and that 47 U.S.C.A. § 230(e)(2), which is captioned "No Effect on Intellectual Property Law," in light of the focus of subsection (e)(3) and the other subsections, arguably means federal intellectual property laws.

[81]17 U.S.C.A. § 512; *see generally supra* § 4.12.

[82]For example, the U.S. Supreme Court adopted the definition of a trade secret taken from the Restatement of Torts, implicitly recognizing trade secret protection as a creature of state tort law. *See, e.g.*, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979).

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Act and the Patent Act.

Support for this interpretation is bolstered by Congress's extension of federal protection to pre-1972 sound recordings in the Classics Protection and Access Act (Title II of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018),[83] which provides that the provisions of 17 U.S.C.A. § 1401—which extend most aspects of federal copyright protection to these works—shall be considered to be a "law pertaining to intellectual property" within the meaning of 47 U.S.C.A. § 230(e)(2).[84] In other words, by extending federal protection to sound recordings fixed prior to February 15, 1972 (which previously were protected, if at all, by state common law or statutes[85]), claims of infringement of those works against intermediaries would be subject to the Digital Millennium Copyright Act[86]—like other federal copyright claims—and not the CDA.

Intellectual property laws, including even federal copyright and trademark laws, have their origin in state tort law. While rights of publicity,[87] state trade secret law,[88] common law copyrights,[89] state trademarks[90] and potentially even idea protection[91] laws usually are considered intellectual property laws, they also often arise under state tort laws or statutory enactments of claims that first arose as common law torts[92] (and, unlike federal copyright, trademark and patent laws, provide no independent basis for federal

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[83]The Orrin G. Hatch–Bob Goodlatte Music Modernization Act, PL 115-264, 2018 H.R. 1551, 132 Stat. 3676 (Oct. 11, 2018).

[84]17 U.S.C.A. § 1401(g).

[85]*See supra* § 4.18[2].

[86]17 U.S.C.A. §§ 512, 1401(f)(3); *supra* § 4.12.

[87]*See supra* chapter 12.

[88]*See supra* chapter 10.

[89]*See supra* § 4.18[2].

[90]*See supra* § 6.04.

[91]*See supra* chapter 13.

[92]A majority of states have adopted the Uniform Trade Secrets Act and a number of states have enacted right of publicity statutes. *See supra* §§ 10.01, 10.12[3] (trade secrets), 12.03[2] (right of publicity statutes). These statutes, like federal intellectual property statutes, have their origins in tort law remedies. State trademark claims likewise may be asserted based on common law or statute, and also have their antecedents in tort law. Common law copyright claims likewise may be based on state tort or unfair competition law, at common law or pursuant to state statutes. *See supra* § 4.18[2]. Idea protection remedies may arise under

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court jurisdiction). Rights of publicity are an outgrowth of state common law privacy law[93] and trade secret law is often defined (even in U.S. Supreme Court case law) by reference to the Restatement of Torts.[94] Common law copyright claims, to the extent still viable and not preempted by the Copyright Act,[95] likewise frequently arise under state tort or unfair competition laws.[96] Thus, Congress may not have even considered these claims as "pertaining to intellectual property."

Although not stated in the legislative history, Congress, in excluding intellectual property laws from the scope of the Good Samaritan exemption, undoubtedly had in mind the issues of vicarious and contributory copyright liability raised in *Religious Technology Center v. Netcom Online Communication Service, Inc.*,[97] and the Clinton Administration's National Information Infrastructure White Paper, which issued in draft form in September 1995, shortly before the CDA was enacted, and recommended no change to existing third-party copyright liability doctrines.[98] Along with vicarious liability for defamation, at that time secondary copyright infringement was viewed as the principal threat to the expansion of e-commerce (and in particular to interactive computer services, which were then known as *access providers* or *content providers*, depending on the nature of their online offerings).[99] The major Internet law cases in 1995 when Congress considered the Good Samaritan exemption

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tort or contract law or other state common law or statutory remedies, such as breach of fiduciary duty or unfair competition. *See supra* chapter 13.

[93]*See supra* § 12.01. The U.S. Supreme Court, while acknowledging that privacy and publicity rights arise from state tort law, has characterized publicity claims at least as "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors . . . ." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (footnote omitted).

[94]*See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979).

[95]*See* 17 U.S.C.A. §§ 301, 1401(e); *see generally supra* § 4.18 (analyzing the scope of Copyright Act preemption).

[96]*See supra* § 4.18[2].

[97]*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

[98]U.S. Department of Commerce, National Information Infrastructure White Paper (Sept. 1995), available at http://www.uspto.gov/go/com/doc/ipnii/.

[99]Concern about potential exposure for secondary copyright infringe-

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(and as late as January 1996 when the statute was enacted into law) were *Cubby, Inc. v. CompuServe, Inc.*,[100] and *Stratton Oakmont v. Prodigy Services, Inc.*,[101] which addressed defamation,[102] and *Religious Technology Center v. Netcom Online Communication Service, Inc.*,[103] which analyzed direct, contributory and vicarious copyright liability. Congress also potentially could have considered secondary trademark liability in light of *Playboy Enterprises, Inc. v. Frena*.[104] At that time, there simply were no cases that held out the risk of vicarious liability being imposed on interactive computer service providers or users for third-party content under *state* intellectual property laws.[105] Indeed, the only online trade secret[106] and right of publicity[107] cases either decided or then-pending raised issues of direct, not vicarious liability. In all likelihood, Congress never considered the risk of exposure for state law intellectual property

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ment eventually led to the enactment of the Digital Millennium Copyright Act in 1998. *See generally supra* § 4.12.

[100]*Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

[101]*Stratton Oakmont v. Prodigy Services, Inc.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995).

[102]*See supra* § 37.04 (discussing these cases).

[103]*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

[104]*Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

[105]This assertion is based on numerous Lexis-Nexis database searches conducted by the author between May 1995 and the time the Good Samaritan exemption was signed into law in January 1996. *See generally* Ian C. Ballon, "The Emerging Law of the Internet" in The Performing Art of Advocacy: Creating A New Spirit (A.B.A. Section of Litigation August 1995); Ian C. Ballon, "The Emerging Law of the Internet" in The Emerging Law of the Internet (Continuing Education of the Bar Jan. 1996) (chronicling Internet law as of those dates).

[106]The Church of Scientology had filed several trade secret cases in the early 1990s, but by 1995 there was already ample case law standing for the proposition that third parties could not be held accountable for the actions of others. *See Religious Technology Center v. Lerma*, 908 F. Supp. 1362, 1368 (E.D. Va. 1995); *Religious Technology Center v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1526 (D. Colo. 1995); *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995); *see generally supra* § 14.11[2] (discussing the cases).

[107]*See Stern v. Delphi Internet Services Corp.*, 165 Misc. 2d 21, 626 N.Y.S.2d 694 (N.Y. Sup Ct. 1995). *Stern* involved an issue of direct liability (Delphia's use of a picture of Howard Stern to promote its service). *See generally supra* § 12.08[2] (discussing the case).

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claims at the time the CDA was enacted.

While it is possible that Congress simply never contemplated whether right of publicity, state trade secret or other state law intellectual property claims would be preempted in crafting the Good Samaritan exemption, courts in practice need to construe the statute as enacted to determine its scope.[108] As a different Ninth Circuit panel commented in a later case construing a different provision of the CDA, the "sound and fury on the congressional intent of the immunity under section 230 . . . ultimately signifies nothing. It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language."[109]

If right of publicity, trade secret and other claims are viewed as tort or state statutory claims, they are plainly not excluded and are potentially preempted by section 230. If, however, they are viewed as laws "pertaining to intellectual property" then they are excluded and not preempted, based on the structure of section 230(e), unless section 230(e)(2) is modified by section 230(e)(3), such that section 230(e)(2)'s exclusion for any law pertaining to intellectual property necessarily means any *federal* law, because any state law is nec-

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[108] *See Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (holding that even though Congress undoubtedly never considered whether section 230 would preempt a federal Fair Housing Act claim the plain text of the statute would control). As Chief Judge Easterbrook explained in *Craigslist*:

> The Lawyers' Committee responds that "nothing in section 230's text or history suggests that Congress meant to immunize an ISP from liability under the Fair Housing Act. In fact, Congress did not even remotely contemplate discriminatory housing advertisements when it passed section 230." That's true enough, but the reason a legislature writes a general statute is to avoid any need to traipse through the United States Code and consider all potential sources of liability, one at a time. The question is not whether Congress gave any thought to the Fair Housing Act, but whether it excluded section 3604(c) from the reach of section 230(c)(1). Cf. Blanchette v. Connecticut General Ins. Corporations, 419 U.S. 102, 126–27, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974) (Congress need not think about a subject for a law to affect it; effect of general rules continues unless limited by superseding enactments).

519 F.3d at 671.

[109] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009). This observation is consistent with the skepticism expressed about legislative history by Justice Scalia (attributing the words to Judge Harold Leventhal), when he wrote that "the use of legislative history [i]s the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

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essarily preempted by section 230(e)(3) (or unless, as suggested by the dissenting judge in *Hepp v. Facebook, Inc.*, a narrow reading of section 230(e)(2) is compelled by the Congressional findings and policy objectives set forth in section 230(a) and 230(b)[110]).

Courts that read section 230(e)(2) expansively to exclude federal *and* state laws pertaining to intellectual property from the broad preemption afforded by the CDA, nevertheless may hold that some state IP claims, such as those for idea misappropriation[111] and unfair competition (including common law copyright claims in many states) may not be excluded because they are more akin to tort than intellectual property claims.

Even in these courts, negligence or other tort actions arising from state intellectual property laws should be treated as preempted as a tort law and not a law *pertaining to intellectual property*. For example, an interactive computer service or user could not be sued for trade secret misappropriation based on the misconduct of another because to make out a claim based on secondary (or third party liability), a plaintiff would almost certainly have to allege a duty undertaken to the trade secret owner, which likely would be premised on state tort law, or possibly contract or quasi-contract law or breach of fiduciary duty—but not intellectual property law.[112] In similar contexts, courts have construed claims as preempted by the CDA if, regardless of how framed, the cause of action sounds in negligence.[113] Consistent with this view, a district court dismissed as preempted

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[110]*See Hepp v. Facebook, Inc.*, 14 F.4th 204, 216-26 (3d Cir. 2021) (Cowen, J. dissenting in relevant part).

[111]*See supra* §§ 13.01–13.04.

[112]A breach of contract claim would not be preempted to the extent that an interactive computer service provider or user was accused of its own breach, unless the claim was premised on acting as a publisher or speaker of material originating with another information content provider or as a result of any action voluntarily taken to restrict access to or the availability of material deemed, among other things, harassing or otherwise objectionable. *See supra* § 37.05[1]. For purposes of clarity, the rest of the discussion in this section focuses on the more typical case where a claim is premised on negligence.

[113]*See, e.g., Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009); *Doe v. America Online, Inc.*, 783 So. 2d

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by the CDA a New Jersey state law unfair competition claim arising out of the republication of allegedly infringing material.[114]

Ultimately, the Ninth Circuit, which for fourteen years was the only circuit to consider the issue, had concluded that section 230(e)(2), as an exclusion to a provision affording immunity, should be narrowly construed to apply only to federal claims pertaining to intellectual propert (other than the DTSA), consistent with the policy directives set forth in the statute itself, in section 230(b). Whether that view, or the perspective of the majority of the Third Circuit panel in *Hepp,* prevails, remains to be seen.

37.05[5][C] The Exclusion for Sex Trafficking Claims (and Related Advertising)

The Good Samaritan exemption was amended in 2018[1] to carve out exclusions from some—but not all—of the immuni-

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1010 (Fla. 2001); *supra* § 37.05[1] (citing additional cases).

Some might argue that preempting a negligence claim based on an interactive computer service provider or user's failure to protect against a state intellectual property right would in effect "limit or expand" a "law pertaining to intellectual property" within the meaning of section 230(e)(2) and therefore could *not* be preempted as merely a negligence claim. Ultimately, however, if a state intellectual property law does not permit a claim for secondary liability to be brought against an interactive computer service or user, any theory of recovery based on negligence or similar theories should be viewed for what it is—a tort claim—and preempted to the extent that a party seeks to impose liability under state tort law for an interactive computer service or user acting as a publisher or speaker of another party's content or undertaking any action voluntarily in good faith to restrict access to or the availability of content enumerated in section 230(c)(2), including material that is harassing or otherwise objectionable. The underlying claim—negligence, for example—is not a law "pertaining to intellectual property" and treating it as such would expand the scope of the state intellectual property law.

[114]*See Inventel Products, LLC v. Li*, Civ. No. 2:19-9190, 2019 WL 5078807, at *8 (D.N.J. Oct. 10, 2019) (dismissing plaintiff's New Jersey Consumer Fraud Act claim against Google, premised on Google's alleged provision of AdWords and analytics services arising out of publication of third-parties' allegedly infringing material, as preempted by the CDA; "While the CDA does not limit laws pertaining to intellectual property, 47 USC § 230(e)(2), the CFA is not an intellectual property statute, *see* N.J.S. § 56:8-2 (banning use of improper business practices).").

[Section 37.05[5][C]]

[1]*See* The Allow States and Victims to Fight Online Sex Trafficking Act of 2017. Pub. L. No. 115-164, 132 Stat. 1253 (2018); 47 U.S.C.A. § 230(e)(5).

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ties created by the CDA for certain federal civil claims and state criminal law charges relating to sex trafficking, the promotion or facilitation of prostitution, and reckless disregard of sex trafficking (including through online third party advertising). Federal criminal prosecutions for all federal crimes, including sex trafficking, had already been excluded from the scope of the CDA by section 230(e)(1), which was a part of the original statute when it was signed into law by President Clinton in January 1996. The list of exclusions, however, was expanded in 2018 by the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)—referred to by some as "FOSTA-SESTA"—to include federal civil claims and state criminal prosecutions related to sex trafficking, and to deter interactive computer service providers from accepting online advertising used by those engaged in sex trafficking.[2]

The impetus for the change in the law in 2018 was the revelation that Backpage.com, which hosted online classified advertisements, had been turning a blind eye to the use of its sites and services to promote prostitution and sex trafficking, including trafficking of minors. Because Backpage had been successful in using the CDA to fend off a number of lawsuits,[3] and enjoin enforcement of certain state criminal

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[2]A challenge to the Constitutionality of the statute under the First and Fifth Amendments and the Ex Post Facto clause was dismissed for lack of Article III standing, but subsequently reinstated by the D.C. Circuit. *See Woodhull Freedom Foundation v. United States*, 948 F.3d 363 (D.C. Cir. 2020). Article III standing is analyzed at various places in the treatise, including in section 27.07 in connection with security breach class action suits and section 26.15 in connection with data privacy class action suits.

[3]*See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by the CDA); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding claims of a victim of a child sex trafficker under 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595, brought against the publisher of Backpage, where sexually explicit ads of the minor plaintiff were placed, were preempted by the CDA). *But see J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 359 P.3d 714 (Wash. 2015) (en banc) (affirming that minor plaintiffs sufficiently stated Washington state law claims that were not preempted by the CDA, in a case that the majority in the Washington Supreme Court en banc opinion characterized as having been brought "to

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law provisions,[4] bipartisan support emerged to carve out sites like Backpage (as well as Eros, Massage Troll, and cityxguide) from the scope of the Good Samaritan exemption.[5]

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show how children are bought and sold for sexual services online on Backpage.com in advertisements . . . ," where plaintiffs alleged that the defendants developed Backpage.com advertisements for sexual services of minors that were "designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message.").

[4]*See, e.g., Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (affirming an order enjoining the Cook County, Illinois sheriff from threatening credit card companies if they refused to stop doing business with Backpage.com because it hosted advertisements for adult listings, where the Seventh Circuit found that the sheriff would not sue Backpage.com directly because similar claims he brought against a different online service were held preempted by the CDA); *Backpage.com, LLC v. Hoffman*, 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230).

[5]*See* H.R. Rep. 572, 115th Cong. 2d Sess. 3 (2018), 2018 U.S.C.C.A.N. 73, 74; *see also* S. Rep. No. 199, 115th Cong., 2d Sess. 2, 2018 WL 359931, at *2 (stating that CDA "protections have been held by courts to shield from civil liability and State criminal prosecution nefarious actors, such as the website BackPage.com, that are accused of knowingly facilitating sex trafficking."). SESTA, the Senate version eventually incorporated into the House Act (FOSTA), had been sponsored by Senator Rob Portman (R-Ohio), who had held hearings into Backpage and its role in facilitating sex trafficking. Backpage was an online classified ads site that accepted adult advertisements for escorts and others. According to the House Report:

> Backpage had knowingly concealed evidence of criminality by systematically editing its "Adult" ads–that is, Backpage knew it facilitated prostitution and child sex trafficking–and that it had been sold to its CEO Carl Ferrer through foreign shell companies. Backpage would automatically delete incriminating words, such as "amber alert," from sex ads prior to publication, moderators then manually deleted incriminating language that filters missed, and the website coached its users on how to post "clean" ads to cover illegal transactions. Further, in July 2017, the Washington Post published a story revealing that a contractor for Backpage had been aggressively soliciting and creating sex-related ads, despite Backpage's repeated insistence that it had no role in the

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As set forth in the "sense of Congress" preamble to FOSTA, section 230 "was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims . . . ," websites "that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion . . . ," and, hence, accordingly, the amendments provided by FOSTA-SESTA were "warranted to ensure that . . ." section 230 did not

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content of ads posted on its site. In sum, Backpage had engaged in a ruse, holding itself out to be a mere conduit, but in fact actively engaged in content creation and purposely concealing illegality in order to profit off of advertisements.

H.R. Rep. 572, 115th Cong. 2d Sess. 5 (2018), 2018 U.S.C.C.A.N. 73, 76. For a contrary view of how Backpage.com operated, *see* Elizabeth Nolan Brown, *The Senate Accused Them of Selling Kids for Sex. The FBI Raided Their Homes. Backpage.com's Founders Speak for the First Time,* Reason, Aug. 21, 2018.

On April 6, 2018, just days before the FOSTA-SESTA amendments to section 230 were signed into law on April 11, 2018, the Backpage.com website was seized in a criminal enforcement action. Following the seizure, the website displayed the following notice:

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provide protection to these websites.[6]

Most of the provisions of FOSTA-SESTA relate specifically to sex trafficking, which should not impact most interactive computer service providers or users outside the adult content industry. Those provisions that implicate third party advertising, however, potentially require attention by any interactive computer service that accepts classified advertising. Not surprisingly, since the 2018 amendments took effect, U.S. companies have shied away from hosting websites that offer adult escort or similar personal services or which provide classified advertisements for those services.[7] Most of the provisions, however, are tailored narrowly enough that those interactive computer service providers that seek to comply with the Good Samaritan exemption created by section 230(c)(2)(A)[8] for taking action to deter objectionable material (including advertisements for adult escorts or other services that could involve sex trafficking) should be able to avoid liability under the new provisions, even if they are now denied protection by section 230(c)(1).[9]

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[6]47 U.S.C.A. § 230 note; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 2, 132 Stat. 1253 (2018).

[7]*See, e.g.,* The Parallax, *Bills targeting sex trafficking to lead to crackdown on anonymous posts?*, https:www.the-parallax.com/2018/04/11/fosta-sesta-sex-trafficking-privacy/ (Apr. 11, 2018) (stating that the enactment of FOSTA-SESTA had prompted Craigslist to drop personal ads, FetLife to prohibit escort or other services, and Reddit to ban its escorts and sugar daddy communities).

[8]Section 230(c)(2)(A) provides that no provider or user of an interactive computer service shall be held liable on account of—

> 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 . . . .

47 U.S.C.A. § 230(c)(2)(A); *supra* § 37.05[4]. While the provisions of section 230(e)(5) generally exclude CDA protection for interactive computer service providers or users from the enumerated claims listed in that section, they do not foreclose the defense provided by section 230(c)(2)(A), which, if applicable, would provide a complete defense in a civil federal or state criminal action where section 230(e)(5) otherwise would exclude CDA immunity. *See* 47 U.S.C.A. § 230(e)(5). This potential "safe harbor" for interactive computer service providers and users is analyzed more closely later in this section (37.05[5][C]) and in section 37.05[4].

[9]In a civil case, the defense provided by section 230(c)(2)(A) is more difficult to establish on a preliminary motion to dismiss or for judgment on the pleadings than the defense afforded by section 230(c)(1). *See infra* § 37.05[7]. As a consequence, suits involving the potential applicability of

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The sex trafficking exclusions to the CDA cross-reference a number of federal statutes, which makes it difficult to summarize their scope precisely in a sentence or two. The provisions are analyzed more extensively later in this section. As a generalization, they provide that the CDA (other than section 230(c)(2)(A)) may not be construed to impair or limit:

(A) any civil claim brought in federal court under 18 U.S.C.A. § 1595 (which authorizes private claims brought by victims under a number of statutory provisions), if the conduct underlying the claim constitutes a violation of 18 U.S.C.A. § 1591 (which penalizes sex trafficking of children, or by force, fraud, or coercion, or benefitting financially, including by advertising);

(B) any state law criminal charge, if the conduct underlying a charge would constitute a violation of 18 U.S.C.A. § 1591 (which penalizes sex trafficking of children, or by force, fraud, or coercion, or benefitting financially, including by advertising); or

(C) any state law criminal charge, if the conduct underlying a charge would constitute a violation of 18 U.S.C.A. § 2421A (which criminalizes promotion or facilitation of prostitution and reckless disregard of sex trafficking) if promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.[10]

In other words, CDA defenses based on section 230(c)(1) (for republication of third party content),[11] which is the immunity section most frequently litigated, or section 230(c)(2)(B) (for enabling or making available content fil-

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section 230(e)(5) may be more costly and time consuming for interactive computer service providers to address than other suits where section 230(c)(1) is potentially applicable. For this reason, and to benefit from the potential "safe harbor" created by section 230(c)(2), a number of interactive computer service providers have simply elected to not accept any adult escort or similar advertisements. Section 230(c)(2)(A) would not provide a defense to federal criminal charges authorized by 18 U.S.C.A. § 2421A, which was also added by FOSTA-SESTA, but, as discussed later in this section, an interactive computer service provider that does the things required to meet the requirements of section 230(c)(2)(A) should be unlikely to risk federal criminal exposure under section 2421A.

[10]47 U.S.C.A. § 230(e)(5).

[11]*See generally supra* § 37.05[3].

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ters),[12] are unavailable for claims that fall into these three categories. By contrast, the CDA defense created by section 230(c)(2)(A) (for voluntary, good faith action to restrict access to or the availability of certain adult content)[13] still potentially insulates an interactive computer service provider or user from liability even under these exclusions, if the requirements for section 230(c)(2)(A) have been met. The obvious intent of the new provisions is to (1) discourage interactive computer service providers from accepting classified advertisements for escorts or similar services that could facilitate sex trafficking, and (2) encourage them to take proactive steps to deter objectionable content, and thereby benefit from the Good Samaritan exemption created by subpart 230(c)(2)(A).

