

CRAIGSLIST—A CASE FOR CRIMINAL LIABILITY FOR ONLINE SERVICE PROVIDERS?

Shahrazad T. Radbod

“The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”¹

In 1995, Craig Newmark created Craigslist.org, a website that enables users to post classified ads and interact in forums. Craigslist’s simple design and the fact that it does not sell advertising space have contributed significantly to its success.² Its pages are divided into broad categories, such as “Jobs” and “Services,” and easy to navigate subcategories for more than 450 cities worldwide. Almost fifteen years after its founding, the San Francisco-based website is the seventh most popular English-language webpage in the world, receiving over twenty billion page views per month.³ However, despite Craigslist’s popularity, it only employs about 30 employees.⁴

Several recent crimes involving Craigslist drew the attention of law enforcement officials. In April 2009, Boston police officers arrested a twenty-two-year-old medical school student named Philip Markoff—better known as the “Craigslist killer”—in connection with several crimes. First, Markoff allegedly robbed a woman at gunpoint at a Westin hotel after he arranged to receive a massage from her through a Craigslist “Erotic Services” posting.⁵ The masseuse only escaped when her husband entered the room.⁶ According to police, four days later, Markoff murdered Julissa Brisman, another masseuse he had solicited through Craigslist’s “Erotic Services”

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1. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

2. Nisan Gabbay, *Craigslist Case Study*, STARTUP REVIEW, July 16, 2006, <http://www.startup-review.com/blog/craigslist-case-study.php>.

3. Craigslist.org, Fact Sheet, <http://www.craigslist.org/about/factsheet> (last visited Sept. 26, 2009).

4. *Id.*

5. *Reports: Craigslist Suspect had Items from Victims*, USA TODAY, April 22, 2009, http://www.usatoday.com/news/nation/2009-04-21-craigslist-killer_N.htm.

6. *Med Student Held Without Bail in Possible Craigslist Killing*, CNN, April 21, 2009, <http://www.cnn.com/2009/CRIME/04/21/mass.killing.craigslist/index.html>.

section.⁷ In the months following the crimes, both the media and law enforcement officials turned their attention to the high volume of crimes associated with classified services advertisements on Craigslist.⁸

Section 230 of the Communications Decency Act (“Section 230”) grants broad immunity to websites with user-generated content. In the past several years, two courts have limited the scope of Section 230 somewhat, but it continues to be a powerful safe harbor protecting websites from liability for their users’ torts and criminal activities.⁹ Still, perhaps motivated in part by judicial narrowing of Section 230, Craigslist elected to change the “Erotic Services” section of its website and assured law enforcement officials that its employees would monitor the section for illegal conduct.¹⁰

This Note will examine the extent of Craigslist’s potential criminal liability for its users’ offenses. Part I looks at Section 230 and its judicial interpretation. Part II explores cases applying Section 230 and how plaintiffs have used unique legal theories to hold online service providers liable for the actions of third parties. Part III discusses how Craigslist’s “Erotic Services” forum has been a source of users’ criminal activity. Part IV weighs the possibility of holding Craigslist criminally liable through an exception to Section 230.

I. SECTION 230 OF THE CDA AND JUDICIAL INTERPRETATION

A. LEGISLATIVE BACKGROUND OF SECTION 230

In 1995, a New York state court held that an interactive computer service acted as a publisher and was, therefore, responsible for defamatory comments made by users on its virtual bulletin boards.¹¹ To prevent a wave of tort-based lawsuits against then-novel internet services and the consequent chilling effect on free speech, Congress passed the Communications Decency

7. Craigslist Drops Erotic Services Ads After Killing, Website to Screen 'Adult' Listings, BOSTON GLOBE, May 14, 2009, at 1.

8. See, e.g., Robert Mitchum & Monique Garcia, *Craigslist Erotic Services: Legal Pressure Shuts Down Section Tied To Prostitution*, CHI. TRIB., May 14, 2009, at 6; Brad Stone, *Craigslist Agrees to Curb Sex Ads*, N.Y. TIMES, Nov. 6, 2008, at B3;

9. See, e.g., NPS, LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 Mass. Super. LEXIS 97 (Mass. Super. Ct. Jan. 26, 2009); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

10. Brad Stone, *Under Pressure, Craigslist to Remove 'Erotic' Ads*, N.Y. TIMES, May 13, 2009, at B1.

11. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 712 (N.Y. Sup. Ct. Dec. 15, 1995).

Act in 1996 (“CDA”).¹² The CDA sought to promote such policy objectives as “continued development of the Internet” and “development of technologies which maximize user control over what information is received by individuals.”¹³ The following year, the United States Supreme Court in *Reno v. ACLU*¹⁴ struck down the parts of the CDA addressing liability for indecent materials as unconstitutional under the First Amendment. However, Section 230 of the CDA remained in tact and still guarantees broad immunities to interactive computer services providers:

(c) Protection for ‘good samaritan’ blocking and screening of offensive material.

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].¹⁵

Congress also enacted limitations to Section 230:

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

...

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be

12. 47 U.S.C. § 230 (2006).

13. *Id.* at § 230(b)(1),(3).

