

CDT Joins Briefs Urging Courts to Properly Apply Section 230 of the CDA

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On March 28, the Center for Democracy & Technology filed a friend-of-the-court brief in the Sixth Circuit case *Doe v. SexSearch.com*, arguing that §230 of the Communications Decency Act immunizes the website from being liable for an under-age user having lied about her age. This is the fourth amicus brief CDT has filed in favor of a broad reading of the 1996 law in recent months. CDT has also filed amicus briefs supporting §230 Internet intermediary immunity for Craigslist in the Seventh Circuit, Roommates.com in the Ninth Circuit, and MySpace.com in the Fifth Circuit.

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1) CDT Joins Briefs Urging Courts to Properly Apply §230 of the CDA

On March 28, the Center for Democracy & Technology filed a friend-of-the-court brief in the Sixth Circuit case *Doe v. SexSearch.com*, arguing that §230 of the Communications Decency Act immunizes the website from being liable for an under-age user having lied about her age. This is the fourth amicus brief CDT has filed in favor of a broad reading of the 1996 law in recent months. CDT has also filed amicus briefs supporting §230 Internet intermediary immunity for Craigslist in the Seventh Circuit, Roommates.com in the Ninth Circuit, and MySpace.com in the Fifth Circuit.

In filing the briefs, CDT joined several other groups, including various distributors of print media, public interest organizations, and some of the Internet industry's largest corporate names. The on-going flood of litigation centered on §230 Internet intermediary immunity highlights the vital importance of the Act in preserving free speech on the Internet. CDT filed the amicus briefs with the hope that all four federal circuits will join the growing list of courts across the country to embrace an expansive understanding of the critical protection for Internet intermediaries provided by §230.

The four amicus briefs essentially all argue for the same thing: a continued reading of §230 in the spirit that Congress intended and that a multitude of courts have so far followed. Any departure would otherwise stifle the provision's purpose and undermine industry strides towards responsible self-regulation. In those briefs, CDT argues that "intermediaries" - ISPs, websites, and online service providers that enable other people - Internet users - to post content onto the Internet should not be held liable for the content posted. To hold intermediaries liable would greatly chill their willingness to host online content created by others. To use a simple example, if the YouTube.com video sharing website had to be legally responsible for the content of the tens or hundreds of thousands of new videos posted to it each day, the site could not possibly continue to operate as an open forum for users' video expression.

Section 230 does permit websites with distasteful or offensive content to exist. Recent controversy has arisen over the JuicyCampus.com website, which encourages uncensored posts about people and events on college campuses. Although some of the postings on the site are offensive, the site is not liable for the postings because of §230. This price - of allowing distasteful postings - is a

necessary one for the critical protection and promotion of free speech and innovation.

2) In Enacting Section 230 Congress Intended to Give Online Service Providers Full Immunity From Liability for the Content of Their Users

The Communications Decency Act of 1996 was Congress' first attempt at regulating content on the Internet. Although the U.S. Supreme Court struck down the Act's anti-indecency provisions in the landmark case *Reno v. ACLU* in 1997, the remainder of the act (including §230) was not challenged and remains law to this day.

Section 230 provides immunity to online service providers or intermediaries (or, as the Act calls them, "providers of interactive computer services") from most civil suits (and some criminal charges) based on the content created by others. This means is that Internet service providers, website hosting companies, and online services and websites are not treated as the "publishers" of the content that their users post.

In creating this distinction in the mid-1990s, Congress opened the door for the development of user-driven websites. To its credit, Congress realized the revolutionary potential of the Internet as a powerful new medium. By providing immunity to Internet intermediaries, Congress allowed the dissemination of third-party information that eventually came to be the driving force behind the Internet's rapid growth. In the absence of the immunity offered by §230, service providers would in many cases be hesitant to host controversial but lawful content, thereby chilling the availability of protected expression.

Without immunity, any time a website took proactive action to edit or remove content from its site, or to set rule of conduct for posters, a would-be plaintiff could argue that such actions, in and of themselves, turned the website into a "publisher" rather than a "provider." Without immunity, online intermediaries would have good reason to take a hands-off approach to any content posted to their sites; any attempt to moderate that content would shift them into the role of publisher rather than provider. With immunity, however, online service providers are freed from these fears and have been able to actively self-regulate by editing or removing any content that either they or their users deem inappropriate.