Section 230(c)(2)(A), unlike section 230(c)(1), requires an interactive computer service provider to take affirmative steps to benefit from the Good Samaritan exemption created by that section.[14] The defense therefore will not be automatically available unless an interactive computer service provider has taken steps in advance to benefit from it, before the time it is sued. The defense provided by section 230(c)(2)(A) also may be more difficult to establish on a preliminary motion to dismiss or for judgment on the pleadings in a civil case than the defense afforded by section 230(c)(1), depending on the facts alleged and whether they allow an inference of or negate action undertaken in good faith.[15] As a consequence, civil suits involving the potential applicability of section 230(e)(5) in particular may be more costly and time consuming for interactive computer service providers to address than other suits where section 230(c)(1) is potentially applicable. Nevertheless, the exemption created by section 230(c)(2)(A), if available, provides a complete defense to the specific claims excluded by section 230(e)(5).

As discussed later in this section, compliance with section 230(c)(2)(A) also should substantially reduce the risk of federal criminal exposure under 18 U.S.C.A. § 2421A, which was added as part of FOSTA-SESTA and, as a federal criminal statute, is not subject to any CDA protection, including the exemption created by section 230(c)(2)(A). Although there

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[12]*See generally supra* § 37.05[4].

[13]*See generally supra* § 37.05[4].

[14]*See supra* § 37.05[4].

[15]*See infra* § 37.05[7]; *supra* § 37.05[4].

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is no CDA defense to federal criminal charges—and therefore no CDA defense to a criminal charge brought under section 2421A—the elements required to establish a violation would be difficult for the government to prove against any interactive computer service provider that does what is required to do, to benefit from the Good Samaritan exemption created by section 230(c)(2)(A). Prosecutorial discretion makes it less likely that even close cases would be pursued, where an interactive computer service provider has taken action to restrict access to or the availability of objectionable content, pursuant to section 230(c)(2)(A).

In conjunction with section 230(e)(1), which excludes from CDA immunity any federal criminal prosecutions, the sex trafficking provisions excluded by section 230(e)(5) mean that the CDA has no application to *any* federal crimes (including federal crimes for sex trafficking) and— except for the immunity created by section 230(c)(2)(A)—to most state law sex trafficking criminal charges, or to certain federal civil claims by victims of sex trafficking that are brought pursuant to 18 U.S.C.A. § 1595 (if the conduct underlying the claim would constitute a violation of 18 U.S.C.A. § 1591).[16] Notably, the various provisions of subpart 230(e) do not exclude state civil claims based on sex trafficking from the full reach of all of the safe harbors created by section 230. Nor do they exclude all potential federal civil claims.

The exclusion for federal civil claims created by section 230(e)(5)(A) applies to any action brought in federal court

[16]To the extent that *A.B. v. Facebook, Inc.*, Case No.: CV 20-9012-CBM-(MAAx), 2021 WL 2791618 (N.D. Cal. June 1, 2021) could be read as holding that section 230(c)(1) preempts a civil claim for a violation of the Trafficking Victims Protection and Reauthorization Act, 18 U.S.C.A. §§ 1591(a) and 1595(a), it would not be a correct reading. On the other hand, a civil claim under section 1595, where the underlying conduct does not "constitute a violation of section 1591"—such as where a plaintiff fails to sufficiently allege conduct that would violate section 1591—then e claim under section 1595 would be preempted by section 230(c)(1) even though it purports to allege a violation of section 1591. Read this way, *A.B. v. Facebook* is correctly decided. As set forth in the statute, and discussed in this section, civil claims brought under section 1595 where the underlying conduct constitutes a violations of section 1591 are excluded from section 230(c)(1)'s protection (but not the immunities provided by 47 U.S.C.A. § 230(c)(2)(A)). *See* 47 U.S.C.A. § 230(e)(5). Whether the underlying conduct would constitute a violation of section 1591 depends on the specific facts established in the case (or alleged, if addressed in connection with a motion to dismiss, as in *A.B. v. Facebook*).

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pursuant to 18 U.S.C.A. § 1595, if the conduct underlying the claim constitutes a violation of 18 U.S.C.A. § 1591.[17] Section 1595 allows an individual, or in some cases a State Attorney General, to initiate a civil action to recover for criminal violations of chapter 77 of the U.S. Code,[18] which enumerates an array of crimes under the heading "Peonage, Slavery, and Trafficking in Persons."[19] Section 1591 specifically addresses sex trafficking of children by force, fraud or coercion. Hence, the scope of section 230(e)(5)(A) is limited to suits by a victim or a State Attorney General brought in federal court under 18 U.S.C.A. § 1595, but only those suits that seek civil remedies for sex trafficking of children by force under section 1591.[20] Section 1591, however, is potentially broad. It penalizes knowing misconduct, or

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[17]47 U.S.C.A. § 230(e)(5)(A).

[18]Section 1595 provides:

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)

(1) Any civil action filed under subsection (a) shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under subsection (a) unless it is commenced not later than the later of—

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

18 U.S.C.A. § 1595.

[19]*See* 18 U.S.C.A. §§ 1581 to 1597.

[20]Section 1591 provides:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United

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merely reckless disregard, and reaches to anyone who

States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in

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"benefits, financially or by receiving anything of value, from participation in a venture which has engaged in . . ." a range of activities relating to sex traffic.[21] With respect to advertising, however, liability may only be imposed for knowing misconduct, not reckless disregard.[22]

To establish liability under section 1595, courts have held that a plaintiff must establish that (1) a defendant knowingly benefited financially or by receiving anything of value (2) by participating in the sex trafficking venture (3) that the defendant knew or should have known was a violation of the Trafficking Victims Protection Reauthorization Act (TVPRA).[23]

The term *participate in a venture* is not defined in section 1595, which governs civil liability, although the same term is defined in the criminal statute, 18 U.S.C.A. § 1891, to mean "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)."[24] Because section 1595(a) premises civil liability on a finding that a defendant "knew or should have known" that it was benefitting from or

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serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

(5) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(6) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C.A. § 1591.

[21]18 U.S.C.A. § 1591(a).

[22]18 U.S.C.A. § 1591(a).

[23]*E.g., J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *8 (N.D. Cal. Aug. 20, 2020); *Doe S.W. v. Lorain-Elyria Motel, Inc*., No. 19-cv-1194, 2020 WL 1244192, at *5 (S.D. Ohio Mar. 16, 2020).

[24]18 U.S.C.A. § 1591(e)(4).

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participating in a trafficking venture, district courts have held that the "negligence standard of constructive knowledge" applies, and thus the criminal statute's definition of *participate in a venture* – which requires a higher level of proof (knowing assistance)—is inapplicable to civil claims brought under section 1595. As explained by one court, "applying the definition of 'participation in a venture' provided for in § 1591(e) to the requirements under § 1595 would void the 'known or should have known' language of § 1595."[25]

For suits against interactive computer service providers or users premised on republication of third party content, however, FOSTA authorizes a civil claim under section 1595(a) notwithstanding 47 U.S.C.A. § 230(c)(1) only where a plaintiff can allege knowing assistance, not merely that the defendant knew or should have known, because, "[b]y its terms, FOSTA did not abrogate CDA immunity for all claims arising from sex trafficking; FOSTA permits civil liability for websites only 'if the conduct underlying the claim constitutes a violation of section 1591.' And section 1591 requires knowing and active participation in sex trafficking by the

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[25]*Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1249-50 (S.D. Fla. 2020), *quoting S.Y. v. Naples Hotel Co*., Case No: 2:20-cv-118-FtM-29MRM, 2020 WL 4504976, at *2 (M.D. Fla. Aug. 5, 2020) (citing *J.C. v. Choice Hotels Int'l Inc*., Case No. 20-cv-00155-WHO, 2020 WL 3035794, at *1 n.1 (N.D. Cal. Jun. 5, 2020); *A.B. v. Marriott Int'l Inc.*, 455 F. Supp. 3d 171, 188 (E.D. Pa. 2020); *Doe S.W. v. Lorain-Elyria Motel, Inc.*, Case No. 2:19-CV-1194, 2020 WL 1244192, at *6 (S.D. Ohio Mar. 16, 2020); *H.H. v. G6 Hosp., LLC,* Case No. 2:19-CV-755, 2019 WL 6682152, at *4 (S.D. Ohio Dec. 6, 2019); *M.A. v. Wyndham Hotels & Resorts, Inc.,* 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019) ("The language of § 1591 differs from the language of § 1595—the former does not have a constructive knowledge element manifested by 'should have known' language." . . . To carry over § 1591's 'participation in a venture' definition would impose a heightened *mens rea* standard inconsistent with the plain language of § 1595.")); *J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *8 (N.D. Cal. Aug. 20, 2020) (quoting *M.A. v. Wyndham* and holding that "participation under § 1595 [must] have, 'in the absence of direct association,' . . . 'a showing of a continuous business relationship between the trafficker and the [defendant] such that it would appear that the trafficker and the [defendant] have established a pattern of conduct or could be said to have a tacit agreement.' "). *But see Doe 1 v. Red Roof Inns, Inc*., No. 19-cv-3840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020); *Doe 2 v. Red Roof Inns, Inc*., No. 19-cv-3841, 2020 WL 1872337 (N.D. Ga. Apr. 13, 2020); *Doe 3 v. Red Roof Inns, Inc*., No. 19-cv-3843, 2020 WL 1872333 (N.D. Ga. Apr. 13, 2020); *Doe 4 v. Red Roof Inns, Inc*., No. 19-cv-3845, 2020 WL 1872336 (N.D. Ga. Apr. 13, 2020) (applying section 1591's "participation in a venture" definition to the stand-alone section 1595 claim).

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defendants."[26]

This is also consistent with Congressional intent. As explained by the court in *Doe v. Kik Interactive, Inc.*,[27] "Congress only intended to create a narrow exception to the CDA for 'openly malicious actors such as Backpage where it was plausible for a plaintiff to allege actual knowledge and overt participation[]' . . . and that a finding of actual knowledge and overt participation in a venture of sexual trafficking is required to defeat CDA immunity."[28]

One court frankly acknowledged that

> there is some tension between the TVPRA's requirements and FOSTA's general purpose. FOSTA's amendment of the CDA sought to make it easier to hold websites accountable. But the TVPRA's requirement that the defendant participate in a venture makes actions against websites such as Craigslist difficult to establish, given that such sites receive billions of posts and interaction with a specific venture may be hard to show. Importantly, however, Congress did not amend Section 1595 when it passed FOSTA, and the Court must interpret the TVPRA elements on their face.[29]

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[26]*Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020).

[27]*Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242 (S.D. Fla. 2020).

[28]*Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1250-51 (S.D. Fla. 2020) (dismissing plaintiff's claim because she had "not alleged facts that would plausibly establish that Defendants knowingly participated in the sex trafficking venture involving her; she allege[d] that Defendants knew that other sex trafficking incidents occurred on Kik. This does not satisfy FOSTA's requirement that the conduct underlying the claim violate 18 U.S.C. § 1591.").

[29]*J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *10 (N.D. Cal. Aug. 20, 2020) (dismissing plaintiff's claim with leave to amend, nothing that "[b]ecause Craigslist cannot be deemed to have participated in all ventures arising out of each post on its site, Plaintiff must allege facts supporting the inference that Craigslist made a tacit agreement with the sex traffickers who victimized"). *But see M.L. v. Craigslist, Inc.*, Case No. C19-6153 BHS-TLF, 2020 WL 5494903, at *3-4 (W.D. Wash. Sept. 11, 2020) (dismissing negligence, unjust enrichment, and ratification/vicarious liability claims, but denying Craigslist's motion to dismiss plaintiff's TVPRA claim and state law request for fees and costs under the Washington Sexual Exploitation of Children Act, based on the finding that plaintiff had alleged sufficient facts to plausibly state a claim that Craigslist "was responsible, in whole or in part, for the development or creation of the unlawful advertisements which trafficked Plaintiff."). In contrast to federal courts, the Texas Supreme Court has construed the FOSTA exclusion to section 230(c)(1) immunity broadly, *See In re Facebook, Inc.*, __ S.W.3d ____, 2021 WL 2603687 (Tex. 2021) (construing the FOSTA

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Subpart 230(e)(5)(B) also excludes from CDA immunity (under subparts 230(c)(1) and 230(c)(2)(B)) for state criminal charges brought under state law "if the conduct underlying the charge would constitute a violation of" 18 U.S.C.A. § 1591.[30] Subpart 230(e)(5)(C) further excludes from CDA immunity (under subparts 230(c)(1) and 230(c)(2)(B)) state criminal charges brought under state law "if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted."[31] Section 2421A, which was enacted as part of FOSTA-SESTA at the same time as the exclusions in section 230(e)(5) for sex trafficking, prohibits the promotion or facilitation of prostitution and reckless disregard of sex trafficking.[32] Section 2421A(a) is directed specifically at anyone who owns, man-

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exclusion to CDA immunity broadly, and allowing plaintiffs to proceed with claims under Tex. Civ. Pract. & Rem. Code Ann. § 98.002 (a Texas statute creating a civil cause of action against those who intentionally or knowingly benefit from participation in a sex-trafficking venture), even as the Texas Supreme Court affirmed dismissal of plaintiff's claims for negligence, negligent undertaking, gross negligence, and products liability based on Facebook's alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms, as preempted by the CDA).

[30]47 U.S.C.A. § 230(e)(5)(B). Section 1591 is set forth in an earlier footnote.

[31]47 U.S.C.A. § 230(e)(5)(C).

[32]Section 2421A provides:

(a) In general.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

(b) Aggravated violation.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—

(1) promotes or facilitates the prostitution of 5 or more persons; or

(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

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ages and operates an interactive computer service, or who conspires or attempts to do so, with the intent to promote or facilitate prostitution. Section 2421A(b) penalizes as an aggravated violation, a violation of subsection 2421A(a) where someone either (1) promotes or facilitates prostitution or (2) acts in reckless disregard of the facts that their conduct contributed to sex trafficking in violation of 18 U.S.C.A. § 1591(a).[33] Section 1591 is not limited to owners, managers and operators of interactive computer service providers and, as noted earlier, broadly proscribes both knowing misconduct and reckless disregard of a range of actions relating to sex trafficking, including extending to anyone who "benefits, financially or by receiving anything of value, . . . from their participation.[34] Section 1591 also specifically addresses advertising in connection with sex trafficking, but only penalizes knowing misconduct, not reckless disregard.[35]

Section 2421A allows victims to recover civil damages for aggravated violations.[36] Because subpart 230(e)(5)(C), by its terms, only excludes from potential CDA immunity *state criminal charges* (where the conduct underlying the charge would constitute a violation of section 2421A) and section 230(e)(1) only excludes federal criminal laws, CDA immunity (including under subparts 203(c)(1) and 230(c)(2)(B)) appears to be fully available, and not excluded, for *civil* claims

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shall be fined under this title, imprisoned for not more than 25 years, or both.

(c) Civil recovery.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.

(d) Mandatory restitution.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b).

(e) Affirmative defense.—It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.

18 U.S.C.A. § 2421A.

[33]18 U.S.C.A. § 2421A.

[34]*See* 18 U.S.C.A. § 1591(a).

[35]*See* 18 U.S.C.A. § 1591(a).

[36]18 U.S.C.A. § 2421A(c).

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brought under section 2421A,[37] even though there is potential overlap where the same misconduct could support a civil claim under section 2421A based on section 1591 (for which all Good Samaritan exemptions could apply) and 1595, based on 1591 (for which only the exemption created by section 230(c)(2)(A) could apply). The main differences between these two types of civil claims, when premised on misconduct prohibited by section 1591, are that (1) a section 1595 claim could be brought by a victim or state Attorney General, whereas a section 2421A claim could be brought by any injured person, (2) section 2421A is directed more narrowly at the owners, managers or operators of an interactive computer service, whereas section 1595 is directed at perpetrators or those who knowingly benefit financially, and (3) under section 2421A, liability may be premised on "reckless disregard" based on promotion of prostitution that contributes to sex trafficking, whereas a claim under section 1595 premised on section 1591 would exclude liability for reckless disregard when it is premised on advertising.[38]

As noted above, an aggravated violation of section 2421A may be based on one of two grounds. Where a civil claim for an aggravated violation of section 2421A is brought under section 2421A(c) for an aggravated violation of section

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[37]*See J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *5-7 (N.D. Cal. Aug. 20, 2020) (dismissing plaintiff's state civil law FOSTA/SESTA claim, as preempted by the 47 U.S.C.A. § 230(c)(1), in a suit arising out of Craiglist's alleged failure to monitor advertisements for illegal sex trafficking of a minor; "The plain language of the statute suggests that state civil claims are not carved out from the immunity provided by Section 230, even in sex trafficking cases. . . . Congress' decision not to list Section 2421A(c) (for whatever reason) does not undermine the conclusion that Section 230(e)(5) comprehensively sets out the scope of the intended immunity carve-out, at least as to state civil claims. . . . Given the clarity of the plain language of the amendment of the CDA, and the ambiguity of the legislative history relied upon by Plaintiff, the Court thus finds that the CDA does apply to state law civil sex trafficking claims."); *see also Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's claim under FOSTA/SESTA and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images, without authorization, in Tweets soliciting subscriptions to its website, where "[a]ll of Morton's non-copyright claims attempt[ed] to treat Twitter as being equivalent to SpyIRL for purposes of considering liability for the latter's tweets.").

[38]*See* 18 U.S.C.A. § 1591(a).

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2421A(a) based on section 2421A(b)(1), for promoting or facilitating prostitution, rather than under section 2421A(b)(2) (for a violation under section 1591(a)), it would neither be excluded by section 230(e)(5)(A) as a civil claim brought under 18 U.S.C.A. § 1595 (based on allegations that would support a claim under 18 U.S.C.A. § 1591), nor under section 230(e)(5)(C) as a state criminal charge equivalent to 18 U.S.C.A. § 2421A. All Good Samaritan provisions of the CDA potentially could be raised against such a civil claim.

Oddly, however, a civil claim brought under section 2421A(c) for an aggravated violation of section 2421A(a) based on section 2421A(b)(2) for reckless disregard of facts that a defendant's conduct contributed to sex trafficking in violation of 18 U.S.C.A. § 1591(a), while not excluded by section 230(e)(5)(C), which only applies to state criminal prosecutions equivalent to the federal crime created by section 2421A, may be identical in some instances to a claim excluded by section 230(e)(5)(A), which excludes federal civil claims brought under 18 U.S.C.A. § 1595, if the conduct underlying the claim constitutes a violation of 18 U.S.C.A. § 1591. A civil claim under section 2421A(c) would be brought directly under that statute (section 2421A), and not section 1595, even where the underlying claim for both would be a violation of section 1591 (and the claims presumably could even be joined in the same lawsuit alleging the same facts). It is unclear why Congress would exclude civil claims premised on section 1591, when brought under section 1595, but not exclude civil claims premised on section 1591, when brought under section 2421A.

One possibility is that Congress perhaps mistakenly assumed that section 2421A, as a criminal statute, would already be excluded from the scope of section 230. Section 230(e)(1)—titled "No effect on criminal law"—provides that "[n]othing in this section [47 U.S.C.A. § 230] shall be construed to impair the enforcement of . . . any . . . Federal criminal statute."[39] Although the exception applies to federal criminal law, the statute refers to *impairment* of the enforcement of a federal *criminal statute*. If section 230(e)(1) were to be construed to exclude even civil claims brought under federal criminal statutes (because enforcement of the statute would be impaired by limiting civil enforcement), then the CDA would provide no defense at all to civil claims under

[39]47 U.S.C.A. § 230(e)(1).

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section 2421A—but this explanation would be faulty because, by extension, it would also exclude defenses to civil claims brought under section 1595. A broad interpretation of section 230(e)(1) to cover civil claims would be inconsistent with Congress's inclusion of section 230(e)(5), which expressly excludes some CDA protection from civil claims brought under 18 U.S.C.A. § 1595 for violations of section 1591— but also expressly provides that the Good Samaritan exemption created by section 230(c)(2)(A) applies to such claims. If section 230(e)(1) already excluded civil claims brought under federal statutes, there would have been no need for Congress to enact section 230(e)(5)(1) to exclude civil claims brought under 18 U.S.C.A. § 1595 for underlying misconduct that violates section 1591. Hence, section 230(e)(1) properly should be construed to exclude criminal charges brought under federal criminal statutes, but not civil claims brought under federal criminal statutes. This is also consistent with how courts have construed section 230(e)(1)—as excluding federal criminal charges but not civil claims brought under federal criminal statutes.[40]

Thus, assuming that section 230(e)(1) excludes only federal criminal statutes and not civil claims made under criminal statutes, and given that section 230(e)(5) only excludes certain state criminal charges and any claim in a civil action brought under 18 U.S.C.A. § 1595 if the conduct underlying the claim constitutes a violation of section 1591 (and that this exclusion does not apply to the exemption created by section 230(c)(2)(A)), then an interactive computer service provider potentially may assert any of the Good Samaritan exemptions created by section 230 in defense of a civil claim brought under 18 U.S.C.A. § 2421A, but only the exemption created by section 230(c)(2)(A) in response to a claim brought under 18 U.S.C.A. § 1595—even when both claims are premised on the same underlying misconduct prohibited by 18 U.S.C.A. § 1591. This may seem like an odd result, but what it means is that section 230(c)(2)(A), which provides a

[40] *See, e.g., Doe No. 1 v. Backpage.com, LLC,* 817 F.3d 12, 23 (1st Cir. 2016) (construing section 230(e)(1) to apply to federal criminal statutes but not civil claims brought under federal criminal statutes); *Force v. Facebook, Inc.*, 934 F.3d 53, 71-72 (2d Cir. 2019) (holding section 230(e)(1) inapplicable in a civil action), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 890 (9th Cir. 2021) ("We agree with the First and Second Circuits, and hold that § 230(e)(1) is limited to criminal prosecutions.").

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broad exemption for any action taken in good faith to restrict access to objectionable content (among other things), creates an incentive for interactive computer services to take steps to benefit from the protections it provides in response to *all* civil claims related to sex trafficking, while the exemptions available under section 230(c)(2)(B) (for screening software) and, importantly, section 230(c)(1), would also be available as defenses to a civil claim brought under 18 U.S.C.A. § 2421A, which otherwise allows for a claim for reckless disregard for advertising (which 18 U.S.C.A. § 1595 does not).

Alternatively, excluding civil claims premised on section 1591 when brought under section 1595 but not civil claims brought under section 2421A may simply have been a drafting error.

Depending on its effectiveness, section 2421A may be amended on or after 2021. FOSTA-SESTA requires that the Comptroller General conduct a study and submit that report to the Senate by April 11, 2021, to evaluate the effectiveness of section 2421A in compensating victims.[41]

Needless to say, besides the risk of potential state criminal or federal civil claims brought against interactive computer service providers, for which at least the immunity created by section 230(c)(2)(A) could apply for those service providers who choose to benefit from it, section 2421A also creates the risk of federal criminal charges for owners, operators and managers of interactive computer services—for which no provision of the CDA would apply, based on the blanket exclusion for federal criminal actions created by section 230(e)(1). Nevertheless, interactive computer service providers and users that take "any action" in good faith to restrict access to or the availability of objectionable material that could promote sex trafficking, such as classified advertisements for adult escorts or similar sex services, pursuant to section 230(c)(2)(A), would be less likely targets for criminal enforcement under section 2421A, because section 2421A requires a showing of *knowing* facilitation or *reckless disregard*, even though the defense of section 230(c)(2)(A) is technically inapplicable. As a practical matter, complying with section 230(c)(2)(A), as a way to avoid the exclusions

[41] *See* 47 U.S.C.A. § 230 note; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 § 8, 132 Stat. 1253, 1255 (2018).