14. *Reno v. ACLU*, 521 U.S. 844 (1997).

15. § 230(c).

imposed under any State or local law that is inconsistent with this section.¹⁶

Thus, the statute shields providers of “interactive computer services” from the liability normally attributed to publishers as long as another “information content provider” provides the content.¹⁷ While the immunity granted by Section 230 is quite broad, it does not extend to federal criminal statutes.¹⁸

B. JUDICIAL INTERPRETATION

In 1997, the Fourth Circuit Court of Appeals in *Zeran v. America Online, Inc.* became the first appellate court to interpret the scope of immunity under Section 230.¹⁹ The plaintiff in *Zeran* brought a negligence claim against America Online (“AOL”), for not promptly removing defamatory statements posted on an AOL bulletin board.²⁰ First, the plaintiff argued that the defendant was a distributor rather than a publisher, and thus not protected by Section 230’s immunity for publisher liability.²¹ The court disagreed and held that AOL fell within the “traditional definition of publisher” and was therefore “clearly protected” by Section 230.²² Artful pleading did not take away from the fact that AOL assumed a role that Section 230 specifically protected.²³

Next, *Zeran* argued that imposing liability on service providers who have knowledge of defamatory statements was consistent with the framework of Section 230.²⁴ The court, once again, rejected the plaintiff’s argument. The court reasoned that, unlike print publishers that publish limited content, interactive computer services receive large numbers of postings, and could not feasibly investigate allegations in a timely manner.²⁵ The court determined that since liability upon notice would have a chilling effect on free speech and deter self-regulation, it was inconsistent with Section 230’s regime.²⁶

Lastly, the plaintiff urged the court to apply a statutory canon favoring retention of common law principles, and thereby hold distributors liable.²⁷ The court rejected the plaintiff’s final argument because the application of

16. *Id.* at § 230(e).

17. *Id.* at § 230(c)(1).

18. *Id.* at § 230(e)(1).

19. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

20. *Id.* at 328.

21. *Id.* at 331.

22. *Id.* at 332.

23. *Id.* at 332–33.

24. *Id.* at 333.

25. *Id.*

26. *Id.*

27. *Id.* at 333–34.

such a canon would contravene the broad scope intended by Congress.²⁸ The court found that Congress unequivocally addressed the issue by using the term “publisher,” which traditionally included both distributors and original publishers.²⁹ The court’s decision in *Zeran* set the stage for over a decade of broad application of the provisions of Section 230.

II. ATTEMPTS TO CIRCUMVENT SECTION 230

Since the CDA’s inception, courts have overwhelmingly used Section 230 to grant immunity to online services providers. Many creative attempts to elude the act’s broad protection have failed.³⁰ However, in the past two years, two plaintiffs successfully argued that Section 230 immunity did not apply to the online service providers against which they brought suit.³¹ This Part explores both the failures and successes and what impact they could have on future Craigslist litigation.

A. CASES GRANTING SECTION 230 PROTECTION

1. *MySpace Cases*

Two cases involving MySpace, an online social networking site, provide insight into how a court might apply Section 230 against Craigslist. In both cases, the plaintiffs ultimately failed to persuade a court that Section 230 protection should not apply.

a) *Doe v. MySpace*

In May 2008, the Fifth Circuit affirmed a district court’s ruling that the “Good Samaritan” provision of Section 230 barred the plaintiff, the mother of a thirteen-year-old that posed as an eighteen-year-old to gain access to the social networking site MySpace, from bringing a negligence action against MySpace for failing to protect her daughter from a predator.³² The plaintiff’s daughter had been sexually assaulted by a predator she met on the

28. *Id.* at 334.

29. *Id.*

30. *See e.g.*, *Doe v. MySpace, Inc.*, 528 F.3d 413, 417–18 (5th Cir. 2008) (holding that plaintiff’s claim that website had a common law duty to protect minors was barred by Section 230); *see also* *Dart v. Craigslist, Inc.*, No. 09-C1385, 2009 U.S. Dist. LEXIS 97596, *18–*19 (N.D. Ill. Oct. 20, 2009) (rejecting plaintiff’s claim that website created a public nuisance).

31. *See Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *see also* *NPS, LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 Mass. Super. LEXIS 97 (Mass. Super. Ct. Jan. 26, 2009).

32. *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

defendant's website.³³ The plaintiff made three unsuccessful arguments as to why MySpace was not protected under Section 230's broad reach.

First, the plaintiff argued that MySpace was not a protected "publisher" because it was partially responsible for creating the content of the information exchanged between the predator and her daughter.³⁴ Second, the plaintiff argued that Section 230 did not immunize entities that failed to take reasonable steps to protect minors.³⁵ Lastly, the plaintiff argued that the defendant had a common law duty to protect her daughter.³⁶

