

**ABSTRACT**

With the explosion of online advertising comes the need to understand the legal complications associated with it. The overwhelming majority of content on the Internet is hosted on privately owned servers. It is because of this that the particular issue of content liability is especially applicable in the online world. Who can be held liable for the legality of an advertisement's content? While there is little debate that the creators of the online advertisements themselves can be held liable, the liability debate is not so clearly defined for that of the "interactive computer service" (ICS) that hosts the advertisements.

The primary piece of legislation that dictates the liability of an ICS for the advertisements they host is Section 230 of the Communications Decency Act. This paper finds that overall Section 230 immunity holds strong for ICSs. It allows them to host and even exercise some editorial control over third-party advertising. When no contribution to the advertising content is made by the ICS, immunity has been consistently upheld.

However, for online marketplaces that provide services that assist third parties in the creation of advertisements, such as Stubhub and Roommates.com, care should be given not to knowingly participate in, profit from or encourage exclusively illegal activity. This study reveals the need for courts to further explain this grey area of contribution. As it stands, it remains unclear what types of activities lead the courts to hold that the ICS knew or should have known it was contributing to illegal activity.

## INTRODUCTION

From inches to pixels, the advertising business has seen an evolution with the advent of the Internet. With the overwhelming majority of United States citizens visiting online websites each day, and virtually unlimited space on those sites in which to advertise, there is little surprise as to why online advertisements have exploded in the last five years.<sup>1</sup> With this explosion has come an increased need to understand the legal complications associated with hosting online advertising.

The need for this new understanding stems from the very structure and design of the Internet as a web of privately owned, interconnected computer networks.<sup>2</sup> The overwhelming majority of content on the Internet is hosted on privately owned servers.<sup>3</sup> It is because of this important distinction that the particular issue of content liability is especially applicable in the online world. Each and every advertisement seen on the Internet today is hosted on a computer network owned by an individual or company. Private parties, who are not the original creators, host the advertisements on its Web hosting servers and websites. Who then can be held liable for the legality of an advertisement's content? While there is little debate that the creators of the online advertisements themselves can and have been held liable, the liability debate is not so clearly defined for that of the "interactive computer service" (ICS) that host the advertisements.<sup>4</sup>

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<sup>1</sup> Nielsen Reporting, *State of The Media – Trends in Advertising Spend and Effectiveness*, available at [http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/TrendsAdSpendanEffectiveness\\_Spreads.pdf](http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/TrendsAdSpendanEffectiveness_Spreads.pdf) (last modified Apr. 4, 2011).

<sup>2</sup> Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005) (Talks of the structure of the Internet as a privately owned enterprise).

<sup>3</sup> *Id.*

<sup>4</sup> John Palfrey & Urs Gasser, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 106 (2008). (Section 230 does not prevent plaintiffs from suing the people who posted the allegedly tortious comments).

The primary piece of legislation that dictates the liability of an ICS for the advertisements they host is Section 230 of the Communications Decency Act.<sup>5</sup> One particularly recent legal case involving Section 230 has recently gained notoriety. In a controversial ruling, the website Roommates.com was held liable for advertisements that were created by users of its online marketplace.<sup>6</sup> Scholars have noted that with cases involving online marketplaces, the simple difference between a dropdown box and a “fill in the blank” box can be the distinctive factor in whether a website is actively participating in the content creation of advertisements.<sup>7</sup> This distinction turns out to be one of the key inquiries as to whether a website is liable for the third-party advertising they host. In this case Roommates.com was liable as an “information content provider” (ICP).<sup>8</sup> While this ruling has given rise to scholarly debate as to whether it ruling was, it still stands as a warning that websites must be careful when aiding in the creation of advertisements on the Web.<sup>9</sup>

The murky understanding of when an ICS becomes viewed as an ICP in connection with the advertising content it hosts illustrates a need for further investigation of Section 230. This paper will gather and analyze court cases in which ICSs have been afforded immunity for their third-party advertisements and when they have not. The body of cases will then be summarized and common threads in the cases will be discussed. First, however, the paper provides background on Section 230 and then reviews the relevant scholarship.

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<sup>5</sup> 47 U.S.C. § 230(f)(3) (2006) (Legal statute definition of “interactive computer service”).

<sup>6</sup> Bradley M. Smyer, *Interactive Computer Service Liability For User-Generated Content After Roommates.com*, 43 U. MICH. J.L. REFORM 811 (2010).

<sup>7</sup> *Id.* at 830.

<sup>8</sup> Brian J. McBrearty, *Who’s Responsible? Website Immunity Under The Communications Decency Act and The Partial Creation or Development of Online Content*, 82 TEMP. L. REV. 827 (2009).

<sup>9</sup> See Smyer *supra*, note 6 at 836.