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set forth in section 230(e)(5), will also minimize the risk of criminal enforcement under section 2421A.

The House Report accompanying the 2018 amendments that created both the new criminal and civil liability provisions of 18 U.S.C.A. § 2421A and the sex trafficking exclusions to the CDA set forth in section 230(e)(5), expressed the view that the CDA properly already was inapplicable to child trafficking laws, but that the exclusions were intended to make that clear.[42] Backpage, for example, had benefitted from the CDA largely because its efforts to promote advertisements for sex trafficking—including helping to create the text for these advertisements— had been concealed prior to the Senate hearings that preceded the enactment of the 2018 amendment to section 230. Had those facts been known, Backpage.com likely would not have been held entitled to CDA immunity under section 230(c)(1), based on its own development of content.[43] But just as bad facts can sometimes lead to bad law, FOSTA-SESTA—which was targeted at a company that was shut down by the FBI before the statute had even been signed into law—could be used to chill speech or target interactive computer service providers for lawful advertising.

To minimize that risk, Congress limited the scope of the exclusions created by section 230(e)(5). As noted earlier, the exclusions set forth in section 230(e)(5)—for civil claims based on sex trafficking and state law criminal charges where the underlying conduct would constitute a sex trafficking violation or promote or facilitate prostitution or constitute reckless disregard of sex trafficking—only constitute exclusions from the immunities created by section 230(c)(1) and 230(c)(2)(B). The Good Samaritan provision created by section 230(c)(2)(A) could still apply for interactive computer services charged with these offenses or sued for civil liability

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[42] *See* H.R. Rep. 572, 115th Cong. 2d Sess. 9 (2018), 2018 U.S.C.C.A.N. 73, 80-81 ("While the newly created law, and the federal sex trafficking law, should both be considered consistent with § 230, as applied to certain bad-actor websites, in order to allow immediate and unfettered use of this provision, included is an explicit carve out to permit state criminal prosecutions."); S. Rep. No. 199, 115th Cong., 2d Sess. 3-4, 2018 WL 359931, at *3-4 ("section 230 was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims; and that clarification of section 230 is warranted to ensure that that section does not provide such protection to such websites.").

[43] *See supra* § 37.05[3][D].

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under section 1595. As explained in the Senate Report:

> [T]his Act would not abrogate section 230(c)(2)(A). This provision would ensure that ICSs cannot be held liable on account of actions taken in good faith to restrict access to objectionable material. With this provision preserved, an ICS should not be concerned that it will face liability for knowingly assisting, supporting, or facilitating sex trafficking based on its actions to restrict access to material that violates the Federal sex trafficking statute. As section 230(c)(2)(A) provides, an ICS would not have their good faith efforts to restrict access to objectionable content used against them.[44]

As a practical matter, most of the sex trafficking exclusions set forth in section 230(e)(5) will not apply to a typical interactive computer service provider that operates outside the adult content industry. The exclusion created by subsection 230(e)(5)(C) (which applies to state law criminal charges for conduct that would be actionable under 18 U.S.C.A. § 2421A)—which potentially could reach advertising and other conduct that knowingly facilitates sex trafficking or amounts to reckless disregard—could expose service providers to potential liability for advertisements for adult escorts or similar services, especially if they cannot claim the protection of the Good Samaritan exemption created by section 230(c)(2)(A).

The Good Samaritan exemption created by section 230(c)(2)(A) provides a roadmap for interactive computer service providers and their owners seeking to avoid liability under the sex trafficking exceptions. Businesses that undertake good faith measures to restrict access to or the availability of material that may be used to promote sex trafficking, such as refusing advertisements for adult escorts or similar personal services (or carefully vetting those advertisements, if that is a feasible option), may benefit from the Good Samaritan exemption created by section

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[44]S. Rep. No. 199, 115th Cong., 2d Sess. 4 (2018), 2018 WL 359931, at *4. The Committee Report explained that:

> If a plaintiff shows that an ICS is knowingly assisting, supporting, or facilitating sex trafficking, then the ICS cannot avoid liability by characterizing those actions as efforts to remove objectionable material. For example, if a website screens advertisements in an effort to remove objectionable material, but then merely edits illegal advertisements to make them more difficult for law enforcement to identify, or knowingly assists, supports, or facilitates sex trafficking, then even an ICS's efforts to remove objectionable content are no bar to liability. Section 230(c)(2)(A) was never intended to, and does not, pose a barrier to liability on these facts.

Id.

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230(c)(2)(A), even for claims and charges otherwise excluded from CDA protection by section 230(e)(5). While section 230(c)(2)(A) would not provide a defense to the criminal provisions created by FOSTA-SESTA in 18 U.S.C.A. § 2421A, the same conduct required to benefit from the safe harbor created by section 230(c)(2)(A) would make federal criminal prosecution under section 2421A—which requires a showing of *knowing* misconduct or *reckless disregard* – less likely. FOSTA-SESTA thus should be viewed as creating compliance obligations for interactive computer services to deter facilitating or promoting sex trafficking.

37.05[6] Claims Against Social Networks

Cases involving social networks provide useful guidance on the contours of potential exposure under section 230. To date, social networks had been sued over safety issues, phony profiles and for housing discrimination.

With respect to safety, courts have held that social networks cannot be held liable for misconduct by or between users. In *Doe v. MySpace, Inc.*,[1] the Fifth Circuit ruled that MySpace was insulated from liability under the CDA for claims arising out of an alleged sexual attack perpetrated on a young girl who had circumvented MySpace's safety features, lied about her age and, interacting as an adult, met a man who contacted her after she gave him her phone number, and thereafter allegedly attacked her. The Fifth Circuit concluded that plaintiffs' "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."[2] Likewise, in *Doe v. America Online, Inc.*,[3] the Florida Supreme Court held that section 230(c)(1) immunized AOL from a claim that the company should have been held liable for a pedophile's sales and marketing in an AOL chatroom

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[Section 37.05[6]]

[1]*Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir), *cert. denied*, 555 U.S. 1031 (2008).

[2]*Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008); *see also Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (granting judgment for MySpace in suits brought by or on behalf of minors who allegedly were abused by people they met on MySpace).

[3]*Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001).

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(which was a precursor to today's social networks) of photos and videotapes that depicted the minor plaintiff, where AOL neither warned the pedophile to stop nor suspended his service. These cases underscore that to the extent one user seeks to hold a network liable for the misconduct of another user the claim will often be treated as premised on the network's role as a "publisher or speaker" and therefore deemed preempted. Similarly, in *Saponaro v. Grindr, LLC*,[4] the court held that a Grindr user's claims against the social network for negligence and negligent infliction of emotional distress arising out of his arrest for engaging in a sexual encounter with a minor who used the service to arrange the encounter were preempted by the CDA. In that case, the court held that a questionnaire that users of the all-male online geo-social networking app were required to complete, which asked them to "answer questions about themselves," post pictures, and suggested content from a dropdown menu, was a neutral tool because the questionnaire did not solicit information that "facially violate[d] a state or federal statute," even if the information facilitated unlawful sexual contacts between users.

The Second Circuit likewise affirmed the lower court's rejection of claims against Grindr, based on section 230(c)(1), in a case where the plaintiff sought to plead around the CDA by alleging that the app was a defectively manufactured product. In *Herrick v. Grindr, LLC*,[5] the court affirmed dismissal of product liability, negligence, and intentional and negligent infliction of emotional distress claims, based on the CDA, in a suit brought by a former user, whose former boyfriend impersonated him on the Grindr app in a catfishing campaign. In that case, the plaintiff had argued that the Grindr mobile app was a defectively designed and manufactured product because it lacked built-in safety features to prevent impersonating profiles and other dangerous conduct, and that Grindr wrongfully refused to search for and remove the impersonating profiles. In affirming the district court's order rejecting these arguments, the Second Circuit explained that plaintiff's "manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred

[4]*Saponaro v. Grindr, LLC,* 93 F. Supp. 3d 319 (D.N.J. 2015).

[5]*Herrick v. Grindr, LLC*, 765 F. App'x 586 (2d Cir. 2019), *aff'g*, 306 F. Supp. 3d 579, 588-93 (S.D.N.Y. 2018).

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by § 230."[6] The appellate panel also rejected the argument that Herrick's claims were outside the scope of CDA preemption because Grindr had a duty to warn, monitor, or remove the offending content.[7]

In *Doe v. SexSearch.com*,[8] the district court had held that the CDA preempted common law tort and contract claims brought by an anonymous user of an "adult" dating service based on the service's failure to prevent minors from joining, but the Sixth Circuit ultimately affirmed the court's dismissal based largely on SexSearch's Terms and Conditions, without reaching the issue of the CDA's applicability. In *SexSearch.com*, the plaintiff had met and had sex with another user of the SexSearch site who turned out to be 14 years old. Doe was arrested and sued SexSearch for a variety of claims, arguing that SexSearch was liable because it purported to only allow adults 18 years or older to join. The Sixth Circuit affirmed the district court's order granting the defendant's motion to dismiss, relying principally on the warranty disclaimers in SexSearch's Terms and Conditions, which, among other things, provided that SexSearch could not "guarantee, and assume[s] no responsibility for verifying, the accuracy of the information provided by other users of the Service."[9]

The court ruled that SexSearch's Terms and Conditions were enforceable, and not unconscionable, finding, among other things, that limiting liability to the $29.95 cost of membership was reasonable in light of the risks faced by the service. Among other things, the court identified those risks as "arrest, diseases of various sorts, and injuries caused by irate family members or others may be the result of such hedonistic sex."[10]

The court dismissed Doe's fraudulent misrepresentation claim because it held he was not justified in relying on the

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[6] *Herrick v. Grindr, LLC*, 765 F. App'x 586, 590 (2d Cir. 2019).

[7] In addition to finding Herrick's duty to warn claims preempted by the CDA, the court found that Herrick failed to plead causation. *See Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019).

[8] *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007), *aff'd on other grounds*, 551 F.3d 412, 416 (6th Cir. 2008).

[9] *Doe v. SexSearch.com*, 551 F.3d 412, 417 (6th Cir. 2008).

[10] *Doe v. SexSearch.com*, 551 F.3d 412, 419 (6th Cir. 2008). The court's contract and unconscionability analysis is set forth in greater detail in section 21.04[1].

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statement that the service was only available to users 18 years or older based on provisions in the site's Terms and Conditions disclaiming responsibility for verifying members' ages and disclaiming any warranties, and in light of his own experience registering as a user of the site. The court explained that "having registered for the site himself, Doe knew that SexSearch merely required a user to check a box stating that he or she is at least eighteen, with no corroborating evidence required from the user and no attempt at verification made by SexSearch."[11]

Doe's claim for negligently inflicted emotional distress based on SexSearch's failure to remove the profile of the minor who Doe slept with was dismissed because to state such a claim under Ohio law a plaintiff must allege that he was aware of real physical danger to himself or another. In this case, the court explained that "Doe's alleged injuries result from embarrassment and harm to social standing and employment prospects . . . ."[12]

Doe's claim for negligent misrepresentation was dismissed because under Ohio law the tort required a showing of a special relationship, which Doe could not allege with SexSearch. Similarly, Doe's breach of warranty claim was dismissed because under Ohio law a breach of warranty claim must involve the sale of goods, not services. The court similarly rejected claims under the Ohio Consumer Sales Practices Act as at odds with the disclaimers and liability limitations plainly set forth in SexSearch's Terms and Conditions. Finally, the court dismissed Doe's failure-to-warn claim, which the court held is not available where the danger complained of is open and obvious. The court wrote that:

> Internet users' anonymity and potential for false personal representations are well known. Doe was familiar with the registration process and knew that SexSearch did nothing more than asking members to check a box indicating that they are at least eighteen. Furthermore, even if there was a duty to warn, the statement in the Terms and Conditions that SexSearch could not verify members' information could be seen as a satisfaction of that duty.[13]

Social networks also have been sued for privacy and public-

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[11] *Doe v. SexSearch.com*, 551 F.3d 412, 417 (6th Cir. 2008).

[12] *Doe v. SexSearch.com*, 551 F.3d 412, 417 (6th Cir. 2008).

[13] *Doe v. SexSearch.com*, 551 F.3d 412, 420 (6th Cir. 2008).

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ity claims and related torts arising out of phony profiles created anonymously or pseudonymously to embarrass or harass someone. Claims premised on phony profiles have been held preempted under section 230(c)(1) to the extent based on the network owner's role as publisher or speaker. A right of publicity claim, however, may or may not be preempted, depending on how the court construes the exclusion to the CDA for laws "pertaining to intellectual property."[14] The cases in this area are *Carafano v. Metrosplash.com, Inc.*,[15] where the provider was held exempt from liability (although *Carafano* was explained more narrowly in a later Ninth Circuit opinion) and *Doe v. Friendfinder Network, Inc.*,[16] where the court held that most claims brought against the social network owner were preempted but plaintiff's right of publicity could proceed).

In *Carafano v. Metrosplash.com, Inc.*,[17] the court rejected claims arising out of a third party's submission of a phony profile purporting to belong to the plaintiff. To create a profile in that case, the defendant offered a menu of detailed questions. Once a user answered the questionnaire, the defendant organized a user's responses into a profile. In *Carafano*, the Ninth Circuit rejected the argument that this amounted to the creation or development of information under section 230(f)(3), concluding that " 'the underlying misinformation' that formed the basis for the complaint was contained entirely in the responses provided by the user," rather than originating with the defendant.[18]

In *Fair Housing Council v. Roommate.com, LLC*,[19] however, an en banc panel of the Ninth Circuit expressly narrowed and recast the holding in *Carafano*, clarifying that the plaintiff's claims in that case were preempted because the interactive computer service merely asked questions, while users supplied their own responses. However, in *Roommate.com* the Ninth Circuit disavowed its suggestion

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[14]47 U.S.C.A. § 230(e)(2); *see generally supra* § 37.05[5][B].

[15]*Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119 (9th Cir. 2003).

[16]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

[17]*Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119 (9th Cir. 2003).

[18]*Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).

[19]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

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in *Carafano* that an interactive computer service was "*automatically* immune so long as the content originated with another information content provider" and cautioned that "even if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as the developer."[20]

Roommate.com involved a fair housing claim where, like *Carafano*, the network owner provided users with questions to answer from which user profiles would be generated. In *Roommate.com*, however, the questions had multiple choice answers that users were required to answer in order to post a profile. The Ninth Circuit held that Roommate.com, by supplying pre-set answers for users to select, *developed* the content provided by users and therefore was itself liable as an information content provider. In *Carafano*, the *Roommate.com* panel concluded, the CDA exemption was not lost because the form/questionnaire used in that case, unlike *Roommate.com*, was a "neutral tool" and the user, not the network provider, ultimately was the information content provider.[21]

The Ninth Circuit reaffirmed the holding for the defendant in *Carafano* but on narrower grounds—characterizing the form/questionnaire in that case as a neutral tool used by a third party to create the actionable profile where plaintiff's claim amounted to one for negligence in failing to screen. By contrast, the plaintiff's claim in *Roommate.com* centered on the very questions written by the site and used by users to create their profiles.

In a later case, *Dyroff v. Ultimate Software Group, Inc.*,[22] the Ninth Circuit relied in part on *Roommate.com* in affirming the dismissal of claims brought against a social network by the mother of a user who allegedly died from an overdose of heroin laced with fentanyl, which he had obtained from someone he met on the social network, where the deceased user had joined a group focused on heroin and posted a notice asking if anyone could help "hook him up." The social network, Experience Project, was comprised of communities

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[20]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1171 n.31 (9th Cir. 2008).

[21]*See supra* §§ 37.05[3][C], 37.05[3][D] (analyzing *Carafano* and *Roommate.com* and discussing the parameters of potential liability).

[22]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1100-01 (9th Cir. 2019).

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or groups where users anonymously shared their first-person experiences, posted and answered questions, and interacted with other users about different topics. The site used a "blank box" approach to user content and did not limit or promote the type of experiences shared. As a consequence, in the words of the appellate court, "[t]he site's 'blank box' approach to user content resulted in an array of topics and forums ranging from 'I like dogs' and 'I am going to Stanford' to 'I have lung cancer' and 'I Love Heroin.' "[23] Although the court noted that some of the site's functions—including user anonymity and grouping—promoted illegal drug sales, it held that Ultimate Software was entitled to CDA immunity because it did not create any of the content on Experience Project and merely published user posts without materially contributing to those posts.

The plaintiff had alleged that Ultimate Software acted as a publisher by using algorithms that analyzed user posts and recommended user groups that a user might be interested in joining, and automatically notifying users by email when they received messages. The appellate court rejected the argument that the provision of neutral tools was equivalent to developing content. The panel explained:

> It is true that Ultimate Software used features and functions, including algorithms, to analyze user posts on Experience Project and recommended other user groups. This includes the heroin-related discussion group to which Greer posted and (through its emails and push notifications) to the drug dealer who sold him the fentanyl-laced heroin. Plaintiff, however, cannot plead around Section 230 immunity by framing these website features as content. . . . By recommending user groups and sending email notifications, Ultimate Software, through its Experience Project website, was acting as a publisher of others' content.[24]

The appellate panel also rejected the argument that Ultimate Software developed the content by manipulating it. The court characterized the functions on Experience Project as resembling the "Additional Comments" features in *Roommate.com,* in that users were not required to disclose that they were looking for heroin or other illegal drugs (in contrast to the other form used in *Roommate.com,* where

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[23] *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1094 (9th Cir. 2019).

[24] *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019).

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"users were required to disclose information related to protected classes through discriminatory questions and answer choices."[25]). In *Dyroff v. Ultimate Software*, "users were given something along the lines of blank text boxes in which they could post and share experiences, questions, and answers. The recommendation and notification functions helped facilitate this user-to-user communication, but it did not materially contribute, as Plaintiff argues, to the alleged unlawfulness of the content."[26] In short, the court found that plaintiff could not allege that Ultimate Software "materially contributed to the content posted on Experience Project that led to Greer's death. Plaintiff cannot and does not plead that Ultimate Software required users to post specific content, made suggestions regarding the content of potential user posts, or contributed to making unlawful or objectionable user posts."[27]

The panel observed that "[w]hile the circumstances and facts of this case are no doubt tragic, . . . Ultimate Software is immune from liability under section 230 of the Communications Decency Act."[28]

By contrast, the Ninth Circuit allowed a claim to proceed against Yahoo! in *Barnes v. Yahoo!, Inc.*[29] In that case, a woman whose former boyfriend created phony profiles of her containing naked pictures that had been taken of her without her knowledge, invitations to engage in sexual intercourse and her real work address, phone number and email account, sued Yahoo! for failing to take down the phony profiles. As explained by the court, men who the plaintiff did not know were "peppering her office with emails, phone calls, and personal visits, all in the expectation of sex."[30] Barnes sent multiple take down requests to Yahoo!, but also spoke to Yahoo!'s Director of Communications, who called her and

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[25]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019).

[26]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019), *citing Fair Housing Council v. Roommate.com, LLC,* 521 F.3d 1157, 1175 (9th Cir. 2008) (*en banc*).

[27]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019).

[28]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1094 (9th Cir. 2019).

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

[30]*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009).

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promised to "personally walk" her statement over to the division responsible for removing unauthorized profiles and that Yahoo! would take care of it. The Ninth Circuit concluded that plaintiff's negligent undertaking claim was preempted by the CDA but ruled that her quasi-contractual promissory estoppel claim, based on the representations of the Director of Communications which plaintiff alleged she relied on to her detriment, was not preempted by section 230(c)(1) because it was not premised on publication or speaking. In so ruling, the Ninth Circuit was careful to explain that it was not opining on whether the claim might be preempted by section 230(c)(2)(A), which Yahoo! had not raised in its appeal.[31] Indeed, on remand, if the conduct of the Director of Communications were deemed to constitute "any action voluntarily taken in good faith" to restrict access to or the availability of objectionable content then the claim certainly would be preempted. The Good Samaritan exemption was created expressly to encourage interactive computer service providers and users to act as Good Samaritans, free from the liability that in the physical world otherwise might attach when a Good Samaritan attempts to help but fails to do so or even makes matters worse.[32]

Doe v. Friendfinder Network, Inc.[33] involved a woman whose photo and biographical information were used in a phony profile on *Adultfriendfriender.com*, which billed itself as "the World's Largest SEX and SWINGER personal community." The phony profile for "petra03755" was online for more than a year before the plaintiff learned about it, during which time others in her social circle had seen and discussed it. After the plaintiff learned about the profile, she contacted the defendants who removed it. She objected, however, that when other members attempted to access the profile after it had been removed, they received the message, "Sorry, this member has removed his/her profile" rather than communicating that the profile had been false and unauthorized. Plaintiff also objected that teasers for the phone profile (including her true biographical information) were used as advertisements on other sites, including other

[31] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1109 (9th Cir. 2009).

[32] *See supra* § 37.05[4] (discussing the case at greater length as well as contrary authority).

[33] *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

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adult sites, when other people logged on from the same area in New Hampshire.

Following *Metrosplash*, the court ruled that because defendants merely published content supplied by another information content provider—"petra03755"—she "cannot call the defendant to answer for that under state law."[34] Analogizing the case to *Metrosplash*, the court rejected the argument that allowing a user to select from a pre-set menu of "sexual responses" in creating a profile made AdultFriendFinder.com an information content provider. The court also rejected the argument that AdultFriendFinder.com could be held liable for re-posting the profile on other sites or using it in "teasers" or other advertisements. "Because 'petra03755' was the source of the allegedly injurious matter in the profile, then, the defendants cannot be held liable for 'reposting' the profile elsewhere without impermissibly treating them as 'the publisher or speaker of . . . information provided by another information content provider."[35] Relying on *Zeran v. America Online, Inc.*,[36] as approved in *Universal Communication Systems, Inc. v. Lycos*,[37] the court further wrote that the fact that defendants allegedly learned that the profile was false and unauthorized before re-posting it does not bring their conduct outside the protection of the Good Samaritan exemption because notice of the unlawful nature of information provided is not enough to make it the service provider's own speech.[38] Similarly, the court rejected the argument that allegedly "slight" modifications to the profile were made when it was re-posted to other sites since immunity as a publisher extends to the exercise of a publisher's traditional editorial functions.

The court ruled that while the CDA preempted plaintiffs'

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[34]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294 (D.N.H. 2008). It is noteworthy that this opinion issued on March 27, 2008, while the Ninth Circuit's en banc decision in *Roommate.com* was filed on April 3, 2008. The plaintiff in *FriendFinder Network* had not challenged defendants' status as an interactive computer service provider.

[35]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 295 (D.N.H. 2008), *citing* 47 U.S.C.A. § 230(c)(1).