Citing cases from the Third, Fourth, Ninth, and Tenth Circuits, the court held that Section 230 should be construed liberally to protect publishers of user-generated comments.³⁷ The court did not rule on the plaintiff's first argument that MySpace created the content on its website because the argument was not raised at trial.³⁸ Although the plaintiff tried to distinguish her case by showing that MySpace had taken no action to protect minors, the court reasoned that such "allegations are merely another way of claiming that MySpace was liable for publishing [the third party content]."³⁹ Thus, the court held that the CDA barred the plaintiff's claims for negligence and gross negligence.⁴⁰

b) *Doe IX v. MySpace*

In May 2009, a district court in Texas granted MySpace's motion to dismiss a suit brought by a mother of a child assaulted by a sexual predator the child had met on MySpace.⁴¹ In addition to claiming negligence and gross negligence, like the plaintiff in *Doe v. MySpace*, the plaintiff also raised a strict products liability claim against the website.⁴²

The plaintiff made two principal arguments. First, she alleged that the defendant was not entitled to Section 230 immunity because it failed to take protective measures.⁴³ Citing *Doe v. MySpace*, the court readily rejected the first argument.⁴⁴ Second, the plaintiff argued that the defendant was an information content provider, not an interactive computer service, and,

33. *Id.* at 416.

34. *Id.* at 417.

35. *Id.*

36. *Id.* at 417–18.

37. *Id.* at 418.

38. *Id.* at 422.

39. *Id.* at 420.

40. *Id.*

41. *Doe IX v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009).

42. *Id.* at 664.

43. *Id.*

44. *Id.*

therefore, not protected under Section 230.⁴⁵ This was the same argument the Fifth Circuit refused to consider in *Doe* because the plaintiff had not raised the argument in the district court.⁴⁶

This time, however, the court did reach the merits of the argument that MySpace was partially responsible for creating information exchanged. The plaintiff argued that MySpace, like the defendant in *Roommates.com*,⁴⁷ was an information content provider because it created the information exchanged between her daughter and the sexual predator.⁴⁸ In *Roommates.com*, the court determined that the defendant was not immune under Section 230 because it required users to enter certain data, and therefore acted like an information content provider.⁴⁹ The court rejected this argument and distinguished *Roommates.com*. It stated that MySpace users were not “required to provide any additional information to their profiles,” whereas the user agreement for *Roommates.com* required users to provide certain information.⁵⁰ The court held that merely prompting users to provide more information did not qualify a website as an information content provider.⁵¹

2. *Craigslist Cases*

During the course of the past two years, several plaintiffs have filed lawsuits against Craigslist based on different theories. Like MySpace, Craigslist used Section 230 to shield itself from liability.

a) *Gibson v. Craigslist*

In September 2008, Calvin Gibson filed an amended complaint against Craigslist, Inc. claiming that it breached its duty of care when a user-generated ad on its website facilitated the illegal purchase of a gun used to shoot the plaintiff.⁵² Craigslist filed a motion to dismiss claiming immunity under Section 230.⁵³ The defendant argued that the “CDA provides an absolute bar to any cause of action that would make an interactive service

45. *Id.*

46. *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008).

47. *Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

48. *Doe IX*, 629 F. Supp. 2d at 664–65.

49. *Roommates.com*, 521 F.3d 1157, 1166 (9th Cir. 2008) (en banc).

50. *Doe IX*, 629 F. Supp. 2d at 665. *See also Doe II v. MySpace, Inc.*, 96 Cal. Rptr. 3d 148 (Cal. Ct. App. 2009) (holding that MySpace was not an information content provider and, therefore, immune under Section 230).

51. *Doe IX*, 629 F. Supp. 2d at 665.

52. *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 U.S. Dist. LEXIS 53246, at *1–*2 (S.D.N.Y. June 15, 2009).

53. *Id.* at *2.

provider, like [C]raigslist, liable for third-party content posted on the Internet through its service.”⁵⁴

In order to determine whether Section 230 immunized Craigslist, the court applied a three-pronged test. The court had to determine “[i] whether Defendant is a provider of an interactive computer service; [ii] if the postings at issue are information provided by another information content provider; and [iii] whether Plaintiff’s claims seek to treat Defendant as a publisher or speaker of third party content.”⁵⁵ As to the first prong, the plaintiff did not contest the categorization of the defendant as an interactive computer service provider.⁵⁶ Second, the amended complaint stated that an unknown individual posted the listing, suggesting the information was provided “by another information content provider.”⁵⁷ Lastly, the court determined that the plaintiff was treating the defendant as a publisher because it sought to hold the defendant liable for not monitoring the postings on its website.⁵⁸ The court consequently granted the defendant’s motion to dismiss.

b) *Chicago Lawyers’ v. Craigslist*

In 2008, the Seventh Circuit issued a decision in a case involving the Fair Housing Act⁵⁹ and Craigslist.⁶⁰ The Chicago Lawyers’ Committee for Civil Rights Under Law brought a suit against Craigslist claiming that its website violated the Fair Housing Act, which prohibits ads that state a preference with respect to race, religion, sex, or family status.⁶¹ The plaintiff argued that Section 230(c) did not grant Craigslist immunity because it did not apply to information content providers who did not filter content on their websites.⁶² It based its argument on the fact that the caption of Section 230(c) read: “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”⁶³ Craigslist, however, argued that Section 230 provided a general prohibition of civil liability for interactive services providers.⁶⁴ The court asserted that neither the plaintiff nor defendant was correct; Section 230 did

54. *Id.*

55. *Id.* at *8–*9 (quoting *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008)).