The 1997 ruling in *Zeran v. AOL* is pivotal for the immunity issue. In that case the court said that §230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Since then the courts have ruled similarly, creating a fairly consistent and broad interpretation of §230. Several cases have also affirmed a subsection of the provision that preempts any state law that runs counter to the Act.

Although critics of §230 have made the argument that victims of various online incidents are left without any legal recourse as a result of the Act, Congress specifically added section (e) to address these very concerns. Online providers remain open to liability for violating federal criminal law and victims can still pursue litigation against the actual creators of the content that has caused them harm. Immunity is only granted to the intermediaries of the information, not the parties originally responsible for creating the content. Courts can and do allow actions against the original posters of content (even anonymous posters, using proper procedures to safeguard the threshold right of anonymity).

For ten years, §230 has been the keystone of free speech on the Internet; any chilling effects that would have restricted online free speech are all but eliminated. The thriving diversity of social networking and other sites that depend on user-generated content bear witness to the need of §230. And Internet content providers are more free to develop new products and services than they otherwise might have been.

3) CDT's Amicus Briefs Urge the Various Circuit Courts to Not Depart From Judicial Precedent that Provides Immunity Against all Causes of Action that Hold Intermediaries Liable for the Content of Third Parties

The amicus briefs filed by CDT in the Sixth, Fifth, Seventh, and Ninth Circuits, largely make the same argument: the courts should not depart from well-established judicial precedent that affords broad immunity under §230.

DOE V. SEXSEARCH.COM (6TH CIR.)

In *Doe v. SexSearch.com*, Plaintiff was a male user of Defendant's website, which served as an online dating service where members join primarily to meet and engage in sexual relations with other members. In order to join, SexSearch.com required users to affirm that they were at least 18 years old, and agree to its terms and conditions, which stated that no one under the age of 18 could become a member and warned users that they used the site at their "sole risk." SexSearch.com went further in expressly stating that it assumed no responsibility for verifying the accuracy of information provided by its other users. Despite this, Jane Roe - age 14 at the time - joined the website and eventually met and engaged in sex with Plaintiff. Plaintiff sued SexSearch.com for a host of claims, ranging from tortious liability to breach of contract. The district court agreed with SexSearch.com's §230 defense and dismissed all charges.

In appealing to the Sixth Circuit, Plaintiff has attempted to sidestep §230 altogether by arguing that publication of Jane Roe's age in her profile is not the factual basis for his claims. However, all claims that Plaintiff makes fundamentally treat SexSearch.com as the publisher of Roe's content (i.e., her untrue age assertion). Courts have consistently held that the §230 provides immunity against tort, contract and other claims whenever such claims try to treat an online service provider as a content creator or publisher. In the amicus brief, CDT is urging the court to rule that all of Plaintiff's claims treat SexSearch.com as a content creator and so the site is immune from liability due to §230.

[District Court Ruling](#) [1]

[CDT Amicus](#) [2]

DOE V. MYSPACE, INC. (5TH CIR.)

In *Doe v. MySpace, Inc.*, Plaintiff created a profile on Defendant's social-networking website. MySpace.com allows its members to create online profiles that can include photographs, personal interests, and information about their lives. Defendant's terms of service state that it cannot verify the age and/or identity of its member and cautions members against providing personal contact information to other members; it also requires that members be at least fourteen years of age to join. Despite this, Plaintiff Doe, 13 at the time, lied and stated that she was 18 years of age. A 19-year-old MySpace.com member subsequently contacted the plaintiff and the two eventually met in person, at which point the 19-year-old sexually assaulted the plaintiff.

Plaintiff brought suit against MySpace for negligence, gross negligence, fraud, and negligent misrepresentation. MySpace, relying on 230 immunity, was granted a motion to dismiss by the district court. On appeal, Plaintiff is reiterating her claim that §230 immunity is not applicable to MySpace. Rather, Plaintiff asserted that her suit centered not on the dissemination of information by the 19-year-old, but instead, on MySpace's failure to adopt certain security measures in spite of an alleged "duty" to do so.