[36]*Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[37]*Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

[38]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 295 n.7 (D.N.H. 2008).

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privacy claims (for intrusion on her solitude, public disclosure of private facts and false light), it did not preempt her right of publicity claims.[39] Needless to say, even absent the exemption, it is not entirely clear that a person whose identity was misappropriated in a phony social network profile could prevail on a vicarious liability claim against a social network.[40]

Friendfinder Network underscores that where intellectual property claims are asserted against a social network, the CDA exemption may not apply. While *Friendfinder Network* was well reasoned and is consistent with one reading of the statute and a subsequent Third Circuit opinion,[41] in the Ninth Circuit right of publicity claims (and other state IP causes of action) brought against interactive computer service providers and users would be deemed preempted based on the Ninth Circuit's interpretation of the CDA as excluding only *federal* intellectual property claims.[42]

Even a right of publicity claim in the Ninth Circuit, however, might not be preempted if under *Roommate.com* the social network was somehow found liable as the developer of the content. As noted above, the Ninth Circuit held that the defendant in *Roommate.com* did not enjoy full CDA immunity to the extent plaintiff's claims were based on user profiles that were generated by the questions and answers that the defendant itself had written. The Ninth Circuit made clear that Roommate.com did not lose its protection for all purposes or all claims, and indeed held it exempt for certain aspects of its business.[43] Hence, both Facebook and LinkedIn were unable to obtain dismissal of right of publicity suits brought in a district court in the Ninth Circuit al-

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[39]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302-03 (D.N.H. 2008). This aspect of the decision is addressed in section 37.05[5][B]. Plaintiff's motion for reconsideration was denied. *See Doe v. Friendfinder Network, Inc.*, 2008 DNH 98, 2008 WL 2001745 (D.N.H. May 8, 2008).

[40]*See supra* § 37.05[5][B]; *infra* chapter 12.

[41]*See Hepp v. Facebook, Inc.*, 14 F.4th 204, 211-15 (3d Cir. 2021) (holding, in a 2-1 ruling issued over a strong dissent, that plaintiff's state law right of publicity claim was not preempted by the CDA because "Section 230 does not preclude claims based on state intellectual property laws."); *see generally supra* § 37.05[5][B] (analyzing the circuit split).

[42]*See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *see generally supra* § 37.05[5][B].

[43]*See supra* § 37.05[3][C].

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leging that these social networks *developed* the content they used in reproducing user profile data and pictures uploaded by users for advertisements, in the case of Facebook,[44] and reminder emails sent by LinkedIn to people who had already been invited to join LinkedIn by their friends.[45] The district court's analysis of *development* in these cases likely is more expansive than what courts in other jurisdictions, including the First, Second, Fourth and Sixth Circuits, would have applied.[46] On the other hand, outside the Ninth Circuit and district courts in Pennsylvania it is not clear that right of publicity claims in fact would be deemed potentially preempted by the CDA.[47]

The potentially conflicting interpretations of when an interactive computer service provider may be deemed an information content provider and whether a CDA claim preempts state IP claims may mean that the outcome of a given case could be different depending on where suit is brought and what law is applied. From the standpoint of a social network, however, the way to minimize the risk of liability under existing case law is clear. Social networks should avoid building user profiles beyond providing blank boxes and lots of white space for users to fill with their own unprompted text. The more a network tailors answers (or potentially even asks certain very specific questions) the greater the risk of liability under *Roommate.com*, at least to the extent that the answers to specific questions are required and the alternative answers predetermined by the provider.

Where a social network deletes or removes content it should be immune from liability by analogy to an editor's traditional functions.[48] Thus, in *Riggs v. MySpace, Inc.*,[49] a Ninth Circuit panel, in an unreported decision, dismissed claims for negligence and gross negligence as preempted by the CDA in a case brought over MySpace's alleged deletion of celebrity imposter user profiles. The CDA also was found at least partially applicable to a suit brought by a YouTube

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[44]*See Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011); *supra* § 37.05[5][B] (discussing the case).

[45]*Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1246-49 (N.D. Cal. 2014); *supra* § 37.05[5][B] (discussing the case).

[46]*See supra* § 37.05[3][C].

[47]*See supra* § 37.05[5][B].

[48]*See supra* § 37.05[3].

[49]*Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011).

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user alleging that YouTube improperly removed its video for allegedly inflating the video's view counts.[50]

By contrast, where a social network itself is alleged to have created the user profile, the CDA would not provide an exemption. Thus, in *Anthony v. Yahoo! Inc.*,[51] the court held that Yahoo! was not entitled to benefit from the Good Samaritan exemption where the plaintiff alleged that it, rather than third parties, created false profiles to induce plaintiff to maintain his membership on its dating site. While it is questionable whether the plaintiff would be able to prove the allegations made in *Anthony*, they were deemed sufficient to plead around the CDA for purposes of a motion to dismiss (at least under the standards applied in 2006, which pre-date the tougher requirements to state a claim imposed by the U.S. Supreme Court in *Ashcroft v. Iqbal*[52] and *Bell Atlantic Corp. v. Twombly*[53]).

Similarly, in the Ninth Circuit the CDA may not apply in narrow circumstances where a social network fails to warn a user about a known danger, where the danger is learned about offline. In *Doe No. 14 v. Internet Brands, Inc.*,[54] the Ninth Circuit held that the CDA did not bar a claim by an aspiring model against the owners of Model Mayhem, a social networking site for people in the modeling industry, for its alleged negligence in failing to warn her about two individuals who used the website as part of a scheme to lure her to a fake audition, where they proceeded to rape her. In that case, the site owner allegedly had actual knowledge of the threat posed by two individuals (Lavont Flanders and Emerson Callum) based on past misconduct, as evidenced by the fact that Internet Brands had sued the former owners of Model Mayhem in 2010 for their failure to disclose the potential for civil suits arising from Flanders' and Callum's

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[50]*See Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 WL 6540452, at *7-8 (N.D. Cal. Nov. 2, 2016) (dismissing plaintiff's claim for intentional interference as preempted by the CDA, but allowing plaintiff's claim for breach of the implied covenant of good faith and fair dealing to proceed under *Barnes v. Yahoo*).

[51]*Anthony v. Yahoo Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006).

[52]*Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

[53]*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007); *see generally infra* § 57.04[1] (analyzing these cases and their impact on pleading standards).

[54]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016).

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prior misconduct towards models who posted profiles on the site. As subsequently clarified in an amended opinion, the defendant's alleged knowledge, which formed the basis for plaintiff's duty to warn claim, "was obtained by Internet Brands from an outside source, not from monitoring postings on the Model Mayhem website."[55] Liability, the appellate panel emphasized on reconsideration, was not premised on Internet Brands learning of "predators' activity from any monitoring of postings on the website . . ." or from failing "to monitor postings at issue." *Id.* at 851.[56] The Ninth Circuit panel hence characterized the suit as one where the plaintiff did not seek to hold Internet Brands liable as a publisher or speaker, but rather for its own failure to warn her about how third parties targeted and lured victims through Model Mayhem, which the defendant allegedly learned about offline. The court further explained that "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content. Any obligation to warn could have been satisfied without changes to the content posted by the website's users."[57] The court held that because section 230(c)(1) only bars liability that treats a website as a publisher or speaker of content provided by somebody else, "[a]n alleged tort based on a duty that would require . . . a self-produced warning therefore falls outside the scope of section 230(c)(1)."[58]

Doe No. 14—as clarified on reconsideration that the duty

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[55]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 849 (9th Cir. 2016). *Doe No. 14* was decided in 2014, withdrawn in 2015 in response to a motion for reconsideration supported by amicus filings, and reissued in 2016 with edits to make clear that the duty to warn found not preempted in *Doe No. 14* arose from information learned offline. *See Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), *reh'g granted, op. withdrawn*, 778 F.3d 1095 (9th Cir. 2015), *replaced by*, 824 F.3d 846 (9th Cir. 2016).

[56]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016).

[57]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016). The appellate panel in *Doe No. 14* distinguished *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) as a case where the tort duty arose from a site's alleged failure to adequately regulate access to user content, rather than a duty to warn. *See Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016); *supra* § 37.05[1][C] (criticizing this aspect of the court's ruling).

[58]*Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016); *see also Beckman v. Match.com, LLC*, 668 F. App'x 759, 760 (9th

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to warn in that case was not preempted because it was based on information obtained offline, not online, and not partially online and offline—creates a very narrow exception that is not likely to arise frequently in litigation.

The Second Circuit emphasized this point as well in rejecting the argument that a mobile dating app provider could be held liable for product liability and other claims based on a duty to warn in *Herrick v. Grindr, LLC*,[59] explaining that "in *Internet Brands*, there was no allegation that the defendant's website transmitted potentially harmful content; the defendant was therefore not an 'intermediary' shielded from liability under § 230."[60]

Doe No. 14 is analyzed more extensively in section

Cir. 2016) (an unreported memorandum opinion, remanding a case for further consideration based on *Doe No. 14*, where plaintiff's counsel represented at oral argument that if granted leave to amend, plaintiff could allege that Match.com had actual knowledge that plaintiff's attacker had attacked other women using Match.com prior to his attack on the plaintiff, because *Doe No. 14* established that, "at the pleading stage, the CDA did not preclude a plaintiff from alleging a state law failure to warn claim against a website owner who had obtained information 'from an outside source about how third parties targeted and lured victims' through that website platform . . . [and] [i]mportantly, Doe's claim did not seek to impose liability for the website owner's role as a 'publisher or speaker' of third party content, for its failure to remove that content, or for its failure to monitor third-party content on its website.").

[59]*Herrick v. Grindr, LLC*, 765 F. App'x 586 (2d Cir. 2019).

[60]*Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019), *citing Doe No. 14 v. Internet Brands, Inc*., 824 F.3d 846, 852 (9th Cir. 2016). In *Herrick,* the Second Circuit held that Herrick's failure to warn claim was "inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content provided by his ex-boyfriend; accordingly, it is barred by § 230." *Herrick v. Grindr,* 765 F. App'x at 591.

Beyond the CDA, the Second Circuit's opinion in *Herrick v. Grindr* underscores the potential weakness of duty to warn cases premised on software, website or mobile app tools. The panel, ruling in the alternative, held that the plaintiff could not allege causation. It explained:

> [I[nsofar as Herrick faults Grindr for failing to generate its own warning that its software could be used to impersonate and harass others, the claim fails for lack of causation. *See Estrada v. Berkel, Inc*., 14 A.D.3d 529, 530, 789 N.Y.S.2d 172 (2005) (observing that causation is element of failure to warn claim). Since, as the Amended Complaint admits, Herrick deactivated his Grindr account in 2015 (over one year before any impersonation or harassment), any purported failure to warn Herrick when he first downloaded Grindr in 2011 is unrelated to his ex-boyfriend's subsequent use of the app. In sum, there is no basis to infer from the Amended Complaint that Grindr's failure to warn caused Herrick's injury.

Herrick v. Grindr, 765 F. App'x at 591.

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37.05[3][B][ii].

In *Dyroff v. Ultimate Software Group, Inc.*[61]—which is discussed earlier in this section in connection with development—the Ninth Circuit affirmed dismissal of the duty to warn claim of the mother of a user of defendant's social network, who allegedly died from an overdose of heroin laced with fentanyl, which he had obtained from someone he met on the social network, holding that Ultimate Software Group, the operator of the Experience Project, owed the user no duty of care because the features of its social network challenged by the plaintiff amounted to content-neutral functions that did not create a risk of harm. Plaintiff had alleged that Ultimate Software acted as a publisher by using algorithms that analyzed user posts and recommended user groups that a user might be interested in joining, and automatically notifying users by email when they received messages. The appellate court explained that "Ultimate Software did not make Plaintiff's son, Greer, worse off because the functions Plaintiff references—recommendations and notifications—were used regardless of the groups in which a user participated. No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content."[62] Although the appellate panel rested on the premise that the social network owed no duty of care to the plaintiff's son, its analysis is steeped in CDA case law on the use of neutral tools, and the panel cited to a D.C. Circuit CDA opinion in holding that the service owed no duty of care.[63]

Ultimately, the exception created by the Ninth Circuit in

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[61]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1100-01 (9th Cir. 2019).

[62]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019). The panel also noted that California law distinguishes between *misfeasance* and *nonfeasance,* emphasizing that what was alleged in *Dyroff* was nonfeasance. It explained:

> Misfeasance is when a defendant makes the plaintiff's position worse while nonfeasance is when a defendant does not help a plaintiff. *Lugtu v. Cal. Highway Patrol,* 26 Cal. 4th 703, 716, 110 Cal. Rptr. 2d 528, 28 P.3d 249 (2001). Misfeasance, unlike nonfeasance, creates an ordinary duty of care where none may have existed before. *See id.*

Dyroff, 934 F.3d 1093 at 1100-01.

[63]*Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019), *citing Klayman v. Zuckerberg,* 753 F.3d 1354, 1359-60 (D.C. Cir. 2014) ("State law cannot predicate liability for publishing decisions on

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Doe No. 14 is a very narrow one that would not be applicable in most cases absent a duty to warn that arose in the physical world, not merely by virtue of operating a social network.

Beginning with the enactment of the Justice Against Sponsors of Terror Acts (JASTA), 18 U.S.C.A. § 2333, which amended the Anti-Terrorism Act (ATA), 18 U.S.C.A. § 2333(a) to allow for aiding and abetting liability, and which took effect when Congress overrode President Obama's veto on September 28, 2016, social networks have been sued in a number of cases alleging that various acts of terror were facilitated by social media platforms. These cases have sought to hold social media services liable for third party content shared on their platforms. The CDA has been held to preclude claims against social networks for providing a forum for terrorists, for allegedly failing to take down material provided by terrorists, and for providing or using neutral tools that allegedly promoted acts of terrorism (or defendants otherwise have prevailed based on lack of causation).[64]

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the mere existence of the very relationship that Congress immunized from suit. In other words, simply invoking the label "special relationship" cannot transform an admittedly waived contract claim into a non-preempted tort action.").

[64] *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65-71 (2d Cir. 2019) (holding that the claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under the Anti-Terrorism Act and the Justice Against Sponsors of Terrorism Act ("JASTA"), 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, were precluded by the CDA, because plaintiffs sought to hold Facebook liable as a publisher of content by Hamas posted to Facebook, and for allegedly not removing that content, and because Facebook's use of algorithms to promote, arrange, and distribute third party content did not change its status as a publisher or amount to development), *cert. denied*, 140 S. Ct. 2761 (2020); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, in a suit brought by the surviving family members of a victim of an ISIS terrorist attack in Paris, and rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888-92 (N.D. Cal. 2017) (dismissing with prejudice the

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While suits against social networks today over user content usually are unavailing, victims may have claims against those directly responsible under tort laws or for privacy or publicity violations.[65] Those responsible for creating phony profiles also may face criminal sanctions for fraud or in the case of revenge porn.[66]

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claims of a police officer and a deceased officer's father, under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), alleging liability by Twitter, Google, and Facebook, for providing material support to Hamas, a Palestinian entity designated as a foreign terrorist organization, primarily in the form of access to defendants' online social media platforms, because plaintiffs had not plausibly alleged a causal connection between the shooting and defendants' alleged conduct, and because the Communications Decency Act immunized most if not all of the conduct at issue); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1157-71 (N.D. Cal. 2017) (dismissing, as precluded by 47 U.S.C.A. § 230(c)(1), the claims of family members of a victim of the November 2015 ISIS terrorist attack in Paris against Google under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), based on Google's ownership and operation of the YouTube platform, which plaintiffs alleged provided material support to terrorists, in an early opinion in a case that subsequently was decided by the Ninth Circuit)); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), with prejudice, holding that (1) liability for providing an account amounts to an allegation that Twitter failed to prevent ISIS from disseminating content through the Twitter platform; and (2) Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (affirming dismissal where the plaintiffs could not allege proximate causation); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016) (dismissing plaintiffs' Complaint with leave to amend, holding Twitter immune under the CDA from liability for a claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), for allegedly providing material support to the Islamic State of Iraq and Syria (ISIS), because ISIS uses Twitter to disseminate its official media publications, raise funds and recruit users); *see generally supra* §§ 37.05[1][C], 37.05[3][D][v] (analyzing these cases and claims in greater detail).

[65]*See supra* chapter 12.

[66]The separate phenomenon of revenge porn, and laws used to punish and deter the practice, is addressed in section 51.04[2]. As detailed in section 51.04[2][A], the revenge porn statutes enacted in Arizona, Colorado, Florida, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, and Wisconsin, contain express carve outs for claims against interactive computer service providers (which otherwise potentially could have been preempted by the CDA).

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37.05[7] Procedural Issues—When to Raise the CDA Defense

The applicability of the immunity provided by section 230 potentially may be determined in federal court at the outset of a case by a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted[1] (which asks

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[Section 37.05[7]]

[1]*See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, and Massachusetts Anti—Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, § 50, as precluded by section 230(c)(1), in an opinion that was subsequently abrogated with respect to the federal trafficking statute, by the enactment of 47 U.S.C.A. § 230(e)(5)); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (affirming dismissal of claims for failure to state a claim because the defendant's alleged activities fell squarely within those that Congress intended to immunize); *Force v. Facebook, Inc.,* 934 F.3d 53, 63, 65-71 & n.15 (2d Cir. 2019) (affirming in part the lower court's order dismissing claims of plaintiffs—victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas—for aiding and abetting Hamas's acts of international terrorism under 18 U.S.C.A. § 2333, providing material support for terrorism pursuant to 18 U.S.C.A. § 2339A, and providing material support or resources to a designated foreign terrorist organization pursuant to 18 U.S.C.A. § 2339B, because plaintiffs sought to hold Facebook liable as a publisher of content by Hamas posted to Facebook, and for allegedly not removing that content, and where Facebook's use of algorithms to promote, arrange, and distribute third party content did not change its status as a publisher or amount to development; rejecting the argument "that the district court prematurely applied Section 230(c)(1), an affirmative defense, because discovery might show that Facebook was indeed a 'developer' of Hamas's content. . . . [T]he application of Section 230(c)(1) is appropriate at the pleading stage when, as here, the 'statute's barrier to suit is evident from the face of' plaintiffs' proposed complaint."), *cert. denied*, 140 S. Ct. 2761 (2020); *Herrick v. Grindr, LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (affirming dismissal under section 230(c)(1) of product liability and other claims alleging that Grindr's mobile app was a defectively designed and manufactured product because it lacked built-in safety features; "the manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and [thus] are barred by § 230."); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 26-28 (2d Cir. 2015) (affirming dismissal under the CDA of plaintiffs' defamation claim against GoDaddy, as the host for a website where allegedly defamatory third party material was posted, based on its refusal to remove the material); *Obado v. Magedson*, 612 F. App'x 90, 91-94 (3d Cir. 2015) (affirming dismissal of claims for defamation, intentional and negligent infliction of emotional distress and invasion of privacy against Yahoo, Google, Neustar, eNom, Intelius, Switchboard LLC & Whitepages, Inc.

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and Xcentric Ventures for displaying, distributing or linking to third party blog posts about the plaintiff); *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015) (affirming dismissal of Kabbaj's claims against Google, Amazon, and Yahoo for defamation, tortious interference with contract, and negligent and intentional infliction of emotional distress under the CDA); *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir.) (affirming dismissal of plaintiff's complaint because section 230 barred a tort action against AOL for its allegedly negligent failure to remove defamatory material from a chat room on its network), *cert. denied*, 540 U.S. 877 (2003); *Westlake Legal Grp. v. Yelp, Inc.*, 599 F. App'x 481, 485 (4th Cir. 2015) (affirming dismissal of plaintiffs' claim for defamation against a customer review site on which a third party allegedly posted defamatory comments because operating an automated system that filtered reviews was a traditional editorial function that did not render Yelp an information content provider); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (dismissing plaintiff's claim for defamation based on material posted by a third party); *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) (affirming dismissal of a suit brought against the Texas Office of Court Administration, Google and Fastcase by a man who falsely appeared to be listed as having been convicted of indecency with a child in search results because of the way the Texas Advance Sheet previewed information); *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 971 F.3d 747, 751-53 (8th Cir. 2020) (affirming dismissal of trade libel claim based on user comments about plaintiff's test preparation service posted on defendant's online forum for nursing professionals); *Gonzalez v. Google LLC*, 2 F.4th 871, 892-97 (9th Cir. 2021) (affirming dismissal of plaintiffs' claims under the Anti-Terrorism Act as barred by the CDA or for failure to state a claim, rejecting the argument that Google algorithms that recommended content to users based on their viewing history and what was known about them amounted to development where the algorithms were merely neutral tools, while holding that Google was not entitled to CDA immunity to the extent it allegedly shared revenue with a third party that stood accused of violating the civil components of various anti-terrorist laws); *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-99 (9th Cir. 2020) (affirming dismissal of plaintiff's state law claims seeking to impose liability on Facebook for "allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor"), *aff'g*, No. C 18-05159 JSW, 2019 WL 11288576 (N.D. Cal. June 18, 2019) (dismissing claims for intentional interference with prospective economic advantage, violation of California Business and Professions Code section 17200 *et seq.*, civil extortion, and fraud for Facebook's devaluation of Plaintiff's online pages); *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-1101 (9th Cir. 2019) (affirming dismissal of claims against The Experience Project website for negligence, wrongful death, premises liability, civil conspiracy, unjust enrichment and a violation of the Drug Dealer Liability Act, Cal. Health & Safety Code §§ 11700, *et seq.,* as preempted by section 230(c)(1), in a suit brought by the mother of a man who participated in an anonymous heroin-related forum, where the deceased user solicited and found someone on the forum to sell him heroin, which turned out to have been laced with fentanyl, which caused his death, because Ultimate Software, through its Experi-

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ence Project, acted as a publisher in recommending user groups and sending email notifications of posts, and did not become a developer of content (or owe a duty of care to the decedent or collude with the drug dealer) by providing neutral tools that a user could exploit to create a profile or perform a search); *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (affirming dismissal with prejudice of plaintiff's Title II Civil Rights complaint where plaintiff sought to "hold Facebook liable as a publisher for hosting, and later blocking, SFJ's online content."); *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588 (9th Cir. 2017) (affirming dismissal of plaintiff's claims for defamation, libel, false light, public disclosure of private facts, intrusion upon seclusion, intentional and negligent infliction of emotional distress, negligent supervision and retention, and California's Unfair Competition Law (UCL), "because the basis for each of these claims is Facebook's role as a 'republisher' of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act."); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016) (affirming dismissal of a defamation claim brought against Yelp over unfavorable customer reviews where the defendant had "apparently hoped to plead around the CDA to advance the same basic argument that the statute plainly bars: that Yelp published user-generated speech that was harmful to Kimzey. . . . We decline to open the door to such artful skirting of the CDA's safe harbor provision."); *Beckman v. Match.com, LLC*, 668 F. App'x 759 (9th Cir. 2016) (affirming dismissal of claims for negligent misrepresentation, violation of the Federal Trade Commission Act (unfair trade practices) and negligence *per se* arising out of a brutal attack on the plaintiff by a man she met on Match.com, but remanding for further consideration plaintiff's potential failure to warn claim), *aff'g in part*, 2:13-CV-97 JCM NJK, 2013 WL 2355512 (D. Nev. May 29, 2013); *Silver v. Quora, Inc*., 666 F. App'x 727 (10th Cir. 2016) (affirming dismissal of claims of libel and defamation brought by an investment banker against Quora, a question and answer website, over postings by two users, who allegedly used fake names in violations of Quora's Terms and Conditions to post allegedly defamatory statements about the plaintiff), *cert. denied*, 137 S. Ct. 2305 (2017); *Getachew v. Google, Inc.*, 491 F. App'x 923, 925-26 (10th Cir. 2012) (affirming dismissal of negligence and intentional infliction of emotional distress claims based on the results displayed by search engine queries and links to third party content about him because "Google cannot be held liable for search results that yield content created by a third party."); *Marshall's Locksmith Service Inc. v. Google, LLC,* 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of the Sherman Act I (conspiracy) and II (monopolization) and Lanham Act false advertising claims of 14 locksmith companies, which alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue, based on CDA immunity, where plaintiffs' theory of liability was premised on third party content (from the scam locksmiths) and defendants merely operated neutral map location services that listed companies based on where they purported to be located); *Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018) (affirming dismissal of plaintiff's claims against Google for defamation, tortious interference with a business relationship, and intentional infliction of emotional distress, premised