56. *Id.* at *10–*11.

57. *Id.* at 12.

58. *Id.*

59. 42 U.S.C. § 3601 (2006).

60. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

61. *Id.* at 668; 42 U.S.C. § 3604(a), (c).

62. *Chicago Lawyers’*, 519 F.3d at 669.

63. *Id.*; 47 U.S.C. 230(c).

64. *Chicago Lawyers’*, 519 F.3d at 669.

not exclude non-filtering internet services but neither did it constitute a complete grant of immunity in all civil liability cases.⁶⁵

Judge Easterbrook discussed at length the problems that would arise if internet services providers were required to filter all material posted on their websites.⁶⁶ The court stated that Craigslist had some of the characteristics of a newspaper's classified section.⁶⁷ However, since it did not produce or publish the material, Craigslist was also similar to a common carrier.⁶⁸ The court stated that it would be cost prohibitive to increase the limited staff of the site to police the thirty million notices published every month.⁶⁹ The court concluded by stating that Section 230 did not allow a party to "sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."⁷⁰

The court in *Chicago Lawyers'* also held that while Craigslist played some causal role by providing a forum for discriminatory ads, it in no way caused the ad to be made.⁷¹ The court reasoned that "[n]othing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination."⁷² Craigslist could not be held more liable than the makers of the computers that enabled users to post the advertisements in the first place.⁷³ Finally, the court held that while the plaintiff could target individuals who violate the Fair Housing Act, the plaintiff could not hold Craigslist responsible.⁷⁴

B. SECTION 230 IMMUNITY NOT GRANTED

While plaintiffs often attempt to circumvent Section 230 by arguing that interactive services providers create the content on their website and have a duty to protect young users, both lines of reasoning have succumbed to the broad immunity court's grant under Section 230. Recently, however, several signs suggest that courts will carve out future limitations on Section 230.

65. *Id.*

66. *Id.* at 668–69.

67. *Id.* at 668.

68. *Id.*

69. *Id.* at 668–69.

70. *Id.* at 672.

71. *Id.* at 671.

72. *Id.*

73. *Id.* at 672.

74. *Id.*

1. Roommates.com

Just one month after the Seventh Circuit reached its decision in *Chicago Lawyers*,⁷⁵ the Ninth Circuit reached a different conclusion in another case regarding the Fair Housing Act.⁷⁶ Several local housing councils brought a case against Roommates.com, a roommate matching website.⁷⁶ Before users could search the listings on the defendant's website, the defendant required them to create profiles and disclose their sex, sexual orientation, and other personal information.⁷⁷ The website also required users to describe their preferences in roommates and encouraged comments in an "Additional Comments" box.⁷⁸ Plaintiffs alleged that the website violated the Fair Housing Act⁷⁹ and state housing discrimination laws by requiring its users to state their preferences in regards to roommates and to share protected characteristics.⁸⁰

The court determined that Section 230 immunity did not apply because Roommates.com acted as an information content provider when it required website users to complete questionnaires it had created.⁸¹ Unlike the limited role of Craigslist in *Chicago Lawyers*, Roommates.com contributed to the content that was placed on its website. The court held that Section 230 did not shield online services providers from civil claims when they "materially contribut[e]" to the unlawfulness of the content.⁸² The court reasoned that "the Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."⁸³

The court also determined that the "Additional Comments" feature was immunized because the defendant "does not provide any specific guidance . . . , nor does it urge subscribers to input discriminatory preferences."⁸⁴ Unlike with the questionnaire, Roommates.com did not require users to fill out "Additional Comments" nor did it provide informational categories or drop down menus for the users' selection. The "Additional Comments" section was more analogous to the user-generated advertisement placed on Craigslist.org in *Chicago Lawyers*. The decision in *Roommates.com* presented a

75. 42 U.S.C. § 3601.

76. *Roommates.com*, LLC, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc).

77. *Id.*

78. *Id.* at 1162.

79. 42 U.S.C. § 3601.

80. *Roommates.com*, 521 F.3d at 1162.

81. *Id.* at 1164.

82. *Id.* at 1167–68.

83. *Id.* at 1164.

84. *Id.* at 1173–74.

break from past CDA jurisprudence, in which courts had granted immunity to nearly all interactive computer service providers.

2. NPS, LLC v. StubHub, Inc.

Shortly after the Ninth Circuit decided *Roommates*, another court applied its Section 230 analysis in *NPS, LLC v. StubHub, Inc.*⁸⁵ The defendant in *StubHub* operated a website that helped users sell season tickets to sporting events.⁸⁶ The plaintiff, an issuer of tickets to the Patriots football games, brought several claims against the defendant for providing a venue for season ticket holders to illegally sell their tickets.⁸⁷

The defendant moved for partial summary judgment with regards to the plaintiff's claim for intentional interference with advantageous relations.⁸⁸ The defendant argued that it was immune under Section 230 because it was merely an interactive computer service provider.⁸⁹ However, the court disagreed and stated that there was evidence that StubHub “materially contributed” to the illegal scalping of season tickets.⁹⁰ Citing *Roommates.com*, the court held that because StubHub helped to develop the unlawful content on its website, it fell outside the scope of Section 230 immunity.⁹¹

The court offered two principal criteria to differentiate StubHub from websites hosting classified ads, such as *Craigslist.org*.⁹² First, it stated that while other websites charged a fixed rate, StubHub charged its users fees based on the price of the ticket sale.⁹³ Second, StubHub affirmatively sought to increase the prices others charge in their ads.⁹⁴ Other classified ads did not encourage any particular content within an ad. After many years of courts liberally granting providers of interactive computer services immunity, two courts reevaluated Section 230 and placed limits on what it means to contribute content to a website.