## **SECTION 230 AND ICS IMMUNITY: AN OVERVIEW**

Section 230 defines an ICS as any “information service, system, or access software provider that provides or enables computer access by multiple users to a computer service.”<sup>10</sup> This definition is so broad that it can be taken to mean everything from an email server to a blog. Section 230 provides an ICS with protection in the form of legal immunity from being treated “as the publisher or speaker of any information provided by another.”<sup>11</sup> Therefore, in many instances, an ICS is protected from legal liability for all sorts of content that others post on their websites, including advertisements.

In addition, Section 230 affords editorial privilege – the so-called “Good Samaritan” provisions – for an ICS to “voluntarily... restrict access to... material that... [the ICS] considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>12</sup> In this way Section 230 offers an expansive protection for an ICS and the content it hosts. However, the protection is not absolute. The immunity does not exempt legal liability for violations of criminal law, intellectual property law, state law or communications privacy law.<sup>13</sup>

Moreover, if an ICS aides in the “creation or development of information,” it may lose its immunity.<sup>14</sup> In this way a website or other online service can be characterized as an “information content provider” (ICP) under Section 230. An ICP is not afforded immunity by Section 230. This critical decision of whether the website or online service

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<sup>10</sup> 47 U.S.C. § 230(c)(1) (2006).

<sup>11</sup> *Id.*

<sup>12</sup> 47 U.S.C. § 230(c)(2)(A) (2006).

<sup>13</sup> 47 U.S.C. § 230(e) (2006).

<sup>14</sup> 47 U.S.C. § 230(f)(3) (2006).

had any role in the creation of content is often the key determination of whether it will be granted ICS immunity under Section 230.

The history of immunity afforded to media for third-party advertising content varies by time and medium. The print newspaper medium has been found to be legally responsible for the third-party content its advertisements made under common law republication liability doctrines.<sup>15</sup> Some scholars speculate that the Internet, too, should be regulated in a way similar to traditional common law publisher and distributor roles defined by the constitutional framework cases in the 1950's and 1960's.<sup>16</sup> However, Section 230 of the Communications Decency Act, passed in 1996, starkly separated the Internet from other media in regards to liability for third party-content. The Communications Decency Act entirely departed from more traditional conceptualizations of content liability for the Internet.<sup>17</sup>

Now, websites and other online services designed for consumers are protected against third-party content of all kinds, commercial or not. Provided that the website or online service had no hand in creating content, the courts have been fairly staunch in their preemption of claims hold interactive computer services as accountable for the actions of others.<sup>18</sup> However, exceptions and intricacies exist for the immunity. Scholars have analyzed Section 230 and have surmised commonalities from the case law.

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<sup>15</sup> Rebecca Tushnet, *Power without Responsibility: Interactive computer services and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2007-2008).

<sup>16</sup> Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?* 7 CHAP. L. REV. 39 (2004).

<sup>17</sup> *Id.*

<sup>18</sup> See *infra* Ardia, note 22 at 481.

## LITERATURE REVIEW

A debate exists in the scholarship regarding the application of the CDA today. The issue can be traced to the origin and aim in which Congress enacted the law. Two viewpoints emerge on the origin and aim. Both have the potential to be valid government interests. However the views stand in juxtaposition of each other. Both viewpoints have different implications for liability of interactive computer services for the advertisements they host on the Internet.

The first view acknowledges consumer protection. Critics of the CDA and the immunity it provides to interactive computer services emphasize the current lack of effective legal claims that are *not* covered by Section 230.<sup>19</sup> They argue that often, these interactive computer services make money from consumers and should take responsibility for material they use to draw consumers to their site. They argue that the law should not limit their liability to just the content they develop or create, but also to the content they disseminate from third-party information content providers.<sup>20</sup> In this way an ICS should have the responsibility of deterring negative behavior that occurs on their website, these critics argue. Scholars in favor of this view argue that the interactive computer services are in the best position to filter and control content.<sup>21</sup> This echoes the position that Senator James Exon took when drafting early versions of legislation that Congress would later fold into the CDA.<sup>22</sup> His aim was to regulate Internet obscenity. The argument continues that because the CDA invalidates ICS liability for any third-party content hosted, the original aim to protect consumers has been lost. One scholar

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<sup>19</sup> See Rustad, *supra* note 16 at 83.

<sup>20</sup> *Id.*

<sup>21</sup> See Holland, *infra* note 26 at 9.