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on Google's refusal to remove a user's blog post, in alleged violation of its "Blogger Content Policy," as preempted by section 2301(c)(1)); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (affirming dismissal of negligence and intentional assault claims against Facebook and its founder because they did not create or provide the Facebook page that allegedly promoted religious hate and violence; "Preemption under the Communications Decency Act is an affirmative defense, but it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint."); *Brock v. Zuckerberg,* 20-cv-7513 (LJL), 2021 WL 2650070, at *4-5 (S.D.N.Y. June 25, 2021) (dismissing plaintiff's N.Y. state law claims against Facebook for allegedly removing and blocking content); *Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437-LB, 2021 WL 783524, at *5-6 (N.D. Cal. Mar. 1, 2021) (dismissing plaintiffs' California right of publicity claim under Cal. Civ. Code § 3344, and claims for intrusion upon seclusion, unjust enrichment and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200, arising out of defendant's use of their yearbook photos and related information in its subscription database, based on CDA immunity pursuant to 47 U.S.C.A. § 230(c)(1)); *Morton v. Twitter, Inc.*, Case No. CV 20-10434-GW-JEMx, 2021 WL 1181753, at *4-5 (C.D. Cal. Feb. 21, 2021) (dismissing plaintiff's right of publicity claim under Cal. Civ. Code § 3344, unfair competition, false light invasion of privacy, and other non-copyright claims brought against Twitter by a nude model who alleged that Twitter had failed to suspend or terminate the account of SpyIRL, an online purveyor of pornography that had disseminated her images, without authorization, in Tweets soliciting subscriptions to its website); *Brodie v. Green Spot Foods, LLC*, 503 F. Supp. 3d 1, 6 (S.D.N.Y. 2020) (dismissing plaintiff's claim against Amazon.com for deceptive practices and false advertising under N.Y. Gen. Bus. Law §§ 349 and 350 as barred by the CDA, in case where plaintiff allegedly suffered injuries after consuming food featured as an "Amazon's Choice" product, where the advertisements at issue were provided by Green Spot Foods); *Ripple Labs Inc. v. YouTube LLC*, 2020 WL 6822891 (N.D. Cal. Nov. 20, 2020) (dismissing, with leave to amend, claims arising out of YouTube's alleged failure to remove impersonations of Ripple's cryptocurrency enterprise from its video-sharing platform); *Jones v. Twitter, Inc.*, Civil No. RDB-20-1963, 2020 WL 6263412, at *3-4 (D. Md. Oct. 23, 2020) (dismissing with prejudice eleven claims arising out of Twitter's decision to permanently suspend plaintiff's Twitter account for violating Twitter's policies against hateful conduct, based on Tweets that plaintiff directed at Trevor Noah and *The Daily Show with Trevor Noah*); *Zimmerman v. Facebook, Inc.*, Case No. 19-cv-04591-VC, 2020 WL 5877863, at *1 (N.D. Cal. Oct. 2, 2020) (dismissing, without leave to amend, "claims relating to the defendants' decision to block their Facebook profiles . . . [as] barred by the Communications Decency Act . . ."), *appeal dismissed,* No. 20-17054, 2020 WL 9257959 (9th Cir. Nov. 30, 2020); *Brikman v. Twitter, Inc.*, 19-cv-5143 (RPK) (CLP), 2020 WL 5594637, at *2-4 (E.D.N.Y. Sept. 17, 2020) (dismissing, with prejudice, pro se plaintiffs' defamation claims arising out of Tweets by allegedly disgruntled members of plaintiffs' synagogue); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1249-61 (S.D. Fla. 2020) (dismissing, with prejudice, minor plaintiff's claims under the Trafficking Victims Protection Act arising out of a mobile messaging service's alleged failure to warn or

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implement sufficient policies to protect underage users from sexual exploitation because her claim was premised on third party content and did not satisfy the narrow exception created by FOSTA in 47 U.S.C.A. § 230(e)(5)(A) for surmounting CDA immunity by alleging knowing participation); *J.B. v. G6 Hospitality, LLC*, Case No. 19-cv-07848-HSG, 2020 WL 4901196, at *3-10 (N.D. Cal. Aug. 20, 2020) (dismissing without leave to amend plaintiff's state law claims of negligence per se, civil conspiracy and beneficiary liability under California's Child Trafficking Victims Protection Act, Cal. Civ. Code § 52.5, arising out of Craiglist's alleged failure to monitor advertisements for illegal sex trafficking of a minor, and dismissing with leave to amend plaintiff's sex trafficking claim under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. § 1595, as excluded from the scope of CDA immunity); *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209 (N.D. Cal. Aug. 14, 2020) (dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims and claim for declaratory relief, as barred by section 230(c)(1) of the CDA, because they arose out of defendant's removal of fitness and health videos containing information about unregulated substances that had not yet been approved by the FDA, but denying defendant's motion to dismiss claims under section 230(c)(2) where plaintiff alleged bad faith, and holding that plaintiff's claims for breach of the implied covenant of good faith and fair dealing was not barred by section 230(c)(1), and therefore granting leave for plaintiff to file an amended breach of covenant claim if he was able to do so); *Wilson v. Twitter, Inc.*, Case No. 3:20-cv-00054, 2020 WL 3410349, at *(S.D.W. Va. May 1, 2020) (recommending dismissal, with prejudice, of plaintiff's claims under Title II of the CRA arising out of allegedly unlawful termination of his Twitter account), *report and recommendation adopted*, 2020 WL 3256820 (S.D.W. Va. June 16, 2020); *Laake v, Dirty World LLC*, No. CV-19-5444-PHX-DMF, 2020 WL 1866124, at *2-3 (D. Ariz. Apr. 14, 2020) (dismissing plaintiff's defamation claim against gossip site thedirty.com, over a user comment posted under the pseudonym *psychic vampire slayer*, as preempted by the CDA); *Asurvio LP v. Malwarebytes Inc.*, Case No. 5:18-cv-05409-EJD, 2020 WL 1478345, at *3-6 (N.D. Cal. Mar. 26, 2020) (dismissing (without leave to amend) claims of Lanham Act false advertising, business disparagement, tortious interference with contractual relations, common law unfair competition, and violation of the Texas Theft Liability Act, in a suit alleging that Malwarebytes wrongfully categorized Asurvio's software as malware or a "Potentially Unwanted Program," holding that Malwarebytes was immune under both 47 U.S.C.A. § 230(c)(1) and (c)(2)(B), for allegedly wrongly filtering and characterizing plaintiff's software as a potentially unwanted program); *Clarks v. Private Money Goldmine*, Case No.: GJH-19-1014, 2020 WL 949946, at *7-8 (D. Md. Feb. 26, 2020) (dismissing claims for fraud, breach of contract, and unjust enrichment against REI Network, LP, which operated www.privatemoneygoldmine.com, an online subscription service that connected prospective private money borrowers and lenders, FM 41, Inc., a general partner of REI, and John Douglas Smith, FM 41's president, as barred by both the statute of limitations and the CDA, in a suit arising out of an allegedly fraudulent preliminary payment scheme, where defendants hosted a platform that allowed prospective lenders to post

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their information online and interact with prospective borrowers, who paid the site a subscription fee to join); *Murguly v. Google LLC*, Civil Action No. 19-14471 (MAS) TJB), 2020 WL 907919, at *3 (D.N.J. Feb. 25, 2020) (dismissing, as barred by the CDA, the *pro se* plaintiff's claim that Google acted negligently by allegedly failing to "detect and protect against evolving online threats" and to "build the strongest security technologies into its products" in a suit where plaintiff alleged he was defrauded by a scam prompted by a Google Alert that he had set); *924 Bel Air Road, LLC v. Zillow Group, Inc.*, Case No. 2:19-CV-01368-ODW (AFMx), 2020 WL 774354, at *2-4 (C.D. Cal. Feb. 18, 2020) (dismissing as preempted by the CDA, without leave to amend, plaintiff's negligence claim in a suit arising from an unknown third party "claiming" the Zillow listing for a $100 Million property and creating a false sales record that caused the property to be removed from the 'elite status of a $100M plus property' list and allegedly shifted market perceptions about the property, over plaintiff's argument that its negligence claim was not premised on the unknown user's publication of false information but on Zillow's own allegedly "inadequate monitoring system" that allowed the user to post false content to the site, as merely another way of saying that Zillow should be held liable for republishing the user's content; "Ultimately, Bel Air's allegations boil down to a charge that Zillow must prevent users from falsely claiming a Residence Page or posting false content. Yet, reviewing each user's activity and postings to ensure their accuracy is precisely the kind of activity for which Congress intended section 230 to provide immunity."), *appeal dismissed,* No. 20-55283, 2020 WL 8910588 (9th Cir. Oct. 23, 2020); *Chukwurah v. Google, LLC*, Civil Action No. PX-19-782, 2020 WL 510158, at *2 (D. Md. Jan. 31, 2020) (dismissing pro se plaintiff's defamation claim against Google for linking to allegedly defamatory material in response to search engine queries, as immunized by the CDA); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 601-06 (S.D.N.Y. 2020) (dismissing plaintiff's claims under California and New York law, arising out of Vimeo's deletion or removal of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds*, No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021); *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116-21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's non-constitutional federal and state claims, including for damages under the California Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing, arising out of Facebook's decision to remove FAN's account, postings, and content, because using data mining to direct users to particular content, or generating revenue from content, do not amount to development); *King v. Facebook, Inc.*, Case No. 19-cv-01987-WHO, 2019 WL 4221768, at *3-5 (N.D. Cal. Sept. 15, 2019) (dismissing plaintiff's claims for removing social media posts that Facebook alleged violated its Terms of Service agreement, but allowing leave to amend to expressly allege a claim for retaliatory breach of the ToS based on the alleged treatment of his speech that was critical of Facebook, if King was able to do so); *Dipp-Paz v. Facebook*, 18-CV-9037 (LLS), 2019 WL 3205842, at *3 (S.D.N.Y. July 12, 2019) (holding that plaintiff's claim, arising from suspension of his Facebook account, was barred by the CDA); *Federal Agency of News LLC v. Facebook, Inc.*,

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395 F. Supp. 3d. 1295, 1304-08 (N.D. Cal. 2019) (dismissing without prejudice, as precluded by the CDA, the claims brought under Title II of the U.S. Civil Rights Act of 1964 and California Unruh Civil Rights Act, among others, by a Russian news site whose Facebook account was terminated in early 2018 after it was determined by Facebook that the account was controlled by the Russian government's Internet Research Agency, which according to a U.S. intelligence community report had created 470 inauthentic accounts on Facebook that were used to influence the outcome of the 2016 Presidential election); *Brittain v. Twitter, Inc.*, No. 19-CV-00114-YGR, 2019 WL 2423375 (N.D. Cal. June 10, 2019) (dismissing with prejudice plaintiffs' claims for (1) violation of the First Amendment; (2) violation of federal election law; (3) breach of contract; (4) conversion, (5) negligent infliction of emotional distress; (6) tortious interference; and (7) promissory estoppel, alleging that Twitter improperly suspended four accounts linked to Craig Brittain and his U.S. Senate campaign); *Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing with prejudice plaintiff's claims under Title II of the Civil Rights Act, the First Amendment to the U.S. Constitution, and California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51 *et seq*., and dismissing with prejudice plaintiff's related claim under California's Unlawful Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq*., to the extent it relied on allegations that Facebook removed plaintiff's posts or restricted his ability to use the Facebook platform); *Dehen v. Doe*, Case No. 17cv198-LAB (WCG), 2018 WL 4502336, at *3-4 (S.D. Cal. Sept. 19, 2018) (dismissing with prejudice state law claims against Twitter brought by a *pro se* plaintiff, who was a former University of San Diego law student, who alleged a conspiracy by defendants to impersonate and defame her online by the creation of a fake Twitter account parodying her as a fictitious Donald Trump supporter); *Jefferson v. Zukerberg,* Civil Action No. RDB-17-3299, 2018 WL 3241343, at *4-5 (D. Md. July 3, 2018) (granting defendants' motion to dismiss plaintiff's defamation claim, based on the CDA); *Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, Case No. 1:16-cv-00168, 2018 WL 1183372, at *2-3 (D. Utah Mar. 6, 2018) (dismissing plaintiff's amended defamation claim based on CDA preemption); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888-92 (N.D. Cal. 2017) (dismissing with prejudice the claims of a police officer and a deceased officer's father, under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), alleging liability by Twitter, Google, and Facebook, for providing material support to Hamas, a Palestinian entity designated as a foreign terrorist organization, primarily in the form of access to defendants' online social media platforms, because plaintiffs had not plausibly alleged a causal connection between the shooting and defendants' alleged conduct, and because the Communications Decency Act immunized most if not all of the conduct at issue); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C.A. § 2333(a), with prejudice), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (affirming dismissal where the plaintiffs could not allege proximate causation); *Lancaster v. Alphabet Inc.*, Case No. 15-cv-05299-HSG, 2016 WL 3648608 (N.D. Cal. July 8, 2016) (dismissing plaintiff's *pro se* complaint arising out of the defendants' alleged removal of videos from YouTube, as preempted by the CDA); *Advanfort Co. v. Maritime Executive,*

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LLC, Civil Action No. 1:15-cv-220, 2015 WL 4603090, at *10-11 (E.D. Va. July 28, 2015) (dismissing plaintiff's amended defamation claim as potentially preempted by the CDA, with leave to amend); *Ross v. Eightbars LLC*, Case No. 3:14-CV2610, 2016 WL 3460254 (N.D. Ohio June 24, 2016) (dismissing plaintiff's claim for libel arising out of posts about plaintiff's products on defendant's online forum); *Free Kick Master LLC v. Apple Inc.*, 140 F. Supp. 3d 975, 982-83 (N.D. Cal. 2015) (dismissing plaintiff's common law trademark infringement claim against Google Play and the Amazon AppStore, arising out of free apps they made available, as preempted by the CDA, where plaintiff did not allege that "either of them had any role whatsoever in the creation of the apps at issue, the choice of name for those apps, or any other action that would place either defendant in the role of speaker or author of the accused products."); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319 (D.N.J. 2015) (holding preempted by the CDA a Grindr user's claims against the social network for negligence and negligent infliction of emotional distress arising out of his arrest for engaging in a sexual encounter with a minor who used the service to arrange the encounter); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (dismissing with prejudice plaintiff's claims against eBay for negligence, intentional conduct, gross negligence, breach of the implied warranty of merchantability, failure to warn, breach of the duty of good faith and fair dealing, violation of the Mississippi Consumer Protection Act, violation of federal law, and punitive damages because the claims were based on publication of sales listings on eBay.com that were created by third parties); *American Income Life Insurance Co. v. Google, Inc.*, No. 2:11–CV–4126–SLB, 2014 WL 4452679 (N.D. Ala. Sept. 18, 2014) (dismissing with prejudice, as preempted by the CDA, plaintiff's claim under the Alabama Deceptive Trade Practices Act, Ala. Code §§ 8–19–1 *et seq.*, alleging that Google chose "to reward with prominent placement in all its search engine results" third party content on *scam.com* and *pissedconsumer.com*, which allegedly referred to the plaintiff as a scam, and based on the argument that Google's algorithms effectively created content about the plaintiff, which the court rejected as merely amounting to republication of third party content); *Russell v. Implode-Explode Heavy Industries Inc.*, Civil Action No. DKC 08–2468, 2013 WL 5276557, at *9 (D. Md. Sept. 18, 2013) (granting defendant IEHI's motion for summary judgment on plaintiff's claim for defamation, based on the CDA); *Evans v. Hewlett-Packard Co.,* C 13-02477 WHA, 2013 WL 4426359, at *2–3 (N.D. Cal. Aug. 15, 2013) (dismissing Pennsylvania unfair competition and trademark infringement and Pennsylvania and California right of publicity claims brought against the operators of the HP App Catalogue, an App store for Palm devices, as preempted by the CDA, because, although "cleverly-worded," the complaint "does not allege that defendants created the app at issue here. Rather, it appears that the app was created entirely by third parties."); *Gavra v. Google Inc.,* 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013) (dismissing with prejudice an attorney's claims for invasion of privacy, defamation, and "blackmail/extortion" arising out of Google's alleged failure to remove unflattering videos posted by a former client); *Regions Bank v. Kaplan,* 8:12-CV-1837-T-17MAP, 2013 WL 1193831, at *18 (M.D. Fla. Mar. 22, 2013) (dismissing claims of defamation per se and invasion of privacy arising from a "Fraud-Net" alert

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bulletin published by a third party on the Florida Bankers Association's website that allegedly contained false and defamatory statements); *Perfect 10, Inc. v. Giganews, Inc.,* CV11-07098 AHM SHX, 2013 WL 2109963, at *15-16 (C.D. Cal. Mar. 8, 2013) (dismissing with leave to amend plaintiff's California right of publicity and unfair competition claims as barred by the CDA because the pornographic images found on defendant's website originated with third parties); *Mmubango v. Google, Inc.,* CIV. A. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013) (dismissing with prejudice plaintiff's claims for defamation and negligence arising out of Google's alleged refusal to remove from its search engine links to negative statements about the plaintiff that were posted on wikiscams.com, an unrelated website); *Shah v. MyLife.Com, Inc.,* 3:12-CV-1592 -ST, 2012 WL 4863696, at *3 (D. Or. Sept. 21, 2012) (recommending that defendants' motion to dismiss be granted; holding that MyLife.com and Google, Inc. "cannot be sued for simply republishing information provided by third parties, including any claim under state law for invasion of privacy by an internet posting of personal information obtained from another party."); *Hadley v. GateHouse Media Freeport Holdings, Inc.,* Case No. 12 C 1548, 2012 WL 2866463 (N.D. Ill. July 10, 2012) (dismissing defamation claim); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (dismissing claims against eBay for strict product liability, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose, negligence, negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 *et seq*. and various related regulations, and breach of express warranty based on an eBay user's alleged sale where liability against eBay was premised on the user's sales listing); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (dismissing the claims of the victim of a child sex trafficker brought pursuant to 18 U.S.C.A. § 2255 and 18 U.S.C.A. § 1595 against the publisher of *Backpage,* where ads for sexual relations with the child had been placed, in a case pre-dating the enactment of 47 U.S.C.A. § 230(e)(5), which excludes CDA immunity for sex trafficking cases brought under 18 U.S.C.A. § 1595 except for the exemption afforded by section 230(c)(2)(A)); *Jurin v. Google Inc.*, 768 F. Supp. 2d 1064 (E.D. Cal. 2011) (dismissing without leave to amend breach of contract and breach of the duty of good faith and fair dealing claims premised on an alleged failure by Google to adhere to its AdWords policy, but declining to dismiss amended false advertising and false association claims arising out of the sale of a keyword as a sponsored link); *Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011) (dismissing a claim for defamation against an online bookseller over promotional statements for a book posted on the defendants-booksellers' websites and granting summary judgment in favor of two other booksellers who had moved on the same claim under Rule 56 instead of Rule 12), *appeal dismissed*, Appeal No. 11–7077, 2012 WL 3068437 (D.C. Cir. 2012); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (dismissing (with leave to amend) claims under the federal Computer Fraud and Abuse Act and for intentional interference with contract, intentional interference with prospective business advantage and alleged violations of California's wiretapping/eavesdropping and unfair competition statutes, as precluded by section 230(c)(2)); *Holomaxx Technologies v.*

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Yahoo!, Inc., No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in dismissing Holomaxx's virtually identical complaint against Yahoo!); *Black v. Google Inc.*, No. 10-02381 CW, 2010 WL 3222147 (N.D. Cal. Aug. 13, 2010) (dismissing a defamation claim where the plaintiffs alleged that Google "sponsored or endorsed" a third party site and failed to provide an adequate dispute resolution system for complaints about user comments), *aff'd mem.,* 457 F. App'x 622 (9th Cir. 2011); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010) (dismissing as preempted by the CDA claims for negligent and intentional interference with contractual relations and prospective economic advantage and fraud arising out of Google's use of its keyword suggestion tool in connection with its AdWords program); *Novins v. Cannon*, Civ. No. 09–5354, 2010 WL 1688695 (D.N.J. Apr. 27, 2010) (dismissing a defamation claim brought against users for allegedly republishing a defamatory web post or email); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009) (dismissing with prejudice plaintiff's amended complaint based on alleged harm from click fraud where the only contribution by Google that plaintiff could point to was Google's keyword suggestion tool which automatically suggested various words to users to purchase; "affirmative defenses routinely serve as a basis for granting Rule 12(b)(6) motions where the defense is apparent from the face of the complaint."); *Gibson v. Craigslist, Inc.,* No. 08 Civ. 7735(RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (granting Craigslist's motion to dismiss a suit by a crime victim alleging breach of duty by Craigslist in failing prevent the sale of a handgun used by its purchaser to shoot the plaintiff; "A defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion where, as here, the defense appears on the face of the complaint . . . . First, the Amended Complaint alleges that Defendant is 'an internet merchant,' . . . and Plaintiff does not appear to dispute that Craigslist is a provider of an interactive computer service . . . . Second, the Amended Complaint acknowledges that an 'unknown individual,' not the Defendant, placed the advertisement under a coded category on the Craigslist website . . . . Third, Plaintiff seeks to hold Defendant liable for its alleged failure to block, screen, or otherwise prevent the dissemination of a third party's content, i.e., the gun advertisement in question."; noting that "[a]n affirmative defense, such as section 230 immunity, is generally addressed on a Rule 12(c) motion for judgment on the pleadings or a Rule 56 motion for summary judgment . . . , but some courts have held that it is proper to evaluate a section 230 immunity defense 'in the context of a 12(b)(6) motion' where the necessary facts are apparent on the face of complaint and the immunity available under the CDA precludes a plaintiff from stating a claim . . . ."; citations omitted); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009) (granting defendant's motion to dismiss); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (dismissing a claim alleging that RipoffReport.com and its owners were liable for actively soliciting defamatory material and for keeping an allegedly defamatory post on its site after the author asked that it be removed); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (dismissing as preempted by the CDA a claim by the Independent party candidate for governor to compel Ask.com to block from its search engine a page that appeared when search results were displayed to identify him with the

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that a complaint be dismissed, either with or without prejudice, based on plaintiff's allegations and any materials incorporated by reference in the complaint) or a motion for judgment on the pleadings[2] pursuant to Rule 12(c) (which

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Communist Party); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007) (granting a Rule 12(b)(6) motion based on CDA immunity); *Supplementmarket.com, Inc. v. Google, Inc.*, No. 09-43056, 2010 WL 6309991 (Pa. Com. Pl. July 26, 2010) (dismissing with prejudice, pursuant to the CDA, claims for fraud, negligence, gross negligence, libel and defamation, harassment and negligent infliction of emotional distress arising out of Google's failure to delete allegedly libelous statements that were originally posted on the Usenet by a third-party user); *Doe v. Bates*, 35 Media L. Rep. (BNA) 1435, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (finding that a Rule 12(b)(6) motion is a procedurally proper method for determining the applicability of an affirmative defense provided by section 230); *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536–37 (D. Md. 2006) (granting an ISP's motion to dismiss because it was "clear that all the requisites for the application of the immunity provisions of the CDA are in place."); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069 (D.S.D. 2001) (granting a motion to dismiss pursuant to Rule 12(b)(6) based on the CDA); *see also Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 452–53 (E.D.N.Y. 2004) (dismissing the pro se plaintiff's tortious interference claim based on alleged search result manipulation where the plaintiff did not request further notice or discovery).