85. *NPS, LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 Mass. Super. LEXIS 97 (Mass. Super. Ct. Jan. 26, 2009).

86. *Id.* at *5.

87. *Id.* at *1.

88. *Id.*

89. *Id.* at *12.

90. *Id.* at *13; *See Roommates.com*, 521 F.3d at 1167–68 (holding that a website that materially contributes to the unlawful content on a website falls within the exception to Section 230 and is not granted immunity).

91. *StubHub*, 2009 Mass. Super. LEXIS 97 at *13.

92. *Id.* at *33–*34.

93. *Id.* at *34.

94. *Id.* at *34–*35.

III. “EROTIC SERVICES” UNDER ATTACK

A. AGREEMENTS WITH STATE ATTORNEY GENERALS

In November 2008, just one year prior to the well-publicized slaying of the masseuse hired through a Craigslist “Erotic Services” posting, Craigslist, along with forty state attorney generals and the National Center for Missing and Exploited Children, released a statement.⁹⁵ The joint statement detailed the “measures that craigslist is taking to help combat unlawful activity and improve public safety on its web site” and announced that Craigslist would require erotic service providers to pay a fee and provide a valid form of identification in order to advertise on the website.⁹⁶ Additionally, Craigslist, if subpoenaed, would provide that information to the relevant authorities.⁹⁷ The goal of the agreement was to “allow legitimate escort and other services to continue advertising, while providing a strong disincentive to companies who are conducting illegal business.”⁹⁸ However, critics later argued that efforts to curb illegal conduct on the website failed because advertisers used fake credit cards or untraceable debit cards.⁹⁹

Following the arrest of the “Craigslist killer,” Craigslist made further voluntary changes to its policy. In May 2009, without conferring with either state attorney generals or law enforcement officials, Craigslist stated that it would close its “Erotic Services” category and replace it with an “Adult Services” category.¹⁰⁰ Postings to the new category would cost \$10 and could be renewed for \$5.¹⁰¹ Furthermore, Craigslist promised that its employees would review the postings for illegal content.¹⁰² New York Attorney General Andrew Cuomo stated that, “Rather than work with this office to prevent further abuses, in the middle of the night, Craigslist took unilateral action which we suspect will prove to be half-baked.”¹⁰³

95. News Release, Washington State Office of the Attorney General, McKenna Announces Agreement with Craigslist to Crack Down on Illegal Sex Trade Ads (Nov. 6, 2008) <http://www.atg.wa.gov/pressrelease.aspx?&id=21328> (providing text of Joint Statement).

96. *Id.*

97. *Id.*

98. *Craigslist To Require Charge Fee For Erotic Ads*, WCBSTV, Nov. 6, 2009, <http://wcbstv.com/local/craigslist.prostitution.erotica.2.857943.html>.

99. Stone, *supra* note 10.

100. Jim Buckmaster, *Striking a New Balance*, CRAIGSLIST BLOG, May 13, 2009, <http://blog.craigslist.org/2009/05/striking-a-new-balance/>.

101. *Id.*

102. *Id.*

103. Statement From Attorney General Andrew M. Cuomo Regarding Craigslist, May 13, 2009, http://www.ag.ny.gov/media_center/2009/may/may13c_09.html.

During the same time, South Carolina Attorney General Henry McMaster threatened to file criminal charges against Craigslist management if they did not within ten days remove portions of Craigslist.org enabling the solicitation of prostitution and dissemination of pornographic materials.¹⁰⁴ Craigslist responded by filing a motion of declaratory and injunctive relief in a district court in South Carolina to “enjoin a threatened prosecution in violation of federal law and the U.S. Constitution.”¹⁰⁵ Furthermore, Craigslist stated that it had voluntarily attempted to reduce the illicit use of its website and that its attempts failed because illicit posting had dropped dramatically.¹⁰⁶ Craigslist alleged that Attorney General McMaster’s threat of prosecution would violate its First Amendment right to free speech.¹⁰⁷ McMaster subsequently backed down and stated that he was happy that Craigslist was taking the matter seriously.¹⁰⁸

B. *DART V. CRAIGSLIST*

In March 2009, Thomas Dart, an Illinois county sheriff, filed a complaint in the Northern District of Illinois against Craigslist claiming that it “knowingly and intentionally facilitates prostitution”¹⁰⁹ and that it “creates an ongoing nuisance” by enabling prostitution.¹¹⁰ The plaintiff alleged that in doing so Craigslist violated several municipal, state, and federal statutory laws.¹¹¹ The complainant stated that his county spent over \$100,000 monitoring Craigslist and arresting criminals based on their activity on the website.¹¹² Dart stated that the changes made to Craigslist following the November 2008 agreement did not reduce the number of illicit posts on the

104. News Release, *Craigslist Told to Remove Illegal Content in Ten Days or Face Possible Prosecution*, May 5, 2009, http://www.scattorneygeneral.org/newsroom/pdf/2009/craigslist_release.pdf.