<sup>22</sup> David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of ICS Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L. A. L. REV. 373 (2009-2010).

surmises that, under this view, the Internet is “rapidly becoming a global Petri dish for new torts and crimes perpetrated against consumers.”<sup>23</sup>

Critics of the CDA immunity provisions seek a reform or repeal of the statute that would then allow better policies of “efficiency and cost allocation.”<sup>24</sup> Some call for the reinstatement of statutes similar to traditional liability law found in common law. This would include statutes that designate “distributor with knowledge” liability from publisher liability for Internet interactive computer services.<sup>25</sup>

Proponents of ICS immunity under the CDA, on other hand, stress that the goal of Congress in enacting the CDA was to promote the growth of the Internet as a resource to promote free speech and commerce. The only way to ensure this growth was to do so by shielding interactive computer services from liability for liability from third-party content. This argument has been summarized as Internet exceptionalism, which one scholar says, “embraces the idea of cyberspace as an environment in which the authority of external legal regimes is minimal, and where an open market in norms and values works in concert with self-governance to permit the online community to establish its own substantive social norms.”<sup>26</sup>

Internet exceptionalism argues, that if the immunity afforded by the CDA was repealed, it might be too difficult or costly for interactive computer services to screen all of the content they receive from third parties. Immunity under the CDA thus is “a vital

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<sup>23</sup> See Rustad, *supra* note 16 at 3.

<sup>24</sup> See Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 226 (2006) (arguing “the goal [is] to encourage service providers to adopt the precautions that they can provide most efficiently while leaving any remaining pre-cautions to other market actors”).

<sup>25</sup> Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of ICS Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 654 (2001) (arguing that under a comparative institutional analysis, the “legal rule of total immunity for interactive computer services rather than distributor liability represents a failure of public policy and the poor resolution of a legal conflict”).

<sup>26</sup> H. Brian Holland, *In Defense of Online ICS Immunity: Facilitating Communities of Modified Exceptionalism*, 56 KAN. L. REV. 369, 10 (2008).

role in this process of building heterogeneous communities that encourage collaborative production and communication” according to Holland.<sup>27</sup> Under the concept of Internet exceptionalism, the costs of indirect ICS liability schemes could be great. Monetary cost would be imposed to the ICS and intellectual cost would be inflicted to consumer in the form of content that could be potentially filtered, Holland argues.<sup>28</sup>

Moreover, scholars point out that courts have not used the CDA to provide blanket protection from all claims that might be filed against interactive computer services regarding third-party content.<sup>29</sup> In a study by Ardia, of all the cases that involved the CDA immunity provisions decided through 2009, he found that nearly two-thirds of the defendants in those cases prevailed, utilizing the immunity provisions of the CDA.<sup>30</sup> While this number is high, nonetheless, immunity was not granted in a fairly substantial number of cases located in that study.

In cases in which unsuccessful claims for CDA immunity have been made, scholars have identified two major themes based on the facts and circumstances of the cases studied.<sup>31</sup> First, CDA immunity has been denied when the website or online services seeking immunity under the CDA has been found to have participated in generating or creating the objectionable or unlawful content. Second, CDA immunity has been denied in cases involving claims of a violation of federal intellectual property law.

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<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> Jeff Kosseff, *Defending Section 230: The Value of ICS Immunity*, 15 J. TECH. L. & POL'Y 123 (2010).

<sup>30</sup> See Ardia, *supra* note 22 at 481.

<sup>31</sup> *Id.*; Amy J. Tindell, *Indecent Deception: The Role of Communications Decency Act § 230 in Balancing Consumer and Marketer Interest Online*, B.C. INTELL. PROP. & TECH. F. 071901 (2009).



The latter point is not surprising perhaps because of provisions in the CDA that exclude intellectual property claims from immunity.<sup>32</sup>

As to the first theme identified about, courts have not granted immunity to website and online services that played a role in the creation of allegedly harmful content.<sup>33</sup> For example, as Kosseff points out and as mentioned in the introduction, a federal appeals court denied CDA immunity to popular housing website - Roommates.com – because of a requirement that consumers using the website to seek housing and roommates answer questions about their sex, gender, sexual orientation and whether they have children.<sup>34</sup> In the case, the public housing authorities that brought the action against the website argued that the content generated by Roommates.com was in violation of California housing discrimination laws and that the website facilitated creation of the illegal content.<sup>35</sup> This limitation on ICS immunity is present in other federal appellate and district court opinions located by scholars. Courts have held that a website is not immune under Section 230 if it actively participated in the allegedly harmful conduct several times in the Section 230's fifteen year history.<sup>36</sup>

However, the exact level of participation by a website or online service that is required to void CDA immunity remains at issue in the courts. In a recent and notable example that Kosseff cites, a company sued Google over allegedly fraudulent

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<sup>32</sup> 47 U.S.C. § 230(e) (2006).

