FOSTA/SESTA EXCLUSIONS FROM CDA IMMUNITY

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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 scope and one provision that addresses the scope of CDA preemption.

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

[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 and California code provisions that create equivalent exemptions under state law). As stated in the stat-

criminal statute[s,]"[3] "any law pertaining to intellectual property,"[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the federal Electronic Communications Privacy Act[5] "or any similar State law"[6] – were included in the statute as originally enacted.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. 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.[8] This issue is analyzed below in section 37.05[5][B].

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ute, 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).

[3]47 U.S.C.A. § 230(e)(1).

[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]*Compare, e.g.*, *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) *with 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

The sex trafficking provisions consist of three separate exclusions to subsections 230(c)(1) (for republication of third party content)[9] and 230(c)(2)(B) (for enabling or making available content filters)[10]of the CDA (but 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).[11] 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 criminalizes 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.[12] Interactive computer service providers and users that seek to avoid liability pursuant

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text of the statute excludes any claim pertaining to intellectual property and severely criticizing the Ninth Circuit's ruling in *Perfect 10*) *and 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).

[9]*See generally supra* § 37.05[3].

[10]*See generally supra* § 37.05[4].

[11]*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].

[12]47 U.S.C.A. § 230(e)(5).

to these exclusions may do so by complying with the Good Samaritan provision of section 230(c)(2)(A).[13]

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),[14] which is the exemption most commonly litigated.

CDA defenses based on section 230(c)(1) (for republication of third party content)[15] or section 230(c)(2)(B) (for enabling or making available content filters)[16] 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)[17] 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 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 ser-

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[13]*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).

[14]*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 preempted 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)).

[15]*See generally supra* § 37.05[3].

[16]*See generally supra* § 37.05[4].

[17]*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).

vice 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),[18] or in narrow circumstances under a limited number of specific state statutes that, by their terms, exclude liability for interactive computer service providers.[19]

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

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[18]*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.

[19]*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, Florida, Illinois, Maine, Maryland, Michigan, Minnesota, Maryland, Michigan, Minnesota, 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). 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.").

[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 Informa-

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 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).

For claims arising under other intellectual property laws, there is general agreement that federal claims are excluded but there is disagreement between the Ninth Circuit and district courts in the First and Second Circuits over whether state law 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[4] plainly are excluded from the scope of section 230 preemption.[5] The applicability of the CDA's Good Samaritan exemption to state intellectual property law claims (such as those arising under state common

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tion 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.

[4]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.

[5]*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).

law and statutory trade secret,[6] right of publicity,[7] copyright,[8] and trademark[9] laws), however, is subject to conflicting judicial interpretations.

To understand the scope of the exclusion for any law pertaining to intellectual property, it is helpful to start with the subsection in which it appears. 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), which address the effect of the Good Samaritan exemption on other laws.[10] The exemption does not apply to "[f]ederal criminal statute[s,]"[11] "any law[s] pertaining to intellectual property,"[12] or the federal Electronic Communications Privacy Act[13] "or any similar State law."[14] Where applicable, the Good Samaritan exemp-

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[6]*See supra* § 10.12[3] (discussing state law trade secret claims). State and federal trade secret law is analyzed in chapter 10.

[7]State common law and statutory right of publicity laws are analyzed in chapter 12 along with claims under the federal Lanham Act, which are excluded from the scope of CDA preemption.

[8]*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).

[9]State trademark claims are addressed in chapter 6.

[10]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).

[11]47 U.S.C.A. § 230(e)(1).

[12]47 U.S.C.A. § 230(e)(2).

[13]47 U.S.C.A. § 230(e)(4); *see generally supra* § 37.05[1][A].

[14]47 U.S.C.A. § 230(e)(4).

tion expressly preempts inconsistent state laws[15] (although it does not preempt those state laws that are consistent with its provisions).[16] 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.[17]

The CDA excludes "*any law* pertaining to intellectual property,"[18] which 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

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[15]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.").

[16]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 and California code provisions that create equivalent exemptions under state law). As 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).

[17]*Compare, e.g.*, *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) *with 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*) *and 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).

[18]47 U.S.C.A. § 230(e)(2) (emphasis added).

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, and not merely *federal* intellectual property laws. Section 230(e) originally contained only the first four sub-parts (which, along with a fifth subpart added for 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)).

The question of whether the Good Samaritan exemption preempts or has no effect on state claims pertaining to intellectual property ultimately depends upon 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 an exemption in federal civil cases other than those arising under the ECPA. This view 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 content)).[19]

To find that the Good Samaritan exemption preempts state laws pertaining to intellectual property a court could conclude that, rather than constituting independent provisions, section 230(e)(3), which broadly preempts all inconsistent state and local laws, modifies section 230(e)(2), which provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."