[2]*See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (affirming entry of judgment on the pleadings for AOL), *cert. denied*, 524 U.S. 937 (1998); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir.) (affirming entry of judgment on the pleadings pursuant to section 230(c)(1)), *cert. denied*, 555 U.S. 1031 (2008); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (affirming the entry of judgment on the pleadings); *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (affirming in part, reversing in part, vacating in part and remanding the lower court's entry of judgment on the pleadings); *National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (granting in part judgment on the pleadings, holding that the CDA was applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms, and explaining that while the opinion delineated what type of content would and would not be subject to the CDA the court's order was limited to embedding because "Harvard's invocation of CDA immunity" was premature, plaintiffs were not required to anticipate Harvard's affirmative defenses, and the record of exactly what content was at issue was not yet defined); *Joude v. WordPress Foundation*, No. C 14–01656 LB, 2014 WL 3107441, at *7 (N.D. Cal. July 3, 2014) (applying Perfect 10 in granting judgment on the pleadings for Automattic on plaintiff's right of publicity claim arising from user content); *Russell v. Implode-Explode Heavy Industries, Inc.,* No. 08-cv-2468, 2013 WL 5276557,

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assumes as true all factual allegations in the complaint, but disregards legal conclusions, and asks that judgment be entered for a defendant based on those assumptions) or equivalent motions in state court.[3] The CDA defense also

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at *4–9 (D. Md. Sept. 18, 2013) (granting judgment on the pleadings, holding that a website was immune from liability under state law claims brought by a Native American tribe over a blog article authored and posted by third-party that contained allegedly defamatory and libelous content about the tribe's home loan program); *Collins v. Purdue University*, 703 F. Supp. 2d 862, 877–80 (N.D. Ind. 2010) (granting judgment on the pleadings on libel and false light claims that sought to hold the defendant liable for user comments posted to its interactive website, based on alleged solicitation or encouragement to engage in defamatory conduct); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (granting judgment on the pleadings in a case where the Sheriff of Cook County had alleged that Craigslist was liable for creating a public nuisance by "causing" users to post advertisements soliciting prostitution by, among other things, creating an "adult services" section of its site and where the court rejected allegations that Craigslist knowingly arranged meetings for the purpose of prostitution and directed people to places of prostitution because "these allegations strain the ordinary meaning of the terms 'arrange' and 'direct' unless Craigslist created the offending ads" and where there was "no such allegation, and given § 230(c)(1), we cannot treat Craigslist as if it did . . . ."); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008) (granting judgment on the pleadings in favor of Comcast under the section 230(c)(2) on claims for violations of the Computer Fraud and Abuse Act, infringement of free speech, tortious interference with prospective economic advantage and deceptive or unfair practices barred by the Illinois Consumer Fraud Act, arising out of Comcast's blocking email from e360, a bulk emailer, to Comcast subscribers); *see also Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (writing that "[a]ffirmative defenses do not justify dismissal under Rule 12(b)(6); litigants need not try to plead around defenses" but proceeding as though the motion was for judgment on the pleadings under Rule 12(c) because no party objected to the lower court's reliance on Rule 12(b)(6)). The court in *Doe v. GTE Corp.* discussed the CDA extensively, ultimately concluding that the CDA was not implicated because plaintiffs had not alleged any duty on the part of the Web host company defendants to affirmatively monitor their sites and terminate customers who engaged in misconduct. The case nonetheless is frequently cited as though it had been decided under the CDA.

[3]*See, e.g.*, *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006) (California Supreme Court decision ordering dismissal of plaintiff's claims for libel and conspiracy based on both publisher and distributor liability under California's anti-SLAPP statute, based on the CDA); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 24-41, 274 Cal. Rptr. 3d 360, 368-82 (1st Dist. 2021) (affirming trial court's judgment sustaining demurrer to complaint, without leave to amend, where plaintiff had sued for breach of contract, promissory estoppel, and violation of California's unfair competition law (Bus. & Prof. Code, §§ 17200 *et seq.*), over the permanent suspension of his account for repeated hate speech violations of Twitter's Terms

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may arise in response to a motion to amend the complaint, where a defendant argues that amendment would be futile

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of Service); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833–35, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (dismissing claims on demurrer against eBay under the CDA); *Reyes v. LA Vaporworks*, No. BC618004, 2017 WL 1717406 (L.A. Cty. Sup. Ct. Feb. 16, 2017) (sustaining eBay's demurrer to plaintiff's product liability claim, based on allegedly defective vaping products offered by users of eBay's website, as preempted by the CDA); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 755 A.2d 1000, 1003–04 (Super. Ct. 2000) (granting, on the basis of section 230, AOL's motion to strike the negligence and breach of contract counts for failing to state a claim upon which relief can be granted, and holding that AOL was a "service provider of Internet access" and could not be held liable for emails sent by AOL users); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1016–17 (Fla. 2001) (Florida Supreme Court decision affirming dismissal because section 230 immunized AOL from claims that the company should have been held liable for a pedophile's sales and marketing in an AOL chatroom of photos and videotapes that depicted the minor plaintiff, where AOL neither warned the pedophile to stop nor suspended his service); *Eagle Ridge Townhouse Association, Inc. v. Snapp*, No. 2-18-0634, 2019 WL 3938706, at *15-17 (Ill. App. Ct. 2d Dist. Aug. 19, 2019) (affirming summary judgment for defendants on plaintiff's defamation claim arising out of the online publication of minutes of a board meeting, in an unpublished opinion-);*Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 279 Ill. Dec. 113, 799 N.E.2d 916, 920 (2d Dist. 2003) (affirming dismissal of a complaint asserting defamation against a website aimed at warning the public of health fraud, which posted an article authored by a third party that contained disparaging comments about the plaintiff, an alleged medical consultant, as being a liar and a charlatan); *Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168, at *4-7 (Mass. Super. Ct. Apr. 28, 2020) (dismissing claims against an online firearms marketplace for negligence, public nuisance, and aiding and abetting the sale of a firearm allegedly used to shoot a police officer); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (affirming dismissal under the CDA of defamation and unfair competition claims where the plaintiff alleged that the defendant encouraged, kept and promoted bad content and posted the plaintiff's picture superimposed on an image of Jesus with the statement "King of the Token Jews" next to negative user posts about the plaintiff); *Okeke v. Cars.com*, 40 Misc. 3d 582, 586–88, 966 N.Y.S.2d 843, 846–48 (N.Y. Civ. Ct. 2013) (dismissing plaintiff's claim and holding Cars.com immune under the CDA from liability for negligence arising from a fraudulent transaction where the plaintiff had wired money and attempted to purchase a vehicle advertised by third party on the cars.com website); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010) (dismissing a defamation claim brought against Yelp! Inc. by a dentist who alleged that the site, in response to a complaint about an allegedly defamatory post, removed ten other positive posts leaving only the allegedly defamatory one online, and dismissing on the merits a deceptive acts or practices claim based on the allegation that for $300 per month the site would remove offensive listings and if a business failed to subscribe the service would remove positive feedback).

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because plaintiffs' claims are preempted by the CDA.[4]

As a general rule, affirmative defenses usually must be raised by motion for summary judgment, except where the applicability of the defense is apparent from the face of the complaint,[5] reasonable inferences drawn from the allegations in the complaint, and materials incorporated by reference[6] (or about which judicial notice may be taken[7]). For this

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[4]*See, e.g.*, *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020) (denying leave to amend to add negligence and strict liability claims arising out of a mobile messaging service's failure to warn or implement sufficient policies to protect underage users from sexual exploitation because "Plaintiff's failure to warn claims are inextricably linked to the harmful content solicited and posted by Kik's users. This is precisely the type of claim for which Congress has determined that interactive computer website providers should be immune."); *Force v. Facebook, Inc.*, 304 F. Supp. 3d 315 (E.D.N.Y. 2018) (dismissing plaintiffs' amended complaint with prejudice and denying plaintiffs' motion to amend, in a case brought by victims, estates, and family members of victims of terrorist attacks in Israel, allegedly perpetrated by Hamas, for claims against a social network which the court had held were largely preempted by the CDA), *aff'd in part*, 934 F.3d 53 (2d Cir. 2019) (affirming dismissal of some claims and dismissing foreign law claims), *cert. denied*, 140 S. Ct. 2761 (2020); *Evans v. Hewlett-Packard Co.*, No. C 13-02477, 2013 WL 5594717 (N.D. Cal. Oct. 10, 2013) (denying plaintiffs' motion to amend the complaint to "plead around the CDA" by alleging that the defendants did not merely operate an App store for Apps used on Palm devices but actually developed the allegedly infringing "Chubby Checker" App, holding that it was proper to resolve on a Rule 12(b)(6) motion whether the plaintiffs' California and Pennsylvania state law trademark, unfair competition, right of publicity, and emotional distress claims were preempted by section 230; "our court of appeals has held that 'the assertion of an affirmative defense may be considered properly on a motion to dismiss where the 'allegations in the complaint suffice to establish' the defense.' " *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013).").

[5]*E.g.*, *Jones v. Bock*, 549 U.S. 199, 215 (2007) ("Whether a particular ground for opposing a claim may be the basis for dismissal for [a Rule 12(b)(6) motion] depends on whether the allegations in the complaint suffice to establish that ground . . . .").

[6]Under the doctrine of incorporation by reference, a court "may consider documents whose contents are alleged in the complaint, provided that the complaint 'necessarily relies' on the documents or contents thereof, the document's authenticity is uncontested, and the document's relevance is uncontested." *Matera v. Google Inc.*, Case No. 15-CV-04062-LHK, 2016 WL 8200619, at *5 (N.D. Cal. Aug. 12, 2016) (taking judicial notice of publicly available websites, legislative history, and matters of public record), *quoting Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); *see also Brown v. Electronic Arts, Inc.*, 724 F. 3d 1235, 1248 n.7 (9th Cir. 2013) ("The district court properly considered the versions of Madden NFL submitted to the court as part of the complaint itself

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reason, some courts have declined to enter judgment on the

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through the 'incorporation by reference' doctrine"); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (stating that the incorporation by reference doctrine has been extended "to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of the document in the complaint, . . ." and ruling that the "doctrine applies with equal force to internet pages as it does to printed material."). A court is "not . . . required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *see also Weiner v. Klais and Co.*, 108 F.3d 86, 89 (6th Cir. 1997) ("Although plaintiff maintains that the complaint referred only to the 'plan' as an entity and not to the 'plan documents,' his claims are based on rights under the plans which are controlled by the plans' provisions as described in the plan documents. Thus, we will consider the plan documents along with the complaint, because they were incorporated through reference to the plaintiff's rights under the plans, and they are central to plaintiff's claims."); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 975-76 (N.D. Cal. 2015) (holding that license agreements and Apple's Privacy Policy, Human Interface Guidelines and "Apple Answers the FCC's Questions" were judicially noticeable because they were incorporated by reference into plaintiffs' amended Complaint); *Turk v. Oiler*, 732 F. Supp. 2d 758, 764 (N.D. Ohio 2010) (stating that courts may consider "documents attached to the motion for judgment on the pleadings that are referred to in the complaint and are central to the plaintiff's allegations, even if not explicitly incorporated by reference.").

A plaintiff may not plead around documents incorporated by reference or implicitly depended upon for a claim. "[F]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

[7] *See, e.g., Force v. Facebook, Inc.,* 934 F.3d 53, 59 n.5 (2d Cir. 2019) (taking judicial notice of Facebook's Terms of Service and Community Standards, for the purpose of "setting forth Facebook's stated representations about its policies and practices and to provide context for plaintiffs' allegations, but not for the truth of whether Facebook follows those policies."), *cert. denied*, 140 S. Ct. 2761 (2020); *Winzler v. Toyota Motor Sales, U.S.A, Inc.*, 681 F.3d 1208 (10th Cir. 2012) (holding that documents on the National Highway Transportation Safety Administration website that a defendant submitted were authentic and properly considered when ruling on Toyota's motion to dismiss, even if the materials contained statements from Toyota that the plaintiff disputed); *Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 263 n.5 (S.D.N.Y. 2018) (taking judicial notice of Lyft's policies, as described on its website); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 975-76 (N.D. Cal. 2015) (taking judicial notice of "the Software License Agreements, Privacy Policy, iOS Human Interface Guidelines, and Apple's App Store Approval Process instructions, as they are publicly available,

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pleadings or dismiss a complaint based on the CDA,[8] prefer-

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standard documents that are capable of ready and accurate determination, and they are relevant to Plaintiffs' UCL and FAL claims."); *Jordan v. Greater Dayton Premier Mgmt.*, 9 F. Supp. 3d 847, 857 n.4 (S.D. Ohio 2014) (taking judicial notice of statements made on defendant's website and noting that "[t]he Court may take judicial notice of factual information found on the Internet."); *Edelman v. Croonquist*, Civil Action No. 09–1938 (MLC), 2010 WL 1816180 (D.N.J. May 4, 2010) (taking judicial notice of a website discussed in the plaintiff's complaint, and information posted on the website, in considering a motion to dismiss various tort claims); *Johnson v. Lodge*, 673 F. Supp. 2d 613, 618 n.10 (M.D. Tenn. 2009) (taking judicial notice of price estimates taken from a third party website); *see also In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3d Cir. 1997) ("[A] document integral to or explicitly relied on in the complaint may be considered without converting the motion [to dismiss] into one for summary judgment.").

Federal Rule of Evidence 201(b) provides that a court may take judicial notice of a fact that is not subject to reasonable dispute because it is generally known or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. As a consequence, it is "not uncommon for court to take judicial notice of factual information found on the world wide web." *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007).

Courts have also taken judicial notice of posts on social media. *See, e.g.*, *Schroeder v. Volvo Group of North America, LLC*, No. LACV 20-05127-VAP, 2020 WL 6562242, at *3 (C.D. Cal. Sept. 3, 2020) (collecting cases where Courts have taken judicial notice of Instagram and Facebook posts where such materials were "arguably incorporated by reference" into the plaintiff's complaint because "[i]f Defendant had moved the Court to take judicial notice of, for example, the photographs at issue in this case that Schroeder posted on his Instagram account or screenshots from Schroeder's Instagram account, the Court would likely grant that request, as these matters arguably were incorporated by reference in the SAC's allegations."; "A court may properly take judicial notice of: (1) material which is included as part of the complaint or relied upon by the complaint; and (2) matters in the public record."); *Young v. Greystar Real Estate Partners, LLC*, No. 3:18-cv-02149-BEN-MSB, 2019 WL 4169889, at *1-2 (S.D. Cal. Sept. 3, 2019) (taking judicial notice of Instagram and Facebook posts where the opposing party failed to object to the party's motion); see also Boesen v. United Sports Publ'ns, Ltd., 20-CV-1552, 2020 WL 6393010, at *5 n.6 (E.D.N.Y. Nov. 2, 2020) (taking judicial notice of Facebook posts where the authenticity of such post was not contested).

However, some courts have expressed skepticism about taking judicial notice of information found on private corporate websites where the information is offered for its truth, as opposed to some other purpose. *See, e.g.*, *Victaulic Co. v. Tieman*, 499 F.3d 227, 237 (3d Cir. 2007).

[8] *See, e.g., e-ventures Worldwide, LLC v. Google Inc.*, 188 F. Supp. 3d 1265, 1273 (M.D. Fla. 2016) (denying defendant's motion to dismiss claims by a search engine optimization company alleging that Google had improperly classified its business as "pure spam" because the CDA is an

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affirmative defense and "[w]hile the CDA defense may properly be considered if it is apparent from the face of the complaint, . . ." in this case the plaintiff alleged bad faith in connection with the removal of its websites from Google's search results); *Amcol Systems, Inc. v. Lemberg Law, LLC*, C/A No. 3:15-3422-CMC, 2016 WL 613896, at *8-9 (D.S.C. Feb. 16, 2016) (expressing skepticism with plaintiff's defamation claim but finding the facts not clear enough to justify dismissal at the outset of the case based on CDA immunity); *Nestle Purina Petcare Co. v. Blue Buffalo Co.*, No. 4:14 CV 859 RWS, 2015 WL 1782661, at *10 (E.D. Mo. Apr. 12, 2015) (denying motion to dismiss because the CDA is an affirmative defense that need not be pleaded around and, in the alternative, the counterclaim plaintiff did so); *Faegin v. LivingSocial, Inc.*, No. 14cv00418-WSQ-KSC, 2015 WL 1198654, at *4-5 (S.D. Cal. Mar. 16, 2015) (denying LivingSocial's motion to dismiss where the court could not tell from the complaint if it was acting as an interactive computer service provider or information content provider for the conduct alleged); *Moving & Storage, Inc. v. Panayotov*, Civil Action No. 12-12262-GAO, 2014 WL 949830, at *2 (D. Mass. Mar. 12, 2014) (denying the defendant's motion to dismiss plaintiff's claims arising out of the defendants' operation of the *MyMovingReviews.com* website and alleged practice of deleting positive reviews about plaintiffs' moving business and posting positive reviews about a competing business owned by one of the defendants, pursuant to section 230(c)(1), because the plaintiff alleged development, or pursuant to section 230(c)(2), because "[a]s the plaintiffs have sufficiently alleged bad faith, the issue cannot be appropriately decided at this stage. It is better resolved on a developed factual record."); *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 968 F. Supp. 2d 1082, 1090-91 (D. Nev. 2013) (denying the defendant's motion to dismiss plaintiff's amended complaint where plaintiff alleged that the website provider "acted as a 'developer' within the meaning of the CDA by promoting the publication of protected 'service plays' and thereby contributing to the misappropriation of Plaintiffs' trade secrets and commercial property."); *Nasser v. WhitePages, Inc.,* 5:12CV097, 2013 WL 2295678 (W.D. Va. May 24, 2013) (stating that CDA immunity generally should be determined on motion for summary judgment and denying a defendant's motion because the "record does not contain a sufficient factual predicate to conclude that Section 230 immunity applies . . . " at the motion to dismiss stage); *Ascend Health Corp. v. Wells,* 4:12-CV-00083-BR, 2013 WL 1010589 (E.D.N.C. Mar. 14, 2013) (denying motion to dismiss defamation claim arising from derogatory comments posted on defendant's website because plaintiffs alleged that defendant "herself created some of the defamatory statements on her blog" and thus whether she made "made more than mere editorial changes" should be determined through discovery); *FTC v. LeanSpa, LLC*, 920 F. Supp. 2d 270, 275-77 (D. Conn. 2013) (denying online marketing firms' motion to dismiss claims of deceptive marketing and selling weight-loss products and creating false news sites to promote sales because "on the face of the Amended Complaint, it is plausible that LeadClick is an information content provider; and the LeadClick defendants cannot claim immunity under the CDA."), *aff'd in relevant part sub nom. FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016) (holding LeadClick liable for FTC Act and Connecticut Unfair Trade Practice Act (CUTPA) violations and ineligible for CDA immunity

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because it participated in the development of the deceptive content at issue in that case; declining to decide whether LeadClick was an interactive computer service provider); *Hare v. Richie,* CIV. ELH-11-3488, 2012 WL 3773116 (D. Md. Aug. 29, 2012) (denying *TheDirty.com's* owner's motion to dismiss defamation claims arising from five derogatory remarks posted on website because the statements of *TheDirty.com's* founder and editor potentially were attributable to the defendant); *Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080 (C.D. Cal. 2012) (denying in part defendant's motion to dismiss plaintiff's false advertising claim "[b]ecause Defendant's entitlement to immunity under the CDA depends on whether Defendant 'developed' or materially contributed to the content of these advertisements, it is too early at this juncture to determine whether CDA immunity applies."); *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 849 (N.D. Cal. 2012) (denying Apple's motion to dismiss because it was premature to determine whether CDA immunity applied to plaintiff's consumer protection, negligence and unjust enrichment claims; "Plaintiff's claims are not predicated solely upon Apple's approving and distributing [third-party] Apps via its online App Store; Plaintiff also seeks to hold Apple liable for representations made by Apple itself."); *Amerigas Propane, L.P. v. Opinion Corp.*, Civil Action No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012) (holding that plaintiffs had stated a claim sufficient to proceed to discovery); *Robins v. Spokeo, Inc.,* No. CV10–05306 ODW (AGRx), 2011 WL 1793334 (C.D. Cal. May 11, 2011) (denying in part the defendant's motion to dismiss based on the CDA where the plaintiff alleged that the defendant "develops original content based on information obtained from a variety of sources and posts it online"); *Swift v. Zynga Game Network, Inc.*, 51 Communications Reg. (P & F) 1118, 2010 WL 4569889 (N.D. Cal. Nov. 3, 2010) (denying defendants' motion to dismiss claims as preempted under the CDA where the plaintiff alleged development based on Zynga's provision of virtual currency for third party ad offers; "the Court cannot determine at this juncture, based on the pleadings, whether Zynga is entitled to immunity under the CDA . . . . [T]he FAC alleges facts, which if proven, could support the conclusion that Zynga is responsible, in whole or part, for creating or developing the special offers at issue."); *Curran v. Amazon.com, Inc.*, 36 Media L. Rep. (BNA) 1641, 86 U.S.P.Q.2d 1784, 2008 WL 472433 (S.D.W. Va. Feb. 19, 2008) (denying a motion to dismiss privacy and right of publicity claims under the CDA, noting that "the CDA constitutes an affirmative defense . . . generally not fodder for dismissal under Rule 12(b)(6)."); *Perfect 10, Inc. v. Google, Inc.*, 2008 Copr. L. Dec. ¶ 26,909, 2008 WL 4217837(C.D. Cal. July 16, 2008) (denying defendant's motion to dismiss state law claims in plaintiff's second amended complaint because "preemption under the CDA is an affirmative defense that is not proper to raise in a Rule 12(b)(6) motion."); *Doctor's Associates, Inc. v. QIP Holders, LLC*, 82 U.S.P.Q.2d 1603, 2007-1 Trade Cas. (CCH) ¶ 75743, 2007 WL 1186026 (D. Conn. Apr. 19, 2007) (noting, in a false advertising claim over an advertisement on the Quiznos website where it was unclear whether Quiznos or a third party posted the advertisement, that the defense is best addressed on Rule 12(c) or 56 motions); *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1148–49 (D. Ariz. 2005) (denying a motion to dismiss based on the CDA where the plaintiff alleged that the defendant had produced editorial comments,

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ring instead to consider the issue on motion for summary judgment, supported by evidence.