<sup>33</sup> Kosseff, *Supra* note 29.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> See e.g., *Jane Doe v. Sexsearch.com*, 551 F.3d 412 (2008) (The court did not grant intermediary immunity saying Section 230 is not a means of "abrogating all state- or common-law causes of action brought against interactive Internet services); See e.g., *Anthony v. Yahoo!*, 421 F.Supp.2d 1257 (2006) (An operator of the dating service created content in the form of fake profiles and was found ineligible for Section 230 immunity).

advertisements that ran on Google's AdWords network.<sup>37</sup> The finding in that case was that the plaintiffs did not adequately allege that Google participated in the advertisement's creation.<sup>38</sup> The opinion did note that if the plaintiffs could provide more evidence that Google's involvement was significant in the creation of the advertisements, there was a possibility that the CDA immunity might not apply.<sup>39</sup>

Scholars have made this, sometimes subtle, distinction as the difference between being an information content provider instead of an Internet service provider. In the former, the website or online service could lose a claim for immunity under Section 230.<sup>40</sup> As Kosseff summarizes,

It becomes clear that for an online ICS to lose its Section 230 immunity, it must play more than a passive role in the alleged injury. At a minimum, for a website to lose immunity it must take specific steps that specifically encourage the plaintiff's injury, as in *Roommates.com*, but many courts are likely to require varying levels of 'encouragement' to abrogate Section 230 immunity.<sup>41</sup>

While scholars have made their opinion of cases involving the CDA clear, little research has been conducted as applied specifically to the content of online advertising. Ardia's study did take an initial look at false advertising claims. Categorized and analyzed alongside deceptive trade practices and unfair competition claims, only forty-four percent of federal and sixty-four percent of state court decisions provided immunity for interactive computer services in these cases.<sup>42</sup>

Overall, there has been little scholarly discussion regarding immunity for interactive computer services under the CDA specifically regarding the third-party

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<sup>37</sup> Kosseff, *Supra* note 29 at 30.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Tindell, *Supra* note 31 at 32.

<sup>41</sup> Kosseff, *Supra* note 29 at 30.

<sup>42</sup> See Ardia, *supra* note 22 at 441.

advertisements they disseminate.<sup>43</sup> None yet has specifically looked at the extent to which interactive computer services specifically have been found to also be information content providers in connection with third-party advertisements. On that note, this paper will analyze cases and then draw conclusions as to what actions constitute the contribution to Internet advertising and what actions do not for the purposes of voiding Section 230 immunity. The result should be beneficial to both advertising, law scholars and practitioners alike.

### **RESEARCH QUESTIONS, METHODS AND LIMITATIONS**

This study applies the method of case analysis to bring a better understanding of cases involving Section 230, interactive computer services and advertisements as the main content in question. Because a specific type of content – third-party advertising – was the focus for this study, no particular attention was given to the claims alleged in the case. To look for certain claims may have excluded certain types of cases, such as one case that took action on a Fair Housing Act.<sup>44</sup> Instead, the population of interest is all related decisions in which a party or the court interposed Section 230 as a defense to liability for the online content of advertising. For each case, a standard case analysis was performed. While the search that was performed is believed to be as exhaustive as possible, it should be noted that new or improperly indexed decisions could have led to results that were not completely inclusive. To collect the relevant decisions, searches were conducted for decisions citing Section 230 and containing the keyword “advertis\*”

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<sup>43</sup> See McBearty, *supra* note 8 at 852.

<sup>44</sup> 47 U.S.C. § 230(c)(1) (2006).

on LexisNexus Legal and Google Scholar.<sup>45</sup> These two databases were the most exhaustive primary legal research services available to this mass communications scholar. The results were then analyzed to identify any decisions. All of the search results were manually checked for maximum accuracy. This resulted in twelve valid cases. Finally, all of the abstracts from Ardia's exhaustive case study of Section 230 were analyzed, and two more cases were found.<sup>46</sup> Those results were checked for linked cases that may have been cited or mentioned. Of those cited cases, one more valid case was found. A total of fifteen cases in total were included in the analysis. Finally, all fifteen cases were then Shepardized to ensure that the highest level court decision was analyzed for each case and to ensure that no similar cases were cited.

Then, the methodology set forth by Ardia's paper was mirrored. The "decisions were then coded in order to capture general data about each decision (e.g., date, caption, venue, posture); data about the website or publication medium involved; data related to Section 230 and specific data about the decision (e.g., the disposition of the defense, appeal status); data about specific areas of judicial focus in the decision (e.g., whether the court analyzed the scope of the parties covered by Section 230, the nature of the defendant's relationship to the source of the content); and various miscellaneous data about the case (e.g., whether the plaintiff sued the third-party source of the content, whether the information was submitted anonymously, whether the court awarded sanctions or fees)." <sup>47</sup> Finally, each case was analyzed for a specific court opinion that

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<sup>45</sup> The search terms "230" and "advertis\*" were searched. Then all returned results for all databases were checked for accuracy. Many results were excluded for passing mentions and irrelevancy.