Alternatively, a court could conclude that laws "pertaining to intellectual property" are necessarily federal laws, because state IP claims typically are tort or tort-like claims.[20]

Congress, in 1995 when the CDA was enacted, 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[21]) and liability for defamation. Nevertheless, neither the plain terms of the statute nor its legislative history reveal what Congress had in mind in referring to "any law pertaining to intellectual property" in section 230(e)(2). The meaning is best understood by reference to the statute itself.

Section 230(e)(2) uses broad language in directing that nothing in section 230 shall be construed to limit or expand any law pertaining to intellectual property. Logically, this would support a construction of section 230 that excludes all laws pertaining to intellectual property, not just federal laws. Likewise, the structure of the statute—focusing on both state and federal claims, and then "*any* law pertaining to intellectual property" suggests a construction that excludes both state and federal laws.

Ultimately, the scope of the exclusion for "any claim

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

[20]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).

[21]17 U.S.C.A. § 512; *see generally supra* § 4.12.

pertaining to intellectual property" is best understood in terms of whether the subparts set forth in section 230(e) are independent or modify one another. In this context, the construction of intellectual property law to mean *federal* intellectual property law could be justified because section 230(e)(3) provides that the CDA preempts state law, leaving section 230(e)(2) to address federal intellectual property laws.

In *Perfect 10, Inc. v. CCBill, Inc.*,[22] the Ninth Circuit construed the term "intellectual property" to mean "federal intellectual property" and ruled that the plaintiff's California right of publicity claim against an Internet payment processor was preempted.[23] Consequently, in the Ninth Circuit 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,[24] provided the

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[22]*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007).

[23]*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir.), *cert. denied*, 522 U.S. 1062 (2007).

[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 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); *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 online app vendors as preempted by the CDA); *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

content originated with a third party information content provider and was not created or developed by the defendant itself.[25]

In *CCBill,* the Ninth Circuit spent most of its attention in the opinion on issues of first impression under the Digital Millennium Copyright Act,[26] giving short shrift to its holding

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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, 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).

[25]*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).

[26]17 U.S.C.A. § 512(c); *see generally supra* § 4.12 (analyzing the statute and discussing the case).

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 development of the Internet from the various state-law regimes.[27]

This analysis, however, was severely criticized for ignoring the structure of the statute in *Doe v. Friendfinder Network, Inc.*,[28] a district court decision from New Hampshire, in which 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.[29]

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."[30] He further criticized the Ninth Circuit for failing to "make any effort to reconcile its reading of section 230(e)(2)

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[27]488 F.3d at 1118.

[28]*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

[29]*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." *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008)*, quoting Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007)*, citing U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

[30]540 F. Supp. 2d at 299.

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 distinguish between state and federal law in section 230, it knew how to do so."[31] 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") . . . .[32]

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."[33]

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[31]540 F. Supp. 2d at 299–300.

[32]540 F. Supp. 2d at 300.

[33]540 F. Supp. 2d at 300. 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.

540 F. Supp. 2d at 300. 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." 540 F. Supp. 2d at 300*, quoting Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007) (footnote omitted).

Other cases had previously discussed[34] the issue or held without specifically analyzing that state intellectual property claims, like federal intellectual property claims, are excluded from section 230 and are not preempted.[35]

In *Atlantic Recording Corp. v. Project Playlist, Inc.*,[36] Second Circuit Judge Denny Chin, while he was still a district court judge for the Southern District of New York, 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."[37] 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

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[34] *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320–24 (11th Cir. 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*.

[35] *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.").

[36] *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

[37] *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*).

pertaining to intellectual property," it knew how to make that clear, but chose not to.[38]

By contrast, he noted that "[t]he Ninth Circuit did not engage in a textual analysis in *Perfect 10*."[39]

Judge Chin continued, explaining 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."[40] 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."[41] 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."[42]

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.[43] Other courts have similarly held that the CDA does not preempt state law IP claims.[44]

Given the sharp divergence between the Ninth Circuit's

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[38]*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) (footnote omitted; emphasis in original).

[39]*Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 n.11 (S.D.N.Y. 2009).

[40]*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).

[41]603 F. Supp. 2d at 704, *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.").

[42]603 F. Supp. 2d at 704.

[43]*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).