Motions to dismiss, even where successful, may be granted with leave to amend, allowing the plaintiff the opportunity to plead around the CDA. Leave to amend, however, will not be granted where any potential amendment would be futile.[9] For example, the court in *Beyond Systems, Inc. v. Keynetics, Inc*,[10] in responding to a defendant's argument that he should be allowed discovery to better address the CDA defense in a case brought under a state anti-spamming statute, characterized plaintiff's request for discovery as "an exercise in futility—a fishing expedition and a deep sea fishing expedition at that. If [plaintiff] were permitted to go forth with discovery in the present case, ISPs would have to undertake the defense of lawsuits in every state that has anti-spam legislation."[11]

The Ninth Circuit's en banc decision in *Fair Housing Council v. Roommate.com, LLC*[12] and the Tenth Circuit's opinion in *FTC v. Accusearch, Inc.*[13] initially gave plaintiffs in those circuits an incentive to try to plead around the CDA by alleging *development*, such that a defendant may be sued as an information content provider, rather than an exempt interactive computer service provider.[14] However, courts should be—and increasingly are—skeptical of attempts to do

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titles and other original content contained in allegedly defamatory postings); *see also Brown v. Intelius, Inc.,* No. 4:12cv00852 (AGF), 2012 WL 5878230 (E.D. Mo. Nov. 21, 2012) (granting motion to dismiss on other grounds but stating that the CDA did not apply to putative class action claims for deceptive online advertising because "plaintiff is not seeking to hold Defendant liable for the statements of others.").

[9]*See, e.g., Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1202 (N.D. Cal. 2009) (declining to grant leave to amend to plaintiff to file a second amended complaint where the plaintiff was already granted leave once before, the court found amendment would be futile in light of the CDA, and the "special form of 'prejudice' to defendants who improperly are denied early dismissals of claims falling within the zone of CDA immunity).

[10]*Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523 (D. Md. 2006).

[11]*Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536–37 (D. Md. 2006).

[12]*Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

[13]*FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009); *see generally supra* § 37.05[3] (discussing these cases).

[14]Some of those cases are discussed in section 37.05[3][D].

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so and courts in those circuits today routinely grant rule 12 motions based on the CDA.

In light of the heightened pleading requirements to state a claim set by the U.S. Supreme Court in *Ashcroft v. Iqbal*[15] and *Bell Atlantic Corp. v. Twombly*[16] "legal conclusions, elements of a cause of action, and bare assertions devoid of further enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes."[17]

Thus, for example, in *Dart v. Craigslist, Inc.*,[18] Judge John F. Grady of the Northern District of Illinois granted judgment on the pleadings for Craigslist in a case brought by Thomas Dart, the Cook County Sheriff, alleging that Craigslist was maintaining a public nuisance by hosting an "adult" section of its site where users could post sexually suggestive advertisements, including, Sheriff Dart alleged, a large number of advertisements for prostitutes in the Chicago area. The court noted that "[a]lthough he carefully avoids using the word 'publish,' Sheriff Dart's complaint could be construed to allege 'negligent publishing.' "[19] Among other things, Sheriff Dart alleged that Craigslist itself caused or induced illegal content, but the court rejected this assertion based on Craigslist's repeated warnings to users not to post such material.[20] Similarly, Sheriff Dart alleged that Craigslist knowingly "arranged" meetings for purposes of prostitution and "direct[ed]" people to places of prostitution, but the court found "these allegations [to] strain the ordinary meaning of the terms 'arrange' and 'direct' unless Craigslist itself created the offending ads" which plaintiff did not allege.[21] In rejecting Sheriff Dart's "conclusory allegations" and granting judgment on the pleadings, the court ruled that "[e]ven at this stage of the case we are not required to

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[15]*Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

[16]*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007); *see generally infra* § 57.04[1] (analyzing these cases and their impact on pleading standards).

[17]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (affirming dismissal of state law claims under the CDA).

[18]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).

[19]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009).

[20]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009).

[21]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009).

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accept those allegations at face value . . . ."[22]

Similarly, in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,[23] the Fourth Circuit, in affirming the dismissal of a defamation claim brought over 20 posts on a commercial gripe site, ruled that the plaintiff failed to plead facts sufficient to show responsibility for the development of the posts, where the complaint alleged that Consumeraffairs.com solicited the posts, contacted consumers to ask questions and help them draft or revise their complaints, and structured and designed its website to develop information related to class-action lawsuits, which the court held was not illegal content and was not related to the alleged defamation.[24] The majority also found insufficient the allegation that Consumeraffairs.com itself fabricated eight posts, based on the fact that Nemet could not match eight of the twenty posts with specific people in its database.[25]

In *Goddard v. Google, Inc.*,[26] the court likewise rejected "labels and conclusions" amounting to a formulaic recitations of the elements of developer liability as inconsistent with the pleading requirements of *Twombly*.[27] In that case, plaintiff alleged that Google's involvement in creating allegedly fraudulent advertisements was so pervasive that the company controlled much of the underlying commercial activity engaged in by third party advertisers. She alleged

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[22]*Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009).

[23]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

[24]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256–57 (4th Cir. 2009). By contrast, the court noted that the website in *Roommate.com* required users to input illegal content as a necessary condition of use. Developing content in a way unrelated to the initial posting, such as its potential to further a class action lawsuit, did not amount to "materially contributing" to a given piece of information's "alleged unlawfulness." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009), *quoting Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (en banc)..

[25]Chief District Judge Jones, sitting by designation, concurred in part, but dissented with respect to the eight posts that Nemet alleged Consumeraffairs.com itself fabricated, arguing that the court, in evaluating a motion to dismiss, was required to accept as true the allegation that these posts were not made by real customers. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 262 (4th Cir. 2009) (Jones, J. concurring in part, dissenting in part).

[26]*Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).

[27]*Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009).

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that Google not only encouraged illegal conduct, but collaborated in its development and effectively required its advertiser customers to engage in it. The court conceded that these allegations, if supported by factual allegations, would have removed plaintiff's action from the scope of CDA immunity, but her allegations related to neutral tools offered by Google that, at most, could be used for proper or improper purposes.

If the applicability of the Good Samaritan exemption is not apparent from the face of the plaintiff's complaint, or if leave to amend an otherwise deficient complaint is granted and the amended complaint is not similarly dismissed, an interactive computer service provider or user may need to prove entitlement to the exemption by moving for summary judgment pursuant to Rule 56, based on admissible evidence. The issue of a party's entitlement to the CDA has been addressed by summary judgment in a number of cases.[28] Where material facts underlying entitlement to the defense are

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[28]*See, e.g., Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313 (1st Cir. 2017) (affirming summary judgment for the defendant); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) (affirming the entry of summary judgment for the defendant under section 230(c)(2)(B)); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007) (affirming the entry of summary judgment for the defendant on plaintiff's false advertising and unfair competition claims, and reversing the lower court's denial of the defendant's summary judgment motion on plaintiff's right of publicity claim); *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119 (9th Cir. 2003) (affirming the entry of summary judgment for the defendant under the CDA); *Clarks v. Private Money Goldmine*, Case No.: GJH-19-1014, 2020 WL 949946, at *7-8 (D. Md. Feb. 26, 2020) (dismissing, but in the alternative granting summary judgment to defendants on plaintiff's claims that online lending network had breached subscription contract with users and contributed to an advanced-payment fraud scheme that connected prospective private money borrowers and lenders, FM 41, Inc., a general partner of REI, and John Douglas Smith, FM 41's president, as barred by both the statute of limitations and the CDA, in a suit arising out of an allegedly fraudulent preliminary payment scheme, where defendants hosted a platform that allowed prospective lenders to post their information online and interact with prospective borrowers, who paid the site a subscription fee to join);); *Sen v. Amazon.com, Inc.*, Case No.: 3:16-CV-01486-JAH-JLB, 2018 WL 4680018 (S.D. Cal. Sept. 28, 2018) (granting summary judgment for Amazon.com on plaintiff's claim for tortious interference), *aff'd in relevant part*, 793 F. App'x 626 (9th Cir. 2020); *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009) (affirming the entry of summary judgment for the FTC, finding the defendant ineligible for the CDA); *Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 983–86 (10th Cir. 2000) (affirming the entry of summary judgment for the defendant under the CDA); *Roca Labs,*

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disputed, summary judgment may be denied[29] (or granted in part and denied in part[30]) and, although quite rare, the issue of the applicability of the CDA may not be resolved short of

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Inc. v. Consumer Opinion Corp., 140 F. Supp. 3d 1311, 1319-22 (M.D. Fla. 2015) (granting summary judgment for the defendant on claims for defamation, tortious interference with a contractual relationship, tortious interference with a prospective economic relationship and a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); holding that the defendant website operator did not lose CDA immunity for tweeting out links to user posts, trimming posts to meet the character limitations imposed by Twitter, adding the Twitter user IDs @rocalabs and @pissedconsumer or by using search optimization practices to highlight critical posts or providing summary statistics of user posts); *Giveforward, Inc. v. Hodges*, Civil No. JFM-13-1891, 2015 WL 4716046, at *9-10 (D. Md. Aug. 6, 2015) (granting summary judgment for Giveforward under the CDA where Hodges' counterclaim was premised on Giveforward allegedly disseminating the information on independent platforms, including on social media and Twitter); *S.C. v. Dirty World, LLC*, No. 11–CV–392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012) (granting summary judgment for the operator of TheDirty.com under the CDA); *GW Equity LLC v. Xcentric Ventures LLC*, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009) (affirming the Magistrate Judge's recommendation to enter summary judgment).

[29]*See, e.g.*, *Doctor's Associates, Inc. v. QIP Holder LLC*, 38 Media L. Rep. (BNA) 1616, 2010 WL 669870 (D. Conn. Feb. 19, 2010) (denying defendant's motion for summary judgment in a case where Quiznos held an Internet contest for customers to submit their own advertisements comparing Quiznos sandwiches to those of Subway, where the plaintiff alleged that defendants "went beyond the role of a traditional publisher by 'soliciting disparaging material' and 'shaping the eventual content' " by using a domain name for the contest (meatnomeat.com) that arguably falsely implied that Subway sandwiches had no meat and posted four "sample videos" on the user submission site that allegedly shaped user submissions; holding that a reasonable jury might conclude that defendants "did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos."); *Woodhull v. Meinel*, 145 N.M. 533, 202 P.3d 126 (Ct. App. 2008) (broadly construing the scope of section 230(c)(1) but finding defendant's entitlement to the exemption presented a factual question precluding summary judgment based on defendant's requests that users post potentially defamatory material for the purpose of "making fun of" the plaintiff), *cert. denied*, 145 N.M. 655, 203 P.3d 870 (2009).

[30]*See, e.g.*, *General Steel Domestic Sales, LLC v. Chumley*, Civil Action No. 14-cv-01932-REB-CBS, 2015 WL 4911585, at *9 (D. Colo. Aug. 18, 2015) (holding defendants entitled to CDA immunity for establishing links to third party content and for a few specific posts, but denying defendant's motion for summary judgment with respect to other material which it appeared that the defendant developed), *appeal dismissed*, 840 F.3d 1178 (10th Cir. 2016).

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trial.[31] Few, if any, CDA determinations, however, are made at trial. Needless to say, the benefits of a federal exemption would be slight if a party had to go to trial to prove its entitlement to the exemption.

Courts increasingly have been willing to address CDA immunity (especially under section 230(c)(1)) at the outset of a case. As explained by the Fourth Circuit, " 'immunity is an *immunity from suit* rather than a mere defense to liability' and 'it is effectively lost if a case is erroneously permitted to go to trial.' . . . ."[32] For this reason, the court explained that entitlement to section 230 immunity should be resolved "at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.' "[33]

Where it is apparent that the CDA applies but the plaintiff has not alleged sufficient facts to allow a Rule 12(c) motion for judgment on the pleadings, some courts will grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) if it is clear from the facts alleged that the plaintiff cannot state a claim in light of the CDA. Indeed, in one case the court even suggested that defendants "who improperly are denied early dismissal of claims falling within the zone of CDA immunity" experience "a special form of 'prejudice.' . . . ."[34]

Although usually raised by motion by a defendant, the applicability of the CDA exemption may be considered by the court, *sua sponte.* In *Johnson v. Arden*,[35] the Eighth Circuit affirmed the district court's decision, *sua sponte,* to dismiss plaintiffs' defamation claim against the ISP that hosted a website where allegedly defamatory statements about

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[31]*See, e.g.*, *Jones v. Dirty World Entertainment Recordings, LLC*, 964 F. Supp. 2d 818 (E.D. Ky. 2013) (denying the defendant's post-trial motion for judgment as a matter of law and affirming the propriety of the jury's award in favor of the plaintiff in the amount of $38,000.00 in compensatory damages and $300,000.00 in punitive damages in a defamation case brought against the operator of *TheDirty.com*), *rev'd*, 755 F.3d 398 (6th Cir. 2014).

[32]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (citations omitted).

[33]*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009).

[34]*Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1202 (N.D. Cal. 2009) (analyzing Ninth Circuit law).

[35]*Johnson v. Arden*, 614 F.3d 785, 790–92 (8th Cir. 2010).

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plaintiffs' rare cat breeding business had been posted, even though none of the parties had raised the CDA in connection with various motions to dismiss that were then pending.

The potential applicability of the CDA defense has also been employed offensively by interactive computer service providers to obtain injunctive relief barring enforcement of other laws or court orders.[36]

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[36]*See Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (affirming an order enjoining the Cook County, Illinois sheriff from threatening credit card companies if they refused to stop doing business with Backpage.com because it hosted advertisements for adult listings, where the Seventh Circuit found that the sheriff would not sue Backpage.com directly because similar claims he brought against a different online service were held preempted by the CDA); *Airbnb, Inc. v. City of Boston,* 386 F. Supp. 3d 113, 119-25 (D. Mass. 2019) (preliminarily enjoining enforcement of those aspects of a City ordinance that required booking agents to prevent, remove, or de-list any ineligible listings, and which required monthly disclosure of the number of nights that a housing unit was occupied the preceding month, based on the finding that Airbnb was likely to prevail on the merits in showing that these provisions of the ordinance violated 47 U.S.C.A. § 230(c)(1)); *Google LLC v. Equustek Solutions Inc.,* Case No. 5:17-cv-04207-EJD, 2017 WL 5000834 (ND. Cal. Nov. 2, 2017) (preliminarily enjoining enforcement of a Canadian court order because Google was likely to prevail in establishing that it was immune under section 230 from claims seeking to force it to remove links to third party websites); *Backpage.com, LLC v. Hoffman,* 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) (preliminarily enjoining enforcement of a New Jersey state law criminalizing "publishing, disseminating or displaying an offending online post 'directly or indirectly' as a 'crime of the first degree' " based on the court's finding that the statute likely was preempted by the CDA), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (preliminarily and then permanently enjoining enforcement of a Tennessee state law that criminalized the sale of certain sex-oriented advertisements as likely preempted by the CDA); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (enjoining enforcement of a statute that criminalized advertising commercial sexual abuse of a minor based on, among other things, a finding that plaintiff, an online classified advertising service, was likely to succeed in establishing that the Washington law was preempted by section 230); *Xcentric Ventures, LLC v. Smith*, No. C 15–4008–MWB, 2015 WL 5184114 (N.D. Iowa Sept. 4, 2015) (enjoining a county prosecutor from continuing a criminal investigation into Xcentric and its owner over critical posts that appeared on RipOff Report about a prosecution brought by the prosecutor, where the court found that any criminal action likely would have been preempted by the CDA). *But see Google, Inc. v. Hood*, 822 F.3d 212, 216-28 (5th Cir. 2016) (dissolving a preliminary injunction that had barred enforcement by the Mississippi Attorney General of an administrative subpoena and threats by him to prosecute an interactive computer service provider for

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Where a claim of immunity is based on subpart 230(c)(2)(A), it had historically been more difficult to establish entitlement short of summary judgment because, unlike section 230(c)(1) which is self-executing,[37] subpart 230(c)(2)(A) requires a showing of voluntary action undertaken in good faith to benefit from the exemption.[38] Courts increasingly have dismissed claims under 230(c)(2) where good faith is apparent on the face of plaintiff's Complaint or where efforts by the plaintiff to allege bad faith have failed because they are based on legal conclusions or boilerplate assertions, rather than actual facts.[39]

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allowing search results that allegedly led to sites offering counterfeit pharmaceuticals and pirated music, where the provider would have been entitled to CDA immunity if it had been sued, because the administrative subpoena served was not self-executing and the prospect of an enforcement action was "not sufficiently imminent or defined to justify an injunction.").

The enactment in 2018 of 47 U.S.C.A. § 230(e)(5), precludes CDA immunity under section 230(c)(1) or 230 (c)(2)(B)—but not section 230(c)(2)(A)—in connection with certain federal civil claims and state criminal charges related to sex trafficking and advertising for sex trafficking. *See* 47 U.S.C.A. § 230(e)(5); *infra* § 37.05[5][C] (analyzing the scope of the sex trafficking exclusions).

[37]*See supra* §§ 37.05[1], 37.05[3].

[38]*See supra* § 37.05[4].

[39]*See, e.g.*, *Daniels v. Alphabet Inc.*, Case No. 20-cv-04687-VKD, 2021 WL 1222166, at *12-13 (N.D. Cal. Mar. 31, 2021) (dismissing MAGA rapper Young Pharaoh's breach of contract claim against YouTube, Google and Alphabet, under section 230(c)(2), in a suit alleging that videos he uploaded to YouTube were removed for violating YouTube's community guidelines or policy on harassment and bullying, and for allegedly shadowbanning him and preventing him from monetizing videos on his YouTube channel; "Mr. Daniels acknowledges that defendants removed the Fauci video because that video purportedly violates YouTube's Community Guidelines and removed the George Floyd video that video purportedly violates YouTube's policy on harassment and bullying. He even concedes that the George Floyd video contained language that could be considered offensive. . . . The complaint contains no plausible factual allegations suggesting that YouTube did not consider the content of the Fauci and George Floyd videos objectionable and/or contrary to its stated policies and guidelines, or that it removed, restricted access to, or demonetized the videos in bad faith. Mr. Daniels relies solely on conclusory assertions that YouTube acted in bad faith . . . ."); *Asurvio LP v. Malwarebytes Inc.*, Case No. 5:18-cv-05409-EJD, 2020 WL 1478345, at *3-6 (N.D. Cal. Mar. 26, 2020) (dismissing (without leave to amend) claims of Lanham Act false advertising, business disparagement, tortious interference with contractual relations, common law unfair competition, and violations of the Texas Theft Liability Act, in a suit alleging that

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In earlier cases, however, it had been more difficult for interactive computer service providers (or users) to obtain dismissal based on section 230(c)(2). For example, in *National Numismatic Certification, LLC v. eBay, Inc.*,[40] the court ruled that the requirement that "good faith" be shown underscores that the exemption created by section 230(c)(2) provides a qualified privilege, which typically cannot be addressed on a Rule 12(b)(6) motion unless the allegations on their face show that the plaintiff's claim is barred.

Similarly, in *Smith v. Trusted Universal Standards in Electronic Transactions, Inc.*,[41] an unreported decision, the

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Malwarebytes wrongfully categorized Asurvio's software as malware or a "Potentially Unwanted Program," holding that Malwarebytes was immune under both 47 U.S.C.A. § 230(c)(1) and (c)(2)(B), for allegedly wrongly filtering and characterizing plaintiff's software as a potentially unwanted program); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 603-04 (S.D.N.Y. 2020) (dismissing plaintiff's claims under California and New York law, arising out of Vimeo's deletion or removal of content posted by the plaintiff, pursuant to its Terms of Service agreement, under both section 230(c)(1) and 230(c)(2)(A)), *aff'd on other grounds,* No. 20-616-cv, 2021 WL 4352312 (2d Cir. Sept. 24, 2021); *Holomaxx Technologies v. Microsoft Corp*., 783 F. Supp. 2d 1097, 1105 (N.D. Cal. 2011) (dismissing with leave to amend claims brought by an email marketing service against an interactive computer service for allegedly filtering and blocking its communications to Microsoft users. In dismissing claims under the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030, for intentional interference with contract and intentional interference with prospective business advantage, and alleged violations of Cal. Penal Code §§ 630 *et seq*., California's wiretapping/eavesdropping statute, where the court concluded that it was clear from the face of plaintiff's complaint that Microsoft reasonably could have concluded that "Holomaxx's emails were 'harassing' and thus 'otherwise objectionable.' "); *Holomaxx Technologies v. Yahoo!, Inc*., No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011) (ruling the same way in dismissing Holomaxx's virtually identical complaint against Yahoo!); *see generally supra* § 37.05[4][B] (discussing these and other cases at greater length).

In *Enhanced Athlete Inc. v. Google LLC*, Case No. 19-cv-08260-HSG, 2020 WL 4732209 (N.D. Cal. Aug. 14, 2020), the court held that plaintiff negated the defendant's section 230(c)(2) defense by alleging bad faith, without much discussion of the issue, in an opinion that didn't address *Enigma*, where the issue of 230(c)(2) preemption was not material because the court dismissed plaintiff's Complaint in its entirely on other grounds, including dismissing (with prejudice) plaintiff's Lanham Act and California unfair competition claims and claim for declaratory relief, as barred by section 230(c)(1).

[40]*National Numismatic Certification, LLC. v. eBay, Inc.,* No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008).

[41]*Smith v. Trusted Universal Standards In Electronic Transactions,*

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court denied defendants' motion to dismiss various claims brought by a *pro se* plaintiff arising out of his Comcast email account having been blocked when his IP address was included on a list of notorious spammers by Spamhaus, where the plaintiff alleged that defendants acted in bad faith in blacklisting his IP address. The plaintiff had alleged that after his email account was first blocked, he called Comcast and was told that he would not need to worry about being blocked again if he upgraded to a higher level of service. Assuming as true plaintiff's allegations (which generally is required in evaluating a motion to dismiss), the court wrote that this explanation "seems to suggest that Comcast was not concerned that people were receiving large quantities of emails, or concerned about the content of the emails, but rather was concerned that Plaintiff had not purchased a sufficient level of service. This is not a good faith belief that the emails were objectionable, but rather a belief that they violated a service agreement."[42]

The court also denied motions to dismiss filed by Cisco and Microsoft, which had alleged that they qualified as access software providers within the meaning of section 230(c)(2)(B). This aspect of the unreported decision, however, may simply reflect the fact that the court was bending over backwards to assist a *pro se* plaintiff, not that it was faithfully applying the requirements of Rule 12 and *Iqbal*.