<sup>46</sup> See Ardia, *supra* note 22 at 413.

<sup>47</sup> See Ardia, *supra* note 22 at 415.

either led or did not lead to Section 230 preemption of alleged legal claims. It is the intent of the researcher that the results addressed the following research questions:

RQ 1: In cases involving an ICS and its hosting of third-party advertisements, what cases exist where an ICS was also found to be an ICP?

- a) How do they compare, and are there any commonalities?

RQ 2: Do the courts for these cases apply the same reasoning, or tests, for these cases?

- a) If so, what does the test look like?

## CASE ANALYSIS

### *Three prong inquiry for ICS immunity*

After an initial analysis, virtually all of the selected cases relied on a three-prong judicial inquiry to determine the application of Section 230. The *Doctor's Associates* case decided by a federal district court in 2010 clearly lists the parts.<sup>48</sup> The first question asked is “whether the Defendant is a provider of an interactive computer service.” Because the term ICS is so broadly defined, not one of the selected cases contained any real debate over this issue.<sup>49</sup> In fact, all of the opinions issued conceded this as an undisputed fact or glossed over this inquiry all together.

The second part of the inquiry is then posed: Are the advertisements “at issue provided by another information content provider?”<sup>50</sup> This issue, which is so frequently debated, relies on this single sentence. As will be later discussed in this section, this seemingly simplistic statement has led to varied interpretation by the courts. Finally, the third part of the inquiry provides a conclusion of the applicability of Section 230, based

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<sup>48</sup> *Doctor's Assocs., Inc., v. QIP Holders, LLC*, 2010 U.S. Dist. LEXIS 62667 (D. Conn., June 23, 2010).

<sup>49</sup> 47 U.S.C. § 230(c)(1) (2006).

<sup>50</sup> *Doctor's Assocs., Inc., v. QIP Holders, LLC*, 2010 U.S. Dist. LEXIS 62667 (D. Conn., June 23, 2010).

on the findings from the first two parts. It states that if the ICS is not ruled an ICP through the second part of the inquiry, it cannot be treated as a publisher or a speaker for the advertisements at issue.<sup>51</sup> The critical issue is in the second part of the inquiry.

Accordingly, of the advertising cases examined, two possible outcomes existed. The alleged ICS that hosted third-party advertising content was either granted immunity under Section 230, or the content could be determined to be outside of the immunity. These two scenarios provide an organizational structure in which to group the cases.

***ICSs immunity for allegedly illegal third-party advertising***

**Webhosts and third-party advertising content.** Of the seven cases (of fifteen) where ICS immunity was granted, only three were decided by appeals courts. Of those three, the only federal case was that of *Doe v. GTE*, a 2003 decision of the Seventh Circuit.<sup>52</sup> In this appellate decision, GTE, a Web hosting company, was found not to be liable for Internet advertisements it hosted for a third-party. The court found that under Section 230, GTE, an ICS, did not have any liability in regard to content it hosted of that was provided by others. The opinion concluded that a Web host, like a delivery service or phone company, is an intermediary and normally is indifferent to the content of what it transmits. It continued to reason that even “entities” that know the information's content do not become liable for the sponsor's deeds. The court found that despite claims by the plaintiff, GTE had no direct hand in the creation of the content at issue. Therefore, GTE was not treated as an ICP for claims of aiding and abetting. This was the only Section 230 case found that involved third-party advertising and Web hosting companies.

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<sup>51</sup> *Id.*

<sup>52</sup> *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003)

**Online marketplaces and third-party advertising content.** Instead, the majority of cases located in this study involved websites and the advertising they host. Of the fifteen cases located in this study, seven included a special type of website: online marketplaces.<sup>53</sup> An online marketplace can be taken to be any interactive website that allows users to create advertisements online for products or services they possess that they'd like to solicit.

In a California appellate district court decision in 2002, at issue was whether popular online marketplace eBay would be liable for the advertisements of “faked collectibles” created by its users.<sup>54</sup> Without any evidence to suggest that eBay did anything other than host the content, online buyers failed to plead around Section 230, which otherwise protected the ICS's conduct.<sup>55</sup> The court ultimately concluded that it was the users themselves who chose the incorrect category description in which to list their items for sale, not eBay. In essence, the court found eBay had no intention or reasonable suspicion that users of its service would list “faked collectibles” and, therefore, had no contribution in the content. The court ruled that eBay was, by definition, not an ICP and, therefore, immune from liability under Section 230.