105. Complaint ¶ 1, *Craigslist, Inc. v. McMaster*, 3:09-av-99999-CIV (D. S.C. filed May 20, 2009) available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-05-20-Craigslist%20Complaint%20for%20Declaratory%20Relief.pdf>.

106. *Id.* at ¶ 5.

107. *Id.* at ¶ 69.

108. Kevin Poulsen, *Sued by Craigslist, South Carolina’s Top Cop Declares Victory and Goes Home*, WIRED, May 20, 2009, available at <http://www.wired.com/threatlevel/2009/05/sued-by-craigslist-south-carolinas-top-cop-declares-victory-and-goes-home/>.

109. Complaint ¶ 86, *Dart v. Craigslist Inc.*, 09-CV1385 (N.D. Ill. March 5, 2009) available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-03-05-Dart%20Complaint.PDF>.

110. *Id.* at ¶ 129.

111. *Id.* at ¶ 5.

112. *Id.* at ¶ 141.

website because prostitutes “found ways to circumvent the less than onerous restrictions.”¹¹³

In May 2009, Craigslist filed a motion for judgment on the pleadings.¹¹⁴ Craigslist argued that Section 230 immunized it from liability and that the plaintiff’s proposed remedies were barred as a matter of law.¹¹⁵ To support its Section 230 argument, Craigslist directed the court to *Chicago Lawyers’* from the Seventh Circuit and *Rommmates.com* from the Ninth Circuit.¹¹⁶ Furthermore, Craigslist urged the court that it qualified for Section 230 immunity under the three-prong test for determining when a provider of online services is a publisher of unlawful third party content.¹¹⁷ Craigslist said that Dart could not “escape this conclusion through artful pleading—such as by trying to impose liability on craigslist as a ‘public nuisance.’”¹¹⁸ Lastly, Craigslist contended that if the court gave credence to Dart’s argument, it would circumvent Congress’s intent to encourage the development and self-regulation of the Internet.¹¹⁹

In July 2009, Dart filed a reply to Craigslist’s motion.¹²⁰ First, Dart argued that advertising prostitution was not constitutionally protected.¹²¹ He maintained that “Erotic Services” was a euphemism for “prostitution” on the defendant’s website and that advertising prostitution was not a constitutional right.¹²² Second, he argued that Section 230 immunity was inapplicable because Craigslist created the content on its website by displaying categories and enabling users to search by sexual proclivity.¹²³ Lastly, Dart argued that even if Craigslist had immunity under Section 230, its actions constituted a nuisance because it knowingly facilitates illegal conduct.¹²⁴

113. *Id.* at ¶ 46–53.

114. Motion in Support of Craigslist’s Motion for Judgment on the Pleadings, Dart v. Craigslist, Inc., 09-CV1385 (N.D. Ill. May 4, 2009) available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-05-04-Memo%20in%20Support%20of%20Craigslist's%20Motion%20for%20Judgment%20on%20the%20Pleadings.pdf>.

115. *Id.*

116. *Id.* at 11–13.

117. *Id.* at 13–17.

118. *Id.* at 16.

119. *Id.* at 17–19.

120. Sheriff Thomas Dart’s Response to Defendant’s Motion for Judgment on the Pleadings, Dart v. Craigslist, Inc., 09-CV1385 (N.D. Ill. May 4, 2009) available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-07-10-Dart%20Response.pdf>.

121. *Id.* at 3.

122. *Id.* at 4–5.

123. *Id.* at 7–8.

124. *Id.* at 15.

On October 20, 2009, the district court ruled in Craigslist's favor and dismissed the suit.¹²⁵ The court stated that Craigslist had Section 230 immunity because it provided interactive computer services and the ads on its website were "information provided by another information content provider."¹²⁶ Regarding the nuisance claims, the court held that Sherriff Dart "strained the ordinary meaning of the words 'arrange' and 'direct'" when he accused Craigslist of knowingly arranging meetings for the purposes of prostitution.¹²⁷ The court cited *Chicago Lawyers'* to emphasize that Section 230 was enacted so that providers of interactive computer services would not be held liable for such crimes.¹²⁸ The court extended this reasoning to the plaintiff's allegation that Craigslist provided the contact information of prostitutes and brothels; Craigslist users, not Craigslist itself, provided that information. After a lengthy analysis, the court concluded that Craigslist was immune under Section 230(c)(1) of the CDA.¹²⁹

In the opinion, the court relied heavily on *Chicago Lawyers'* and distinguished the case from *Roommates.com*. Contrary to Sherriff Dart's claim, the court found that Craigslist's "Erotic Services" section did not induce others to engage in unlawful conduct, unlike the mandatory questionnaire of *Roommates.com*.¹³⁰ Furthermore, the court held that since not all of the listed services were sexual in nature, the subcategories were not merely synonyms for illegal sexual services and that Craigslist was not liable for users who disregarded the site's guidelines.¹³¹ Judge Grady concluded that Sherriff Dart's allegations were not different from those the Seventh Circuit rejected in *Chicago Lawyers'*.¹³² Craigslist, once again, was able to use Section 230 to shield itself from liability.