[44]*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).

analysis, on the one hand, and the *Friendfinder* and *Project Playlist* cases on the other, however, many courts in other parts of the country 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.[45]

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[45]*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 gen-

Even in the Ninth Circuit, the scope of preemption for state IP claims is only relevant where third party content is at issue and the other elements of the Good Samaritan provision may be satisfied. Thus, in *Fraley v. Facebook, Inc.*,[46] 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."[47] She emphasized that plaintiffs did not allege merely that Facebook edited user content—"such as by correcting spelling, removing obscenity or trimming for length."[48] Judge Koh concluded that "Facebook transformed the character of Plaintiffs' words, photographs, and actions into a commercial endorsement to which

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eral '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 Publicity 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.

[46]*Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

[47]*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).

[48]*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).

they did not consent."[49] 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 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."[50] 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.*,[51] 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."[52] 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

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[49]*Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011).

[50]*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.").

[51]*Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1246-49 (N.D. Cal. 2014).

[52]*Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1248 (N.D. Cal. 2014).

republication.[53] 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.

Judge Koh also based her ruling on her conclusion that the reminder emails were not "substantively identical to the initial invitation email."[54] 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.[55]

Identicality, however, should not be the relevant test, given that the CDA broadly immunizes traditional editorial

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[53]*See supra* § 37.05[3] (analyzing publication and development).

[54]*Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1248 (N.D. Cal. 2014).

[55]*Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1248 (N.D. Cal. 2014) (footnote omitted).

functions,[56] including editing, which involves some rewriting and reorganization of material, as anyone who has ever 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.[57] Outside the Ninth Circuit, however, it is not clear that a right of publicity claim would be held preempted by the CDA, as previously discussed in this subsection.

In *Cybersitter, LLC v. Google, Inc.*,[58] 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

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[56]*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 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].

[57]*See supra* § 37.05[3] (analyzing CDA case law, its development and nuanced differences in how CDA law is applied in different jurisdictions).

[58]*Cybersitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086-87 (C.D. Cal. 2012).

be argued that Congress may not have 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 intended that the exclusion for intellectual property claims not impact the general rule of preemption of state law claims.[59]

One could also argue that 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*, because, 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 Act and the Patent Act.

Intellectual property laws, including even federal copyright and trademark laws, have their origin in state tort law. While rights of publicity,[60] state trade secret law,[61] common law copyrights,[62] state trademarks[63] and potentially

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[59]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.

[60]*See supra* chapter 12.

[61]*See supra* chapter 10.

[62]*See supra* § 4.18[2].

[63]*See supra* § 6.04.

even idea protection[64] 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[65] (and, unlike federal copyright, trademark and patent laws, provide no independent basis for federal court jurisdiction). Rights of publicity are an outgrowth of state common law privacy law[66] and trade secret law is often defined (even in U.S. Supreme Court case law) by reference to the Restatement of Torts.[67] Common law copyright claims likewise frequently arise under state tort or unfair competition laws.[68] 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.*,[69] 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

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[64]*See supra* chapter 13.

[65]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 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.

[66]*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).

[67]*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).

[68]*See supra* § 4.18[2].

[69]*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

third-party copyright liability doctrines.[70] 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).[71] The major Internet law cases in 1995 when Congress considered the Good Samaritan exemption (and as late as January 1996 when the statute was enacted into law) were *Cubby, Inc. v. CompuServe, Inc.*,[72] and *Stratton Oakmont v. Prodigy Services, Inc.*,[73] which addressed defamation,[74] and *Religious Technology Center v. Netcom Online Communication Service, Inc.*,[75] 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*.[76] 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.[77] Indeed, the only online trade secret[78] and right of publicity[79] cases either decided or then-pending raised issues of direct, not vicarious liability. In all

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[70]U.S. Department of Commerce, National Information Infrastructure White Paper (Sept. 1995), available at http://www.uspto.gov/go/com/doc/ipnii/.

[71]Concern about potential exposure for secondary copyright infringement eventually led to the enactment of the Digital Millennium Copyright Act in 1998. *See generally supra* § 4.12.

[72]*Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

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

[74]*See supra* § 37.04 (discussing these cases).

[75]*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

[76]*Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

[77]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).

[78]The Church of Scientology had filed several trade secret cases in

likelihood, Congress never considered the risk of exposure for state law intellectual property 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 to determine its scope.[80] 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."[81]

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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).

[79]*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).

[80]*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.

[81]*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

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 necessarily preempted by section 230(e)(3).

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 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.[82] In similar contexts, courts have construed claims as preempted by the CDA if, regardless of how

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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).