Craigslist.com, another online marketplace, was found to have immunity for advertisements created by its users in *Dart v. Craigslist*, a 2009 decision of an Illinois federal district court.<sup>56</sup> A county sheriff alleged that the “adult” services section of the Craigslist.com's Internet classifieds service facilitated prostitution and constituted a public nuisance. Dart alleged that the mere creation of this category on Craigslist.com's website

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<sup>53</sup> See Ardia, *supra* note 22 at 429 (For a detailed definition of an online marketplace).

<sup>54</sup> Gentry v. eBay, Inc., 121 Cal.Rptr.2d 703 (2002).

<sup>55</sup> *Id.*

<sup>56</sup> Thomas Dart, Sheriff of Cook County v. Craigslist, Inc., 665 F. Supp. 2d 961 (N.D. Ill. Oct. 20, 2009)

invited and encouraged the proliferation of prostitution-related advertisements and, thereby, made Craigslist.com an ICP for those advertisements. The court, however, found that Craigslist was not culpable for “aiding and abetting” its customers who misused its services to commit unlawful acts. Instead, the court found that nothing the online marketplace offered induced anyone to post any particular listing. The phrase “adult,” even in conjunction with “services,” was not found to be unlawful in itself. *Stoner v. Ebay, Inc, Jane Doe v. Friendfinder Network, Inc* and *Anne Milgram v. Orbitz Worldwide, Inc.* all echo the reinforcement of user-generated content as an included protection under Section 230 when the ICS has no hand in the creation of or shaping in the user-generated advertisement for online marketplaces.<sup>57</sup>

**Websites and third-party advertising content.** The immunity for ICSs has also been extended to websites engaged in more traditional advertising and media buying relationships. These relationships can be thought of as in the realm of traditional advertisement purchasing, such as in more traditional media like newspapers and television.

In *Ramey v. Darkside Productions, Inc.*, a 2004 decision of the D.C. federal district court, a dancer sued a website publisher after one of her photos appeared in an advertisement on Darkside Productions’ website without her permission.<sup>58</sup> Even though the advertisement was uploaded to the website by Darkside Productions, the court found uploading and hosting was not a sufficient enough action to constitute Darkside Productions being held liable as a contributor or creator of the advertisement. Therefore

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<sup>57</sup> *Stoner v. eBay, Inc.*, 56 U.S.P.Q. 2d (BNA) 1852 (Cal. Super. Ct. 2000); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, (D.N.H. 2008); *Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, (Law Div. 2010).

<sup>58</sup> *Ramey v. Darkside Prods.*, 2004 U.S. Dist. LEXIS 10107 (D.D.C. May 17, 2004).



the court concluded that Darkside Productions was not an ICP under Section 230 and was immune from liability over for advertisement.

In 2008, a California superior court even extended Section 230 immunity to gambling ads that were illegal under federal criminal law.<sup>59</sup> The court noted that while the website with third-party Internet gambling advertisements could invoke Section 230 coverage in federal criminal prosecution; the ICS was still protected against civil action. As this was a civil action, that scenario did not apply and the ICS was again afforded immunity under Section 230 for the third-party advertising it hosted.

**The “Good Samaritan” provisions.** Finally, Section 230’s “Good Samaritan” provisions have been interpreted as a type of editorial privilege for interactive computer services.<sup>60</sup> These protections allow ICSs to restrict access to objectionable online material that its users may post. It has also been shown to allow discretion concerning what advertisements ICSs allow on their websites.

For example, a federal district court in Delaware decided a case in 2007 which the plaintiff sued search engines Google, Microsoft and Yahoo for refusal to run his advertisement.<sup>61</sup> The plaintiff alleged that the content was not defamatory or offensive as defined by the Good Samaritan provision in Section 230’s statute. He, therefore, alleged that the companies committed fraud, breach of contract and violation of his First Amendment rights by not publishing his advertisement per their advertising agreements on their websites. The court ruled that Section 230 protected all three defendants as ICSs from claims regarding their editorial discretion. Because the language “or otherwise objectionable content” was included in the Good Samaritan provision of Section 230, the

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<sup>59</sup> *Cisneros v. Yahoo, Inc.*, No. CGC-04-433518 (Cal. Sup. Ct. Nov. 6, 2008).

<sup>60</sup> 47 U.S.C. § 230(c)(2)(a) (2006).

<sup>61</sup> *Langdon v. Google, Inc., Yahoo! Inc., and Microsoft Corporation*, 474 F. Supp. 2d 622.

court concluded that an ICS did not need to justify why it chose to screen and delete content from its network.

