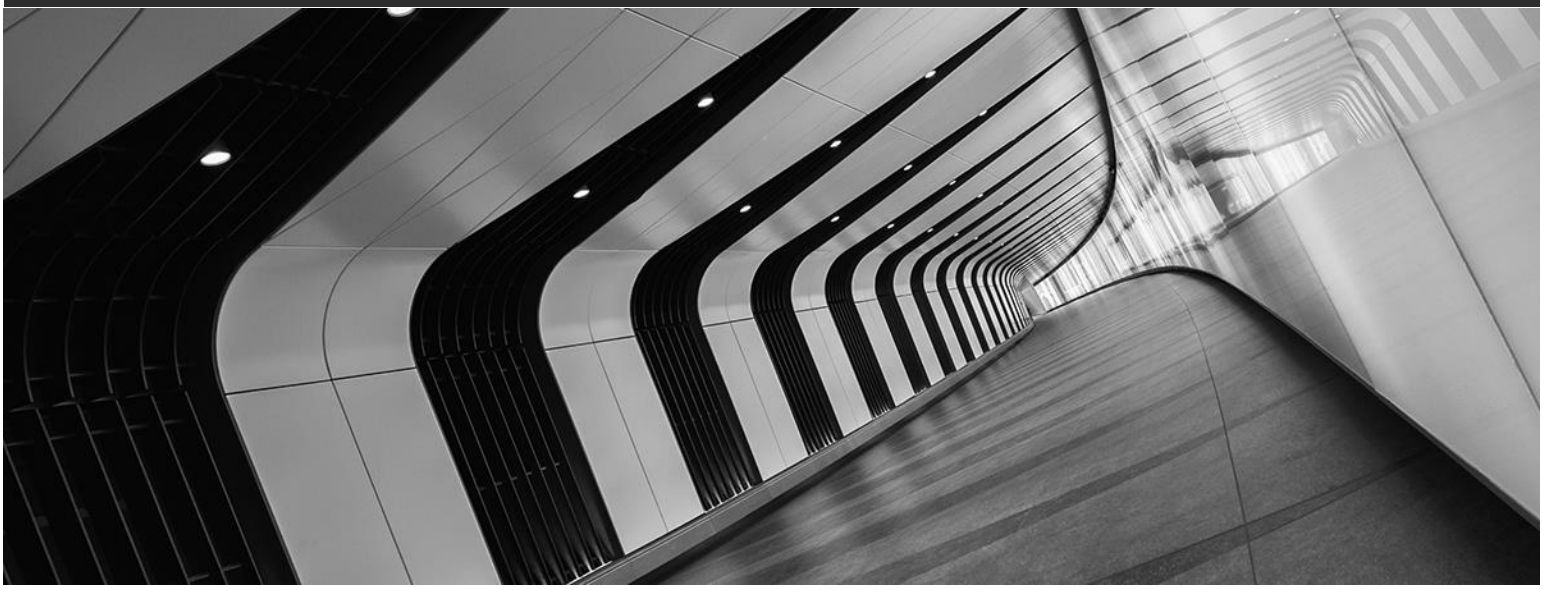
Decision Upholding Santa Monica Ordinance Too Narrowly Construes Section 230(c)(1) of the CDA



By Ian C. Ballon and Ranika S. Morales | April 8, 2019 | The Recorder

In *HomeAway.Com v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019), the U.S. Court of Appeals for the Ninth Circuit unanimously upheld a Santa Monica ordinance that would force online home-sharing platforms like HomeAway.com and Airbnb to police third-party users' listings for compliance with city registration laws. Santa Monica's Ordinance 2535, as amended in 2017, restricts most short-term rentals, with the exception of licensed home-shares. It further requires hosting platforms to refrain from, among other things, completing booking transactions involving properties not licensed and listed on the city's registry. Violations of the ordinance are punishable by a fine of up to $500 and/or imprisonment for up to six months.

The decision followed an order by Central District of California Judge Otis D. Wright II dismissing for failure to state a claim an action brought by HomeAway.com and Airbnb challenging the ordinance under, among other things, the Communications Decency Act, which shields interactive computer services, including platform providers, from liability for publishing third-party content. See The Communications Decency Act of 1996, 47 U.S.C. Section 230(c)(1) (the CDA) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."), Section 230(e)(3) (providing for the express pre-emption of inconsistent state laws).

