

HUMAN RIGHTS PROJECT FOR GIRLS

CHILD SEX TRAFFICKING ON THE INTERNET AND THE COMMUNICATIONS DECENCY ACT

The Internet is a haven for the sexual exploitation of children. Whether through social media sites or through online classifieds ads, the Internet provides numerous and often anonymous venues for those who wish to sexually exploit children. However, in instances where children are advertised for sex online, federal law protects Internet service providers and website operators from liability if a third party is responsible for creating the illegal content. Websites are therefore free to publish content provided by a third party and profit from the posting of such content, so long as they do not directly create the content themselves.

I. GENERAL INFORMATION ON THE COMMUNICATIONS DECENCY ACT

- Communications Decency Act of 1996 (CDA) is Title V of the Telecommunications Act of 1996.
- CDA (47 U.S.C. Section 230) attempted to affect the Internet in two significant ways:
 1. Attempted to regulate obscenity and indecency of content by criminalizing any such content that was transmitted to minors, and
 2. Through Section 230, attempted to provide broad immunity to Internet service providers (ISPs) by distinguishing them from publishers of content (in other words, ensure ISPs are not responsible for content published or uploaded on their sites by third parties.)
- In 1997, the anti-obscenity and anti- indecency portions of the Act were unanimously struck down by the Supreme Court in *Reno v. American Civil Liberties Union*, as violating the First Amendment.
 - Congress has since attempted to make narrower laws after *Reno* to protect children from Internet obscenity.
 1. First attempt: Child Online Protection Act (COPA) was struck down.
 2. Second attempt: Children's Internet Protection Act (CIPA) of 2000 was upheld as constitutional in 2004.

II. SECTION 230 IMMUNITY

Section 230 of the CDA is the section that provides broad civil immunity to ISPs. The CDA states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. Section 230(c)(1). The purpose behind this section was to promote a vibrant Internet, the continued development of the Internet and interactive media, and to encourage the development of technologies that advocate maximum user control. However, due to this language, almost all federal and state causes of action are

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barred in the case of websites that publish ads for sex with children because the ads are uploaded by third parties and not the ISPs.

- Section 230 of the CDA was introduced in the House by Representatives Christopher Cox (R-CA) and Ron Wyden (D-OR) as the Internet Freedom and Family Empowerment Act.
- Unlike the anti-decency and anti-obscenity portions of the CDA which were found to be unconstitutional, this portion of the Act remains intact.
- Section 230 promotes free speech by making it unnecessary for ISPs and other service providers to restrict their customers' actions for fear of being found legally liable for their customers' conduct.
- Effectively this section provides broad immunity to both ISPs and Internet users from liability for torts committed by others using their website or online forum, even if the provider fails to take action after receiving actual notice of the harmful or offensive content.
- Types of websites that fall under Section 230 immunity include: blogs, classifieds, content farms, discussion boards, Internet forums, social media sites such as Facebook, Twitter, MySpace, etc.
- In analyzing Section 230 immunity, it is important to distinguish 'publishers' of content (no liability) from 'creators' or 'developers' of content (who may have liability).
- In order to weigh Section 230 immunity, courts generally apply a three-prong test. The defendant must satisfy each of the three prongs in order to gain immunity under the Act:
 1. The defendant must be a “provider or user” of an “interactive computer service.”
 2. The cause of action asserted by the plaintiff must treat the defendant “as the publisher or speaker” of the harmful information at issue.
 3. The information must be “provided by another information content provider,” i.e., the defendant must not be the “information content provider” of the harmful information at issue.
- ISP loses immunity when it contributes directly to the illegality of the content. Not enough to merely publish what another party creates.

III. NOTABLE EXCEPTION TO BROAD CDA IMMUNITY

- *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* was one of the only cases where the court ruled ISPs were not entirely protected by CDA immunity.
 - In this case ISPs were deemed to have contributed to the illegality of content, because they required users to enter and use discriminatory information in violation of the Fair Housing Act (FHA) by forcing users to select from a limited list of descriptions including,

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gender, sexual orientation, number of children, etc. The court in this case ruled that CDA immunity did not extend to the ISP since it was instrumental in developing content that was discriminatory and in violation of FHA.