***No ICS immunity for allegedly illegal third-party advertising***

**Online marketplaces and third-party advertising content.** As mentioned earlier in this paper, perhaps the most well-known case to date regarding online marketplaces, advertising and Section 230 immunity is the *Roommates.com* case decided by the Ninth circuit in 2008.<sup>62</sup> This case is an example of a website losing ICS immunity under Section 230 because it provided tools that allowed users to create the allegedly illegal advertisements.<sup>63</sup>

On appeal, the Ninth Circuit found Roommates.com's advertising creation system to inherently demand for, and filter content by, "impermissible criteria." The court found that the questions Roommates.com posed to users, such as asking racial preferences, to be a contribution to the advertising. Moreover, users' profile answers were created using pull-down menus that required answers before the user could proceed. These prompts required users to answer questions that were unlawful under California's Fair Housing Act. This contribution to content was enough to make Roommates.com, the ICS, also an ICP, thereby disqualifying it for Section 230 immunity.

A similar ruling came later in the Superior Court of Massachusetts. In *NPS, LLC v. Stubhub, Inc.*, the organization that owned the New England Patriots sued Stubhub alleging that it advertised and sold tickets that explicitly disallowed their resale online as protected by state law.<sup>64</sup> The court ruled that the claims of intentional interference with advantageous relations should be allowed to continue because although Stubhub was an

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<sup>62</sup> Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. Cal. 2008).

<sup>63</sup> See *supra* notes 53-57 and accompanying text.

<sup>64</sup> NPS LLC v. StubHub, Inc., No. 06-4874, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009).

ICS and the tickets were listed by third-parties, Stubhub still materially contributed to the alleged unlawfulness. The court ruled the “evidence of participation in illegal ‘ticket scalping’ is sufficient [in this case]... to establish improper means... sufficient to place Stubhub outside the immunity provided by the CDA.” The court ruled that Stubhub’s system of listing tickets contributed to the user’s ticket advertisements, therefore making it an ICP for those advertisements.

Stubhub again lost Section 230 immunity in a case where the plaintiff sued over Stubhub’s allegedly selling of tickets at well above face value.<sup>65</sup> In that case, a state trial court in North Carolina ruled that Stubhub’s practices contributed to the illegal act of ticket scalping. While the listings for the tickets for sale themselves were created by third-parties, the court found that Stubhub was profiting from the tickets and should have had “reasonable inclination” that the tickets were being sold at illegal prices. The court found it “difficult to accept” that Stubhub was consciously indifferent about and willfully blind to the tickets being advertised illegally at illegally escalated prices. The court found that, at the least, Stubhub encouraged illegal content. In this way, even though Stubhub was an ICS, its encouragement and contribution also made it an ICP for the listings and, thereby, did not receive protection under Section 230.

In *800JR Cigar, Inc. v. Goto.com, Inc.*, decided by a federal district court in New Jersey, Section 230 immunity was not applicable.<sup>66</sup> The alleged fraud claims were brought in the use of a trademarked name on the bidding pages of the online marketplace services. The court found that the uses of the trademarks were not solely confined to the advertisements listed by third parties. The court found that ICSs could become ICPs

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<sup>65</sup> Hill v. StubHub, Inc., No. 07 CVS 11310 (N.C. Super. Ct. July 14, 2008).

<sup>66</sup> 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273 (D.N.J. 2006).

when they, themselves, create or contribute to advertisements. In a 2008 decision by a federal district court in California, the online auction site eBay similarly was ruled to be an ICP for specific statements it made in advertisements about third-party auctions [and was not granted<sup>67</sup>

**Websites and third-party advertising content.** An ICS can be disqualified from ICS immunity if it creates advertisements themselves, even if those advertisements are for third-party services or companies. In *Swift v. Zynga*, a California federal district court decision in 2010, for example, the defendants ran a popular online gaming community called Farmville.<sup>68</sup> The online gaming site hosted advertisements for third-party services that claimed to provide free “in game credits,” without clearly listing that, by subscribing to the advertised service, users would incur monthly charges on their cellphone bills. Because there was evidence that Zynga crafted the advertisements for the third-party service and then placed them into the game, the court was quick to classify Zynga as an ICP, therefore excluding it from Section 230 immunity, regardless of the fact that the service featured in the advertisement was run by another company.

## **DISCUSSION & ANALYSIS**

This research has demonstrated that Web hosting companies, websites and online marketplaces can each be afforded protection from third-party-created advertising that they host. Section 230 applied to all cases located in this study in which the ICS clearly had no role in creating or actively encouraging content. However, the line remains blurred as to what degree an ICS may contribute to an advertising message. Because

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<sup>67</sup> Mazur v. eBay, Inc., 2008 US Dist. LEXIS 16561 (N.D. Cal. Mar. 4, 2008).

<sup>68</sup> Swift v. Zynga Game Network, Inc., 2010 U.S. Dist. LEXIS 117355 (N.D. Cal. Nov. 2, 2010).