In a unanimous opinion written by Judge Jacqueline H. Nguyen, the panel rejected the platforms' claim that the ordinance runs afoul of Section 230(c)(1) of the CDA by requiring them to monitor and remove third-party content. The panel held that the ordinance does not expressly require platforms "to review the content provided by the hosts of listings on their websites," but rather to "monitor … incoming requests to complete a transaction—content that, while resulting from the third-party listings, is distinct, internal and nonpublic." The panel further held that the First Amendment was not implicated because the ordinance is "plainly a housing and rental regulation" and doesn't apply to "expressive activity." It also acknowledged that "even assuming that the ordinance would lead the platforms to voluntarily remove some advertisements for lawful rentals, there would not be a 'severe limitation on the public's access to lawful advertisements, especially considering the existence of alternative channels like Craigslist."

The court's CDA holding contravenes its own precedent set in *Doe No. 14 v. Internet Brands*, 824 F.3d 846, 851 (9th Cir. 2016). In that case, the Ninth Circuit held that the CDA did not shield the owner of a website used to connect models with prospective employers from liability for failing to warn the plaintiff, who was drugged and raped by third party users of the website, where it allegedly had knowledge obtained in the physical world of an ongoing scheme to lure models to fake auditions where they were later attacked. Significantly, however, the court held that the CDA shielded interactive computer service providers from any duty to warn *p*remised on online content. The *Doe No. 14* panel explained that "the 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." 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.'"

Under the court's own *Internet Brands* framework, however, the CDA should apply to shield hosting platforms from liability for user-generated content under the ordinance. As the panel itself acknowledged, under the ordinance, platforms face liability for "unlicensed bookings." To avoid liability, platforms would be required to search for, identify, and (yes) "remove noncompliant third-party listings on their website." While the panel dismissed this obligation as a mere business "choice," it goes to the heart of what Section 230(c)(1) protects—namely, interactive computer services who face liability for the exercise of their traditional editorial functions. Because violations of the ordinance are punishable "by a fine of up to $500 and/or imprisonment for up to six months," Op. at 10, removal is mandated by law. Thus, unlike in *Internet Brands*, the ordinance at issue in *City of Santa Monica* would "require [platforms] to remove" user content to avoid liability, which would constitute a fundamental "change" to the content posted by the platforms' users. Hence, the obligations imposed on platforms by the ordinance are significantly greater than the "self-produced warning" required of the platform in *Internet Brands*, 824 F.3d at 851, and the ordinance "necessarily requires" platforms to monitor, identify, and remove noncompliant third-party content.

The *Santa Monica* panel also held—for the first time—that compelled monitoring of "internal and nonpublic" information is not inconsistent with the CDA. It explained that the ordinance "does not require the platforms to review the content provided by the hosts of listings on their websites," but rather to monitor "incoming requests to complete a booking transaction—content that, while resulting from the third-party listings, is distinct, internal, and nonpublic." But under the CDA and even the Ninth Circuit's own decision in *Internet Brands*, the outward or inward facing nature of the information is a distinction without a difference where, as here, a law would "require [defendant] to remove any [offending] user content" and "affect how it publishes such content."

The panel's assertion that the ordinance would not hinder the Congressional policy underlying the CDA is likewise flawed. The CDA endeavors to immunize interactive computer services from lawsuits seeking to hold them liable for the exercise of their "traditional editorial functions, such as deciding whether to publish, withdraw, post or alter third party content," see *Zeran v. America Online,* 129 F.3d 327, 330–33 (4th Cir. 1997).

Indeed, the language of the opinion underscores that, despite artful wordsmithing, the panel recognized it was imposing editorial and content-monitoring obligations on the defendant-platforms. See Op. at 16 ("Like their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations, concerning, for example, employment, tax, or zoning.").

The platforms have petitioned for rehearing en banc. Unless this decision is reconsidered, it will force certain interactive computer service providers to monitor and edit or withdraw from the publication of third-party content—the very conduct the CDA purports to protect.

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Ballon and Morales represented a group of technology companies as amici curiae in support of plaintiffs-appellants in the HomeAway.Com v. City of Santa Monica appeal before the U.S. Court of Appeals for the Ninth Circuit. The opinions expressed in this article, however, are solely those of the authors.