- The court in *Roommates* did make the point however, that keyword search engines allowing for searches of illegal criteria are considered neutral tools and do not qualify as developing content. For example, allowing a user to perform a search query for “white roommate” would not destroy immunity under the CDA. In fact, sites can even suggest keywords to users and still fall within Section 230 immunity because courts have deemed such suggestions as assisting third parties in refining their own content. *Jurin v. Google, Inc.*
- Moreover, creating categories in which third-party users can post content is also considered neutral, unless the categories are explicitly illegal. For instance, in *Dart v. Craigslist, Inc.* the court held that an “adult services” category is not in and of itself unlawful, nor does it necessarily call for unlawful conduct.
- CDA immunity is therefore deemed to be exceptionally broad with respect to any civil cause of action. In fact, the only limits to immunity seem to exist in the context of infringement of federal intellectual property law or federal criminal law.¹

IV. HISTORICAL CHALLENGES TO CDA IMMUNITY (1997-2011)

1. Negligence/Gross Negligence – ISP should have known that users were abusing the forum it provided for illegal activity.

- For example, in *Doe v. MySpace*, the court upheld immunity for a social networking site from negligence and gross negligence liability for failing to institute safety measures to protect minors and failing to institute age verification policies. In this case, Plaintiff’s daughter had lied about her age and communicated over MySpace with a man who later sexually assaulted her. In the court’s view, Plaintiff’s allegations, were “merely another way of claiming that MySpace was liable for publishing the communications.”

2. Notice – ISP should be liable for removing illegal material when it has notice of that material.

- In *Zeran v. American Online, Inc.*, Plaintiff alleged that AOL unreasonably delayed in removing defamatory messages posted by a third party, that it failed to post retractions, and failed to screen for similar postings. The court found that holding ISPs accountable upon receipt of notice undermines the policy considerations of the CDA because free speech would be hindered. They reasoned that operators would be incentivized to remove any material remotely resembling illegality.

¹ Although there have been no attempts to sue ISPs using federal criminal law, demonstrating requisite intent may prove difficult based on courts’ reasoning and analyses in those suits where plaintiffs sought civil damages based on federal criminal statutes.

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- The court stated that: “lawsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred. The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium . . . Section 230 was enacted, in part, to maintain the robust nature of Internet communication.”
- Courts have even gone so far as to state that “even if a service provider knows that third parties are posting illegal content, ‘the service provider’s failure to intervene is immunized.’” *M.A. v. Village Voice Media Holdings, LLC* citing to *Goddard v. Google*.

3. Profiting from Illegal Activity

- This challenge was brought based on the fact that some websites, such as Backpage.com, were charging third parties higher fees to post “adult” ads on their sites, thereby greatly increasing profits from what were essentially ads for prostitution. However, courts quickly debunked this challenge as well.
- ISPs are immune from profiting from illegal activity for the same policy reasons that they are immune from liability through receipt of notice. The court in *M.A. v. Village Voice Media, LLC* also noted that to find Backpage liable would be to create a for-profit exception to Section 230’s broad grant of immunity, which the court may not do.

4. Aiding and Abetting of Minor Sex Trafficking

- 18 U.S.C. Section 2 requires that to aid and abet, one must act with the intent to help those involved with a certain crime. *Doe v. Liberatore*.
- In *M.A. v. Village Voice Media Holdings, LLC*, the court held that “the creation and maintenance of a highly effective Internet tool” did not illustrate the specific intent required for aiding and abetting under Section 2.
- Additionally, in *Dart v. Craigslist, Inc.* the court found that Craigslist could not be liable for facilitating prostitution and child exploitation under an “aiding and abetting” theory based on misuse of its services by its customers.