IV. POTENTIAL FOR LIABILITY UNDER § 230(E)

Although plaintiffs throughout the past decade have developed creative arguments to establish liability against online services providers, none have brought a successful claim based on the criminal law exceptions in § 230(e). However, the potential of such a threat from both federal and state prosecutors could drive many interactive computer service providers to

125. *Dart v. Craigslist*, 2009 U.S. Dist. LEXIS 97596 (N.D. Ill. Oct. 20, 2009).

126. *Id.* at *13; *See* 47 U.S.C. § 230(f)(2)–(3).

127. *Dart*, 2009 U.S. Dist. LEXIS 97596, at *19.

128. *Id.* at *19–*20.

129. *Id.* at *27.

130. *Id.* at *22; *see Chicago Lawyers'*, 519 F.3d 666, 671–72 (7th Cir. 2008) ("Nothing in the service craigslist offers induces anyone to post any particular listings . . .").

131. *Dart*, 2009 U.S. Dist. LEXIS 97596, at *24.

132. *Id.* at *27.

change the way they operate. This Part will look to these possible exceptions to immunity under Section 230 and whether they could alter the behavior of providers of interactive computer services.

A. EXCEPTIONS

1. *Section 230(e)(1)—Federal Criminal Statutes*

Section 230(e)(1) states that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.”¹³³ Although Section 230 preempts state criminal law, Section 230(e)(1) permits plaintiffs to allege federal criminal violations against internet service providers that would otherwise be shielded from liability.¹³⁴ In addition to alleging that Craigslist violated state and city laws, Sherriff Dart alleged in *Dart v. Craigslist* that Craigslist violated 18 U.S.C. § 1952, which prohibited the facilitation of prostitution.¹³⁵ When it granted the motion for judgment on the pleadings, the court glossed over this issue by stating in a footnote that 18 U.S.C. § 1952 “does not bring [Dart’s] public-nuisance suit within that [§ 230(e)(1)] exception.”¹³⁶ The court cited *Doe v. Bates*, an unreported decision from a district court in Texas, to support its proposition that § 230(e)(1) did not enable private litigants to bring civil claims under the guise of federal criminal law.¹³⁷ The court in *Doe v. Bates* reasoned that Congress intended to preserve the ability of law enforcement officials to do their job while granting online service providers immunity from civil claims.¹³⁸ No other court has cited to *Doe v. Bates* to support a similar proposition.

This raises the question whether Craigslist, or any other provider of interactive computer services, could be held liable under the same federal criminal statutes if a prosecutor brought the claims as opposed to a private

133. 47 U.S.C. § 230(e)(1).

134. *See Voicenet Commc'ns, Inc. v. Corbett*, No. 04-1318, 2006 U.S. Dist. LEXIS 61916, at *13 (E.D. Pa. Aug. 30, 2006) (“sub-subsection (e)(3) gives interactive computer service providers immunity from state criminal laws that are inconsistent with the CDA . . .”).

135. Dart Complaint ¶ 4, *supra* note 109.

136. *Dart*, 2009 U.S. Dist. LEXIS 97596, at *14 n.6.

137. *Id.*; *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (holding that plaintiff cannot bring a claim against defendant because she believed that it violated criminal law by hosting child pornography).

138. *Bates*, 2006 WL 3813758, at *22.

citizen. According to *Doe v. Bates*, the answer to that question is yes.¹³⁹ If a prosecutor successfully brought criminal charges under 18 U.S.C. § 1952, the statute cited by Sherriff Dart, Craigslist could be held liable for facilitating prostitution. While prosecutors have yet to bring federal criminal charges against Craigslist, this could be a successful means for holding Craigslist responsible for its users' activities and could have contributed to Craigslist's decision to implement changes to its website. Furthermore, prosecution does not have to be limited to crimes relating to prostitution. Prosecutors can look to any chapter of Title 18 of the United States Code to charge website operators with criminal activity.

2. Section 230(e)(3)—State Law

Section 230(e)(3) states that “nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”¹⁴⁰ Dart argued that Craigslist's actions violated a state law criminalizing the solicitation of a prostitute.¹⁴¹ However, the court determined that Sheriff Dart's allegations “strain the ordinary meaning of the terms ‘arrange’ and ‘direct’” as the postings on Craigslist.org were not created by Craigslist itself.¹⁴² While this court did not agree that Craigslist violated state laws, it is possible for another court to reach the alternate conclusion based on a slightly different fact pattern.

The current design of Craigslist.org would likely place it outside of any state law violations. Unlike the website in *Roommates.com*, Craigslist.org has a simple user interface and no drop down menus.¹⁴³ Therefore, it would be difficult to argue that the website played a role in any unlawful conduct that resulted from a posting. However, just as with the federal law exception provided in § 230(e)(1), it is imaginable that a fact pattern could emerge in which a provider of interactive computer services violated a state statute that is consistent with Section 230.