In California and a limited number of other states, claims based on Internet posts in newsgroups or other publicly accessible areas of the Internet that fall within the scope of section 230(c)(1) potentially may be addressed by a special motion to strike under anti-SLAPP statutes, which under California's statute would shift the burden of proof to a plaintiff to show by admissible evidence that it is likely to prevail on a claim or suffer dismissal with prejudice and an award of attorneys' fees.[43] A similar motion potentially may

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Inc., Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

[42]*Smith v. Trusted Universal Standards In Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010).

[43]*See Barrett v. Rosenthal*, 40 Cal. 4th 33, 41, 51 Cal. Rptr. 3d 55, 59 (2006) (affirming entry of judgment for the defendant on an anti-SLAPP motion where the plaintiffs' claims were preempted by section 230(c)(1)); *see also Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 163 Cal.

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be made under Oregon law[44] and the laws of other states.[45] Anti-SLAPP statutes are separately analyzed in section 37.02[3].

In California state courts, the applicability of the CDA also may be determined by demurrer.[46]

37.05[8] Injunctive Relief and Orders Directing Interactive Computer Services to Remove Third Party Content

Some early decisions construing the CDA had suggested that section 230 bars suits for damages, but not injunctive relief.[1] To the extent that other courts had considered the issue prior to 2018, more had expressly disagreed with those early rulings or otherwise held that injunctive relief was barred by the Good Samaritan exemption.[2] In 2018, the Cal-

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Rptr. 3d 919 (4th Dist. 2013) (affirming grant of anti-SLAPP motion brought by newspaper publisher who allowed readers to comment on online article and failed to delete comments by one user that allegedly invaded another user's privacy, on grounds that publisher's actions were in furtherance of free speech and that the user was not likely to prevail on the merits because his claims were barred by the CDA, 47 U.S.C.A. § 230); *see generally supra* § 37.02[3] (analyzing California's anti-SLAPP statute). *But see Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294,175 Cal. Rptr. 3d 131 (2d Dist. 2014) (reversing the lower court and holding that plaintiff's California false advertising claim against Yelp was not subject to California's anti-SLAPP statute or preempted by the CDA because it was based on Yelp's own statements about the accuracy of its review filter, not user comments).

[44]*See Higher Balance, LLC v. Quantum Future Group, Inc.*, 37 Media L. Rep. (BNA) 1181, 2008 WL 5281487 (D. Or. Dec. 18, 2008) (applying Oregon's anti-SLAPP statute, Or. Rev. Stat. Ann. §§ 31.150 to 31.155).

[45]*See supra* § 37.02[3] (analyzing anti-SLAPP statutes).

[46]*See, e.g., Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2d Dist. 2009) (affirming an order granting defendant's demurrer without leave to amend); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833–35, 121 Cal. Rptr. 2d 703 (4th Dist. 2002) (dismissing claims on demurrer against eBay for, among others, negligence, based on the CDA).

[Section 37.05[8]]

[1]*See Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F. Supp. 2d 552, 561 (E.D. Va. 1998); *see also Morrison v. America Online, Inc.*, 153 F. Supp. 2d 930 (N.D. Ind. 2001) (noting the split in authority).

[2]*See Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 698, 104 Cal. Rptr. 2d 772 (1st Dist. 2001); *see also Ben Ezra, Weinstein & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 983–86 (10th Cir. 2000) (applying section 230 to a claim for injunctive relief); *Noah v. AOL Time Warner,*

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ifornia Supreme Court expressly held that the CDA potentially insulates an interactive computer service provider (or user) from injunctive relief, in addition to liability for damages.[3]

In *Hassell v. Bird*,[4] the California Supreme Court held that a plaintiff cannot make an "end-run" on the CDA by obtaining a default judgment against an information content provider in a case where an interactive computer service provider could have asserted the CDA as a defense if it had been joined in the proceeding, and then seek to enforce an injunction obtained as part of the default judgment against the service provider to have material taken down, without allowing the service provider to assert the CDA in the second action.

In that case, the plaintiff, Dawn Hassell—a lawyer unhappy with a one star negative review provided by a former client, Ava Bird—had obtained a default judgment and permanent injunction against the former client, in a suit alleging that the former client's feedback on Yelp was defamatory and cast her in a false light. The default judgment awarded the plaintiff $557,918.85 and ordered defendant Bird to remove any defamatory posts. It also expressly directed Yelp, a nonparty to the proceedings, to remove reviews posted by Bird. Yelp had had no notice of the case until it was served with a copy of the order, directing it to

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Inc., 261 F. Supp. 2d 532, 539-40 (E.D. Va. 2003) (questioning *Mainstream Loudoun*'s continuing authority on this point; "given that the purpose of section 230 is to shield service providers from legal responsibility for the statements of third parties, section 230 should not be read to permit claims that request only injunctive relief . . . . [I]n some circumstances injunctive relief will be at least as burdensome to the service provider as damages, and is typically more intrusive."), *aff'd mem.*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004); *Smith v. Intercosmos Media Group, Inc.,* No. Civ. A. 02–1964, 2002 WL 31844907, at *4 (E.D. La. Dec. 17, 2002) ("any claim made by the plaintiffs for damages or injunctive relief with regard to either defamation and libel, or negligence and fault . . . are precluded by the immunity afforded by section 230(c)(1) and subject to dismissal."); *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So. 3d 727, 728-29 (Fla. Dist. Ct. App. 2014), *review denied*, 168 So. 3d 226 (Fla. 2015) (holding that the preemptive effect of the CDA extended to equitable claims for declaratory and injunctive relief filed by an investor against the operator of an interactive investment website, seeking removal of allegedly defamatory statements made by a third party).

[3]*See Hassell v. Bird*, 5 Cal. 5th 522, 541, 544-45, 234 Cal. Rptr. 3d 867, 881, 884-85 (2018).

[4]*Hassell v. Bird*, 5 Cal. 5th 522, 234 Cal. Rptr. 3d 867 (2018).

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remove Bird's posts about Hassell. The California Supreme Court, reversing an intermediate appellate court, held that by directing Yelp to remove the challenged reviews from its website, the removal order improperly treated Yelp as the publisher or speaker of information provided by another information content provider.

The California Supreme Court observed that had plaintiff named it as a defendant in her suit against Bird for defamation, intentional infliction of emotional distress, and false light, "Yelp could have sought and received section 230 immunity . . . ."[5] This immunity, the court held, would have shielded Yelp from the injunctive relief that plaintiffs sought.[6] The court, accordingly, held that a plaintiff could not "accomplish indirectly what Congress has clearly forbidden them to achieve directly."[7]

The majority acknowledged the general rule that when an injunction has been obtained, certain nonparties may be required to comply with its terms, but held that this principle does not "supplant the inquiry that section 230(c)(1) requires. Parties and nonparties alike may have the responsibility to comply with court orders, including injunctions. But an order that treats an Internet intermediary 'as the publisher or speaker of any information provided by another information content provider' nevertheless falls within the parameters of section 230(c)(1)."[8] The court explained that, in substance, Yelp was being held to account for nothing more than its ongoing decision to publish defendant's reviews.

The majority declined to draw a distinction between uncontested proceedings, such as default judgments, and contested proceedings, because there was no indication that Congress believed that such a distinction should be drawn in applying section 230 immunity to enforcement of court orders against interactive computer service providers (or users)

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[5] *Hassell v. Bird*, 5 Cal. 5th 522, 540, 234 Cal. Rptr. 3d 867, 881 (2018).

[6] *Hassell v. Bird*, 5 Cal. 5th 522, 541, 234 Cal. Rptr. 3d 867, 881 (2018).

[7] *Hassell v. Bird*, 5 Cal. 5th 522, 541, 234 Cal. Rptr. 3d 867, 882 (2018).

[8] *Hassell v. Bird*, 5 Cal. 5th 522, 542, 234 Cal. Rptr. 3d 867, 883 (2018).

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who were not a party to the earlier lawsuit.[9] The alternative, the majority observed, would encourage an array of procedural maneuvers to circumvent section 230 to obtain relief that otherwise would be unavailable in a suit brought directly against an interactive computer service provider or user for material originating with another information content provider.[10]

Hassell v. Bird should not be read to mean that interactive computer service providers should be added as named defendants in defamation or other tort suits arising out of material posted by users. As the California Supreme Court made clear services such as Yelp are immune from liability under section 230(c)(1)[11] for decisions to publish, not publish, or decline to remove material originating with another information content provider. Rather, it stands for the proposition that an interactive computer service provider (or user) cannot be deprived of the right to assert CDA immunity in response to any order sought to be enforced against it. The case also stands for the proposition that the CDA immunizes interactive computer service providers from not simply

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[9]*See Hassell v. Bird*, 5 Cal. 5th 522, 542 n.13, 234 Cal. Rptr. 3d 867, 883 n.13 (2018).

[10]The majority observed:

> [P]laintiffs' maneuver, if accepted, could subvert a statutory scheme intended to promote online discourse and industry self-regulation. What plaintiffs did in attempting to deprive Yelp of immunity was creative, but it was not difficult. If plaintiffs' approach were recognized as legitimate, in the future other plaintiffs could be expected to file lawsuits pressing a broad array of demands for injunctive relief against compliant or default-prone original sources of allegedly tortious online content. Injunctions entered incident to the entry of judgments in these cases then would be interposed against providers or users of interactive computer services who could not be sued directly, due to section 230 immunity. As evinced by the injunction sought in *Kathleen R.*, *supra*, 87 Cal.App.4th 684, 104 Cal.Rptr.2d 772, which demanded nothing less than control over what local library patrons could view on the Internet (*id.*, at p. 691, 104 Cal.Rptr.2d 772), the extension of injunctions to these otherwise immunized nonparties would be particularly conducive to stifling, skewing, or otherwise manipulating online discourse—and in ways that go far beyond the deletion of libelous material from the Internet. Congress did not intend this result, any more than it intended that Internet intermediaries be bankrupted by damages imposed through lawsuits attacking what are, at their core, only decisions regarding the publication of third party content.

Hassell v. Bird, 5 Cal. 5th 522, 546-47, 234 Cal. Rptr. 3d 867, 886-87 (2018).

[11]*See generally supra* §§ 37.05[1], 37.05[3] (analyzing the scope of immunity under section 230(c)(1)).

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money damages but also injunctive relief.[12]

While not technically binding on courts outside of California, *Hassell v. Bird*'s interpretation of section 230—which is construed by both state and federal courts—will be influential. In ruling as it did, the California Supreme Court was not operating in a vacuum. California courts have had extensive experience analyzing the CDA. The Court's basic conclusion about the CDA's application to injunctive relief should also not be controversial given the plain text of the statute and the manner in which it has been construed by courts.

In ruling that the CDA provided immunity from both damages and injunctive relief, the California Supreme Court relied in part on section 230(e)(3), which refers expressly to *liability*, which it construed broadly. Other parts of section 230 also support this construction.

With respect to injunctions sought directly from interactive computer service providers or users, subpart (c)(1), by its terms, applies to the treatment of interactive computer service providers and users. There is simply no basis in the statute or its legislative history for concluding that a cause of action otherwise barred by section 230(c)(1) would nonetheless be viable if limited to injunctive relief.

Subpart 230(c)(2)(A), in turn, provides that no provider or user of an interactive computer service "*shall be held liable*" on account of any action voluntarily taken in good faith to restrict access to or the availability of particular content.[13] Given the broad scope of the exemption and its underlying policies, a strong argument may be made that, since a finding of liability is a precondition for final injunctive relief, subpart (c)(2) preempts both damage claims and injunctive relief.

Although *Hassell v. Bird* was the first case to squarely address whether the CDA prevented a plaintiff from extending injunctive relief to an interactive computer service by way of

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[12]*See Hassell v. Bird*, 5 Cal. 5th 522, 544-45, 234 Cal. Rptr. 3d 867, 884-85 (2018) (holding that *liability*, as used in section 230(e)(3)—which provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."—is a broad term and includes injunctive relief such as the removal order obtained by the plaintiff in that case).

[13]The interplay between subparts (c)(1) and (c)(2) is addressed in section 37.05[1].

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a prior action to which the provider was not a party, in an earlier suit, a district court had declined to compel an interactive computer service to remove material in compliance with a court order entered against the party who originally posted it.[14] Fed. R. Civ. Proc. 65(d) allows a court to enforce an injunction against third parties acting in concert or legally identified with the enjoined party (such as agents, employees and officers, among others). In *Blockowicz v. Williams*,[15] however, the court declined to enforce a permanent injunction ordering the removal of defamatory material against RipoffReport.com, a website where the content was hosted. Plaintiffs had argued that RipoffReport.com was acting in concert with the defendants who posted the defamatory statements by, among other things, establishing a service that promised to publish and never remove material in return for indemnification and an exclusive copyright license from users.

In discussing the CDA, the court observed that plaintiffs, "[a]voiding the CDA's limitations, . . . instead sued the authors of the defamatory posts—the Defendants—and sought an injunction requiring that the defamatory postings be removed from the websites."[16]

Although the court cited to the CDA, it ultimately rested on the fact that the record was "devoid of any evidence" that Xcentric, the owner of RipoffReport.com, intended to protect defamers and aid them in circumventing court orders.[17] In the absence of contrary evidence, it also found persuasive the fact that RipoffReport.com's Terms of Service purported to prohibit users from posting defamatory statements.

In denying plaintiff's motion, Judge Holderman wrote that he was "sympathetic to the Blockowiczs' plight; they find themselves the subject of defamatory attacks on the internet yet seemingly have no recourse to have those statements removed from the public view. Nevertheless, Congress has narrowly defined the boundaries for courts to enjoin third

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[14]*See Blockowicz v. Williams*, 675 F. Supp. 2d 912 (N.D. Ill. 2009), *aff'd,* 630 F.3d 563 (7th Cir. 2010).

[15]*Blockowicz v. Williams*, 675 F. Supp. 2d 912 (N.D. Ill. 2009), *aff'd,* 630 F.3d 563 (7th Cir. 2010).

[16]*Blockowicz v. Williams*, 675 F. Supp. 2d 912, 915 (N.D. Ill. 2009), *aff'd,* 630 F.3d 563 (7th Cir. 2010).

[17]*Blockowicz v. Williams*, 675 F. Supp. 2d 912, 916 (N.D. Ill. 2009), *aff'd,* 630 F.3d 563 (7th Cir. 2010).

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parties, and the court does not find that Xcentric falls within those limited conscriptions based on the facts presented here."[18]

Judge Holderman's decision was affirmed on appeal in an opinion by the Seventh Circuit that does not reference the CDA.[19]

Even in cases where the CDA may not prevent a suit for injunctive relief from an interactive computer service provider for user content (by virtue of development[20] or on other grounds), the standard for obtaining equitable relief should be high. In an analogous context, the Ninth Circuit has held that an injunction compelling a service provider to remove user content pursuant to the Copyright Act is deemed to be a mandatory injunction, which is disfavored.[21] It may also be viewed as an impermissible prior restraint.[22]

37.05[9] Legal Framework in Cases Where the Exemption Does Not Apply

Where section 230 does not apply,[1] a service provider or user may nonetheless be able to avoid liability under the common law standards applied in cases such as *Cubby, Inc.*

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[18] *Blockowicz v. Williams*, 675 F. Supp. 2d 912, 916 (N.D. Ill. 2009), *aff'd,* 630 F.3d 563 (7th Cir. 2010).

[19] *See Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010).

[20] *See supra* § 37.05[3][C].

[21] *Garcia v. Google, Inc.*, 786 F.3d 733, 740 & n.4 (9th Cir. 2015) (en banc); *see generally supra* § 4.13[1] (discussing the case).

[22] *See Garcia v. Google, Inc.*, 786 F.3d 733, 746-47 (9th Cir. 2015) (en banc) (dissolving a previously entered preliminary injunction compelling YouTube to take down copies of the film "Innocence of Muslims" and take all reasonable steps to prevent further uploads, which the en banc panel held had operated as a prior restraint), *citing Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints."); *see generally supra* § 4.13[1] (discussing the case).

[Section 37.05[9]]

[1] The issue of retroactivity raised in *Lunney* is less likely to arise today. With the passage of time, fewer claims may be asserted under applicable statutes of limitation that would have arisen prior to the time the Good Samaritan exemption took effect in January 1996.

Lunney is instructive even if it is unlikely to arise frequently because it underscores that even absent the CDA exemption, there may be no affirmative duty to act. In light of the Ninth Circuit's ruling in *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en

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v. CompuServe Inc.[2] prior to the enactment of the Telecommunications Act of 1996 and still applicable to defamation claims arising on *terra firma*.[3] In *Lunney v. Prodigy Services Co.*,[4] for example, the New York Court of Appeals dismissed defamation and negligence claims against Prodigy arising out of the conduct of an imposter who opened several Prodigy accounts which he used to spoof plaintiff's identity and post and transmit vulgar, threatening and profane messages.

The court in *Lunney* declined to decide whether the Good Samaritan exemption could be applied retroactively, but ruled that Prodigy was entitled to the common law qualified privilege accorded telephone companies for liability premised on individual email transmissions and thus could not be held liable.[5] The court similarly ruled that Prodigy did not act as a publisher of messages posted on bulletin boards it hosted, although the court conceded that "[a]s distinguished from email communications, there are more complicated legal questions associated with electronic bulletin board messages, owing to the generally greater level of cognizance that their operators can have over them."[6] Perhaps even more broadly, the court dismissed plaintiff's negligence claim for

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banc), this issue could be litigated more frequently in the coming years, at least in the Ninth Circuit.

[2]*Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *see supra* § 37.04[2].

[3]*See generally supra* § 37.04.

[4]*Lunney v. Prodigy Services Co.*, 94 N.Y.2d 242, 701 N.Y.S.2d 684, 723 N.E.2d 539 (1999).

[5]The court, *citing* earlier case law, emphasized

> the distinction between a telegraph company (in which publication may be said to have occurred through the direct participation of agents) and a telephone company, which, as far as content is concerned, plays only a passive role . . . . Prodigy's role in transmitting email is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations.

94 N.Y.2d at 249.

[6]94 N.Y.2d at 249–50. The court explained that:

> In some instances, an electronic bulletin board could be made to resemble a newspaper's editorial page; in others it may function more like a "chat room." In many respects, an ISP bulletin board may serve much the same purpose as its ancestral version, but uses electronics in place of plywood and thumbtacks. Some . . . post messages instantly and automatically, . . . while . . . others significantly delay posting so as not to become "chat rooms". . . . [E]ven if Prodigy "exercised the power to exclude certain vulgarities from the text of certain . . . messages," this would not alter its passive character in "the millions of other messages in whose transmission it did not participate" . . . nor would this . . . compel it to guarantee the content of those myriad messages.

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allowing a third party imposter to open an account to spoof plaintiff's identity, rejecting the suggestion that an ISP should be held to a duty to investigate or authenticate the identity of subscribers.[7]

The issue of retroactivity raised in *Lunney* is less likely to arise today. With the passage of time, fewer claims may be asserted under applicable statutes of limitation that would have arisen prior to the time the Good Samaritan exemption took effect in January 1996.

Lunney is instructive—even if the retroactivity issue decided in that case is unlikely to arise again given the passage of time—because it underscores that even absent the CDA exemption, there may be no affirmative duty to act.

Similarly, in *Doe v. SexSearch.com*,[8] the Sixth Circuit affirmed the district court's dismissal of a variety of claims arising out of the plaintiff's use of a sex finding service, based largely on the site's Terms and Conditions. In *SexSearch.com*, the plaintiff had met and had sex with another user of the SexSearch site who turned out to be 14 years old. Doe was arrested and sued SexSearch, alleging that it was liable because it purported to only allow adults 18 years or older to join. The Sixth Circuit declined to reach the question of whether plaintiff's claims were barred by the CDA, relying instead on plaintiff's failure to allege sufficient facts for some claims and the warranty disclaimers in SexSearch's Terms

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94 N.Y.2d at 250 (quoting in part the district court ruling; citations and footnote omitted). In this regard, the court's analysis about how to draw the line is closer to the standard applied in *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) than the one used by Judge Ain in *Stratton Oakmont v. Prodigy Servs., Inc.*, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (Nassau County, N.Y. Sup. Ct. May 26, 1995), whose ruling in that case led to the passage of the Good Samaritan exemption. *See supra* § 37.04[3]. The New York Court of Appeals cautioned, however, that it saw "no occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher." *Lunney*, 94 N.Y.2d at 250–51.

[7] 94 N.Y.2d at 251. The court wrote that:

> The rule plaintiff advocates would, in cases such as this, open an ISP to liability for the wrongful acts of countless potential tortfeasors committed against countless potential victims. There is no justification for such a limitless field of liability . . . . If circumstances could be imagined in which an ISP would be liable for consequences that flow from the opening of false accounts, they do not present themselves here.

94 N.Y.2d at 251 (citation omitted).

[8] *Doe v. SexSearch.com*, 551 F.3d 412 (6th Cir. 2008).

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and Conditions, which, among other things, provided that SexSearch could not "guarantee, and assume[s] no responsibility for verifying, the accuracy of the information provided by other users of the Service."[9] The *SexSearch* case is discussed more extensively in section 37.05[6].

In light of the Ninth Circuit's ruling in *Fair Housing Council v. Roommate.com, LLC*[10] and the Tenth Circuit's opinion in *FTC v. Accusearch, Inc.*,[11] the issue of liability on the merits could be litigated more frequently in the coming years, at least in the Ninth and Tenth Circuits.

37.06 Advising Clients in Disputes With Interactive Computer Services and Users

37.06[1] In General

The Good Samaritan exemption makes it unappealing in most cases for an attorney to sue a service provider for damages or injunctive relief in cases involving online acts of defamation. Plaintiffs' lawyers nonetheless may be able to obtain practical relief for their clients—in some cases without even having to resort to litigation. Service providers, in turn, may have an incentive to increase their protection under the exemption by taking action voluntarily, in appropriate cases, to restrict access to or the availability of potentially actionable content.

As discussed in section 37.02, potential litigants also may be able to compel the disclosure of the identity of pseudonymous tortfeasors, thereby facilitating direct relief.

37.06[2] Demand Letters and Other Communications with Site Owners and Service Providers

Some site owners and service providers—especially those targeted at consumers—may respond to complaints about defamatory or other tortious, illegal or objectionable content posted on their sites or services. Lawyers seeking redress for defamed clients should review applicable terms and condi-

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[9] *Doe v. SexSearch.com*, 551 F.3d 412, 417 (6th Cir. 2008).

[10] *Fair Housing Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

[11] *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009); *see generally supra* § 37.05[3] (discussing these cases).

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Mr. Ballon was the recipient of the 2010 Vanguard Award from the State Bar of California's Intellectual Property Law Section. He also has been recognized by *The Los Angeles and San Francisco Daily Journal* as one of the Top Intellectual Property litigators in every year the list has been published (2009-2021), Top Cybersecurity and Artificial Intelligence (AI) lawyers, and Top 100 lawyers in California.

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