Section 230 sets out no specific guidelines as to what exactly constitutes content creation, the courts have been left to decide on a case-by-case basis whether various ICSs have contributed to content.

The courts opinions in the *eBay* and *Craigslist.com* cases seem to be in agreement for online marketplaces.<sup>69</sup> In both cases, the court ruled that the creation of categories for users to post advertisements under was generally not enough to constitute contribution of content to those advertisements for purposes of voiding Section 230 immunity. The court ruled, in these cases, that the defendants had no real reasonable expectation that the very nature of the categories in which they created would lead to illegal activity.

However, the *Stubhub* decisions seems to warn ICSs that knowingly profit, or otherwise gain, from illegal activity that they can be held accountable for the creation of a category being used to advertise the sale of items.<sup>70</sup> The very act of creating a category for a specific sporting event was indeed enough to void Section 230 immunity protection in both *Stubhub* cases, because the reselling of tickets and the scalping of tickets were illegal activities. Therefore, by merely creating the category, Stubhub should have known that it was calling for illegal content, the courts concluded. The courts reasoned *Stubhub* most certainly knew that it was creating the categories, and the courts found that contribution to be significant. The *Roommates.com* case is another example of an online marketplace with an advertisement creation system that lost protection under Section 230 because the site knowingly contributed allegedly illegal advertising. Because the users had no way of not answering the questions to create their housing-related advertisements,

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<sup>69</sup> See *supra* 54-56 and accompanying text.

<sup>70</sup> See *supra* 65-66 and accompanying text.

Roommates.com was actively encouraging the creation of that content, according to the court in that case.

Still, it remains unclear what types of activities lead the courts to hold that the ICS knew or should have known it was contributing to illegal activity. One of the stated rationales for creating Section 230 immunity was based on the fact that it would be nearly impossible for an ICS to have knowledge of all the third-party content that it hosted on its website.<sup>71</sup> Because the volume of user-created content is so great on many ICSs, it would be an enormous and laborious task for an ICS to filter content for unlawful activity. Indeed, in *GTE*, the court in that case was clear to say that ICSs can be well within the bounds of Section 230, even if it is “indifferent to the content of what it transmits.”<sup>72</sup> But, the courts have suggested that there is some line, not clearly defined by law, where an ICS explicitly knows that its actions will lead to or encourage illegal activity. When this line is crossed, Section 230 immunity is not afforded. The lack of legal definition for this line, and the lack of court opinion that addresses this line is troublesome for website owners that host advertisements, especially those who host online marketplaces, such as classified sections or wanted ads. Courts in the *Stubhub* cases were quick to infer the consciousness and motivation behind the creation of categories.<sup>73</sup> This reveals the need for ICSs to be aware of the types of content they invite by the creation of categories on their online marketplaces.

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<sup>71</sup> Ardia, *supra* note 22 at 392.

<sup>72</sup> *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).

<sup>73</sup> *See supra* notes 64-65 and accompanying text.

## CONCLUSION

In every case observed, if the court did not find a persuasive argument that the ICS aided in the creation of the advertisement in question, Section 230 immunity was upheld. ICSs were not stripped of immunity without some substantial indication that they also provided or facilitated the creation of the advertising content, therefore making them ICPs. These results seem to be consistent with the original language and intention of Section 230.<sup>74</sup> For companies and organizations with websites that simply host advertisements received from third parties, there appears to be no valid argument that the courts accept to vacate Section 230 immunity. The single exception found in this study was when the companies or organizations aid in the creation of the content. Therefore, websites that engage in these types of activities should be relatively confident that they should not be held liable for the third-party advertisements they display, regardless of the legality of the advertisements themselves.<sup>75</sup>

However, for online marketplaces that provide services for third parties that assist users in the creation of advertisements, such as Stubhub and Roommates.com, care should be given not to knowingly participate in, profit from or encourage exclusively illegal activity. In these instances, courts have not applied the immunity in Section 230, therefore making the online marketplace susceptible to liability for potentially many types of claims. However, the degree of participation or contribution to the content or illegality of the advertising in question has been shown to vary in the cases located in this study. Therefore, it would be advantageous for these types of online marketplaces to exercise caution when creating areas or categories within their marketplaces that would

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<sup>74</sup> Ardia, *supra* note 22 at 410.

<sup>75</sup> Any website that advertises, but does not employ the service of an interactive online marketplace, would likely fit under this category of websites.

facilitate illegal advertising or activity, or require users to enter information that could be in violation with the law.

Overall, it appears that Section 230 immunity holds strong for ICSs. It allows them to host and even exercise some editorial control over third-party advertising. When no contribution to the advertising content is made by the ICS, immunity has been consistently upheld.