5. Benefiting from the Illegal Content

- Plaintiff in *Dart v. Craigslist, Inc.* alleged that ISP was “benefitting” under 18 U.S.C. Section 1595 as added by the Trafficking Victims Protection Act.
- The court rejected this argument for the same reasons as in the aiding and abetting analysis.

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- The court in *M.A. v. Village Voice Media Holdings, LLC*, affirmed this reasoning by holding that Backpage remained immune under Section 230 to a claim brought under 18 U.S.C. Section 1595.

6. State Law Preemption

- CDA bars most state law causes of action against ISPs for publishing content provided by third parties due to Supremacy Clause. *Zeran v. American Online, Inc.*
- Washington State has recently passed a law requiring ISPs who publish “adult” ads to verify the age of those appearing in the ads. The law was passed in response to the overwhelming backlash against Backpage.com and the growing number of children who are advertised and sold for sex on The Village Voice’s online classifieds site. Village Voice Media, LLC has already stated that it plans to challenge this law and based on prior courts’ rulings, the law will likely be struck down due to federal preemption.

7. Public Nuisance

- In *Dart v. Craigslist, Inc.* the court upheld immunity for *Craigslist* against a county sheriff’s claims that its “erotic services” section constituted a public nuisance because it caused or induced prostitution.

8. Retroactive Application

- In *Zeran v. American Online, Inc.*, Plaintiff argued CDA immunity should not apply because the tort here was committed before CDA was enacted. The court disagreed and held that legislative intent suggested that CDA immunity should be applied retroactively.

V. TECH COMMUNITY’S SELF-REGULATION

- The good news is that some members of the tech community have already recognized and begun to show a commitment to responsible Internet practices relating to sexual exploitation of minors.
 - Reddit instituted a ban of all sexually exploitive content involving minors on its site.
 - Moreover, Google instituted very stringent ad policies, including a total ban on all escort or prostitution related ads. Google has also donated several million dollars to help fight human trafficking in recognition of the growing magnitude of this problem.
 - Microsoft has developed technology called PhotoDNA to assist in the fight against human trafficking and child exploitation online. They have also recently awarded research grants to fund efforts to develop software to fight child sex trafficking online.

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- Representatives from Facebook and Microsoft joined 50 law enforcement and nonprofit leaders in May 2012 as part of a new Department of Justice task force on human trafficking in California. By the end of Summer 2012, the task force plans to issue a report containing best-practice guidelines for law enforcement, tech companies and service providers to combat human trafficking locally and online.

VI. RIGHTS4GIRLS' RECOMMENDATIONS

- Case after case makes it clear that courts are bound by CDA's broad immunity from providing relief to victims on a variety of grounds. Each challenge that has been skillfully brought has been struck down with equal weight, further strengthening the body of law reinforcing Section 230.
- Because almost all legal challenges against immunity have failed, the power is with Congress to change Section 230 of the CDA and provide a narrowly tailored carve-out for instances where egregious crimes are being committed.
- In the most recent case challenging CDA immunity for the sex ads involving minors on Backpage.com, the judge in *M.A. v. Village Voice Media Holdings, LLC*, acknowledged that Plaintiff had endured "horrific victimization" but that: "Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others...Plaintiff artfully and eloquently attempts to phrase her allegations to avoid the reach of [the CDA]. Those allegations, however, do not distinguish the complained-of actions of Backpage from any other website that posted content that led to an innocent person's injury. Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity."
- Although Rights4Girls does not currently seek to amend CDA Section 230, we do recommend full cooperation and collaboration with the tech community to brainstorm ways to combat the issue of child exploitation and trafficking on the Internet.
- Rights4Girls recommends engaging the tech community and compiling best practices and strategies for combating child sex trafficking in particular. We feel that the more we can work together with the tech community to advance policies to protect children, the more we can ostracize those ISPs like Backpage.com that have made child sexual exploitation their business model.