[82]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.

framed, the cause of action sounds in negligence.[83]

37.05[5][C] The Exclusion for Sex Trafficking Claims (and Related Advertising)

The Good Samaritan exemption was amended in 2018 to carve out exclusions from some—but not all—of the immunities 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

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[83]*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 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.

trafficking.[1]

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,[2] and enjoin enforcement of certain state criminal law provisions,[3] bipartisan support emerged to carve out

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[Section 37.05[5][C]]

[1]A challenge to the Constitutionality of the statute under the First and Fifth Amendment was dismissed for lack of Article III standing. *See Woodhull Freedom Foundation v. United States,* __ F. Supp. 3d __, 2018 WL 4568412 (D.D.C. 2018). 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.

[2]*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 preempted 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 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.").

[3]*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

sites like Backpage (as well as Eros, Massage Troll, and cityxguide) from the scope of the Good Samaritan exemption.[4] 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

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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).

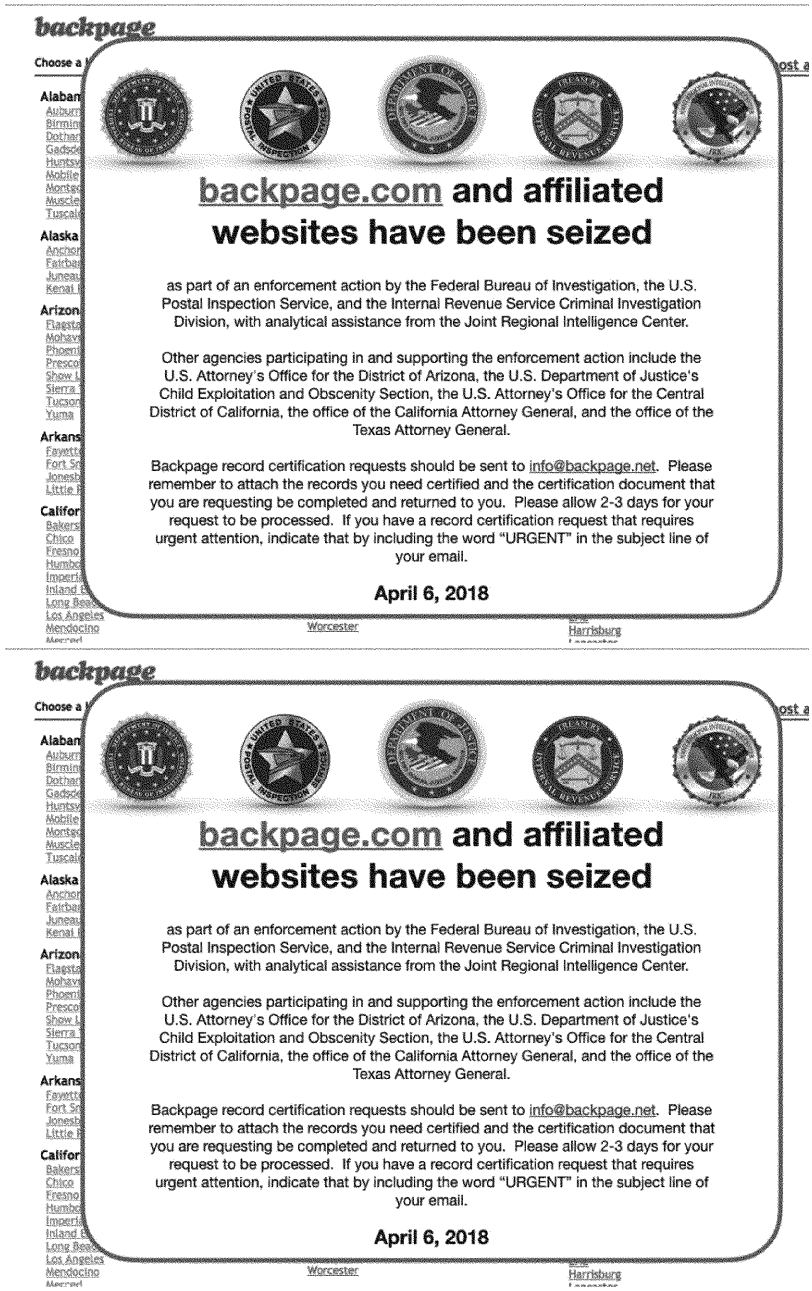
[4]*See* H.R. Rep. 572, 115th Cong. 2d Sess. 3 (2018), 2018 U.S.C.C.A.N. 73, 74; *see also* S. Rep. No. 199, 115th Cong., 2d Sess. 2, 2018 WL 359931, at *2 (stating that CDA "protections have been held by courts to shield from civil liability and State criminal prosecution nefarious actors, such as the 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 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:

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 provide protection to these websites.[5]

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.[6] 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)[7] for taking action to deter objectionable material (including advertisements for adult escorts or other services that could involve sex trafficking) should be

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[5]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).