Over the past several years, states have tried to pass laws aimed at making the Internet a safer place.¹⁴⁴ For example, New Jersey proposed the Social Networking Safety Act to prohibit the transmission of sexually

139. *See id.* (“section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws.”).

140. 47 U.S.C. § 230(e)(3).

141. Dart Complaint ¶ 4, *supra* note 109; 720 ILCS § 5/11–15.

142. *Dart*, 2009 U.S. Dist. LEXIS 97596, at *19.

143. *Roommates.com*, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc).

144. *See* Charlotte Chang, Note, *Internet Safety Survey*, 25 BERKELEY TECH. L.J. _ (2010).

offensive communication to a minor located in the state.¹⁴⁵ Under this law, operators could be held liable if they do not provide a reporting link, enable users to block sexually offensive comments, or review reports regarding offensive material submitted by users or third parties.¹⁴⁶ If passed and held to be constitutional and consistent with the CDA, such a law could pose a serious threat to interactive computer services providers.

B. SECTION 230(E) AS AN IMPETUS FOR CHANGE

Fears of prosecution under the exceptions provided in § 230(e) could result in changes to the way interactive computer services providers operate. In the past year, Craigslist has voluntarily implemented many changes to curb the use of its website for illicit purposes. In March 2009, Craigslist reported that as a result of the changes, its website saw a 90-95% decrease in monthly posts in the “Erotic Services” section.¹⁴⁷ Less than two weeks after South Carolina Attorney General Henry McMaster threatened Craigslist, the website eliminated the “Erotic Services” category all together.¹⁴⁸ It is possible that Craigslist was concerned about its potential criminal liability under the exceptions to Section 230 immunity.

While Craigslist circa early 2008 may have been vulnerable under the § 230(e)(1) exception, the current incarnation of its website attempts to do what it can to discourage users from committing illegal acts. However, it is unlikely that other websites with complex user interfaces can continue to use Section 230 as a bulletproof shield. During the past few years, *Roommates.com* and *StubHub* have demonstrated that courts are no longer interested in granting unfettered immunity to providers of interactive computer services. Therefore, courts might be receptive to using § 230(e) as a way to limit Section 230 immunity.

Prosecutors could use the exceptions provided in § 230(e) to further other congressional goals. Some have argued that while the law has accomplished its goal of promoting the Internet, the same cannot be said of its goal of curbing child pornography.¹⁴⁹ Under the liberal application of

145. Assem. 3757, 213 Leg., (N.J. 2009) available at http://www.njleg.state.nj.us/2008/Bills/A4000/3757_R1.HTM.

146. *Id.*

147. Jim Buckmaster, *CL Collaboration with AGs, NCMEC—Early Results*, CRAIGSLIST BLOG, March 9, 2009, <http://blog.craigslist.org/2009/03/cl-partnership-with-ags-ncmec-early-results/>.

148. Jim Buckmaster, *Striking a New Balance*, CRAIGSLIST BLOG, May 13, 2009, <http://blog.craigslist.org/2009/05/striking-a-new-balance/>.

149. Katy Noeth, Note, *The Never-Ending Limits of § 230: Extending ISP Immunity to the Sexual Exploitation of Children*, 61 FED. COMM. L.J. 765, 776 (2009).

Section 230, websites that knowingly facilitate the exploitation of children are immune.¹⁵⁰ Prosecutors could employ the exception to Section 230 as a tool to limit an interactive computer services provider's immunity if it violates federal criminal laws or state laws consistent with the CDA. Federal criminal statutes, such as 18 U.S.C. § 1466A, which prohibit the distribution of obscene visual representation of sexually abused children, could be used to hold websites that facilitate criminal activity accountable.

The exceptions in § 230(e) could serve as much needed limits on Section 230 immunity. Many critics have argued that courts have incorrectly broadened the scope of Section 230.¹⁵¹ Furthermore, critics argue that broad application of service provider immunity is no longer necessary because Congress has achieved its goal of fostering the growth of the Internet.¹⁵² *Roommates.com* and *StubHub* demonstrate a trend, albeit a minor one, towards curtailing the broad reach of Section 230. Moreover, the fact that Craigslist is succumbing to the demands of state attorney generals to make changes to its website could signal that providers of interactive computer services no longer view Section 230 as a source of blanket immunity.

V. CONCLUSION

During the past decade, interactive service providers have enjoyed broad immunity under Section 230 of the Communications Decency Act. Plaintiffs have unsuccessfully attempted to thwart the application of Section 230 to various providers of interactive computer services. To date, Craigslist has avoided every civil charge raised against it under Section 230 and has recently implemented many changes to its website in order to avoid future liability. However, two recent cases demonstrate that there are limits to Section 230 immunity. An interactive computer service provider with a slightly different fact pattern might not be as fortunate as Craigslist if prosecutors bring charges that fall within the § 230(e) exceptions.

150. *Id.* at 777.

151. See Thomas D. Huycke, Note, *Licensed Anarchy: Anything Goes on the Internet? Revisiting the Boundaries of Section 230 Protection*, 111 W. VA. L. REV. 581 (2009).

152. Noeth, *supra* note 149.