[6]*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).

[7]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].

able to avoid liability under the new provisions, even if they are now denied protection by section 230(c)(1).[8]

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.[9]

In other words, CDA defenses based on section 230(c)(1)

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[8]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* § 27.05[7]. As a consequence, suits involving the potential applicability of 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.

[9]47 U.S.C.A. § 230(e)(5).

(for republication of third party content),[10] which is the immunity section most frequently litigated, or section 230(c)(2)(B) (for enabling or making available content filters),[11] 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)[12] would still 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 (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.[13] 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 is 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).[14] 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 crimi-

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[10] *See generally supra* § 37.05[3].

[11] *See generally supra* § 37.05[4].

[12] *See generally supra* § 37.05[4].

[13] *See supra* § 37.05[4].

[14] *See infra* § 27.05[7].

nal statute, is not subject to any CDA protection, including the exemption created by section 230(c)(2)(A). Although there 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). 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 pursuant to 18 U.S.C.A. § 1595, if the conduct underlying the claim constitutes a violation of 18 U.S.C.A. § 1591.[15] 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,[16] which addresses an array of crimes under the heading "Peonage,

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[15]47 U.S.C.A. § 230(e)(5)(A).

[16]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.

Slavery, and Trafficking in Persons."[17] 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.[18] Section 1591, however, is potentially broad. It penalizes knowing misconduct, or

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(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.

[17]*See* 18 U.S.C.A. §§ 1581 to 1597.

[18]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 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 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.

merely reckless disregard, and reaches to anyone who "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.[19] With respect to advertising, however, liability may only be imposed for knowing misconduct, not reckless disregard.[20]

Subpart 230(e)(5)(B) 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" 18 U.S.C.A. § 1591.[21] 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."[22] 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.[23] Section 2421A(a) is directed specifically at anyone who owns, manages and oper-

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(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.

[19]18 U.S.C.A. § 1591(a).

[20]18 U.S.C.A. § 1591(a).

[21]47 U.S.C.A. § 230(e)(5)(B). Section 1591 is set forth in an earlier footnote.

[22]47 U.S.C.A. § 230(e)(5)(C).

[23]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—

ates 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).[24] 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.[25] Section 1591 also specifically addresses advertising in connection with sex trafficking, but only penalizes knowing misconduct, not reckless disregard.[26]

Section 2421A also allows victims to recover civil damages for aggravated violations.[27] 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

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(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),

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.

[24]18 U.S.C.A. § 2421A.

[25]*See* 18 U.S.C.A. § 1591(a).

[26]*See* 18 U.S.C.A. § 1591(a).

[27]18 U.S.C.A. § 2421A(c).

(including under subparts 203(c)(1) and 230(c)(2)(B)) appears to be fully available, and not excluded, for *civil* claims brought under section 2421A, 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.[28]

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 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

[28]*See* 18 U.S.C.A. § 1591(a).

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."[29] 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 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

[29] 47 U.S.C.A. § 230(e)(1).

how courts have construed section 230(e)(1)—as excluding federal criminal charges but not civil claims brought under federal criminal statutes.[30]

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 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

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[30]*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); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1163 n.5 (N.D. Cal. 2017) (rejecting the argument that section 230(e)(1) extends to civil claims brought under federal criminal statutes); *Cohen v. Facebook Inc.*, 252 F. Supp. 3d 140, 157 (E.D.N.Y. 2017) (concluding that section 230(e)(1) "does not limit Section 230(c)(1) immunity in civil actions based on criminal statutes, but rather extends only to criminal prosecutions . . . .").

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.[31]

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 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.[32] Backpage, for example, had benefitted from the CDA largely because its efforts to promote adver-

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[31]*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).

[32]*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 protec-

tisements 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.[33] 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 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.[34]

As a practical matter, most of the sex trafficking exclusions

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tion 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.").

[33]*See supra* § 37.05[3][D].

[34]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

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 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.

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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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SUMMARY OF CONTENTS

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- **Website and mobile accessibility** (chapter 48)
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- **Applying the First Sale Doctrine to the sale of digital goods and information** (chapter 16)
- **The GDPR, ePrivacy Directive and transferring data from the EU/EEA** (by Francoise Gilbert) (chapter 26)
- **Patent law** (updated by Josh Raskin) (chapter 8)
- **Music licensing** (updated by Tucker McCrady) (chapter 17)
- **Mobile, Internet and Social Media contests & promotions** (updated by Ed Chansky) (chapter 28)
- **Conducting a risk assessment and creating a Written Information Security Assessment Plan (WISP)** (by Thomas J. Smedinghoff) (chapter 27)