CDT and the other amici argued that the only measures that could qualify as "security" in nature are the blocking, targeting, and editing of content on its site. Incidentally, these are all the roles of a publisher, something that MySpace is clearly not. Thus, no duty exists for any intermediary to create any sort of security system, and therefore such service providers enjoy full §230 immunity.

[District Court Ruling](#) [3]

[CDT Amicus](#) [4]

FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY V. ROOMMATES.COM, LLC (9TH CIR.)

In the case of Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, CDT sees the court's decision as a significant departure from the large body of case law that exists regarding §230 immunity. Defendant Roommates.com operates an online roommate matching website that helps individuals find roommates based on their description of themselves and their roommate preferences. To become a member on Defendant's site, users complete a questionnaire provided by Defendant by selecting answers from multiple-choice menus, providing information about themselves and their preferences based on characteristics such as age and sex. After the questionnaire has been completed, they can provide any additional information they wish in an open form. Plaintiff filed suit claiming that Defendant violated the Fair Housing Act. They argue that the free-form essays written by the users have at least the potential for discriminatory preferences, and also contend that the questions posed by Roommates.com's questionnaire require the disclosure of information regarding age, gender, sexual orientation, and family status, thereby violating the Act. Defendant asserted §230 immunity and the District Court subsequently granted its motion for summary judgment. On appeal the court surprisingly held that although §230 applies to the additional comments section of Defendant's website, it did not necessarily apply to the questionnaire portion, and remanded the case to the District Court. The case, however, is now being re-heard en banc by a full appellate court.

The Ninth Circuit's initial holding flies directly in the face of case law it itself established in Carafano v. Metrosplash.com, which held that online intermediaries are not rendered "publishers" by merely providing templates to assist their users create third-party content. In the 2003 Carafano decision, the court held that a questionnaire provided by the defendant online dating-service, and designed to help its users create their profiles, did not disrupt the immunity that it was afforded under §230. The court reasoned that even though the questionnaire was provided by the website operator, a profile on its site has no content other than what a user provides it. Despite this precedent, the Ninth Circuit's recent Fair Housing decision not only holds that service providers can be considered the content providers of their users' information by categorizing, distributing, and organizing it, but it also goes further in finding that service providers may enjoy no immunity at all depending on the type of information that they host. CDT and the other amici are urging the Ninth Circuit to overrule this holding en banc in light of the absence of any legal standing on which the court came to its decision.

[Ninth Circuit Court Ruling](#) [5]

[CDT Amicus](#) [6]

CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW, INC. V. CRAIGSLIST, INC. (7TH CIR.)

Finally, in the case of Chicago Lawyers' Committee For Civil Rights Under The Law, Inc. v. Craigslist, Inc., the plaintiff—a non-profit public interest consortium of 45 law firms whose mission is to promote civil rights and eliminate discriminatory housing practices—alleges that Defendant Craigslist's online posting process discourages or prohibits certain home-seekers from pursuing housing thus decreasing the number of units available to them. Craigslist operates a website that posts "user-supplied information" that includes, among other things, housing sale and rental opportunities on a non-commercial bulletin board system. CLC contends that through its posting process, Craigslist is in essence publishing housing advertisements that indicate a preference, limitation, or discrimination on the basis of race, color, national origin, sex, religion, or familial status. In doing so, CLC sought a declaratory judgment that Craigslist violated a subsection of the Fair Housing Act that "prohibits racial discrimination of all kinds in housing." The lower court granted the Craigslist motion for judgment on the pleadings and barred the case under §230 immunity. However in doing so, it also held that §230 barred only those causes of action that would require treating intermediaries as publisher of third-party content.

CDT and the other amici strongly urged the Seventh Circuit court to overturn the lower court's narrow interpretation of when immunity will be provided to information content providers. The Seventh Circuit recently issued its decision in the Craigslist case, upholding the applicability of §230 to protect Craigslist from liability. The appeals court did, however, suggest that §230 has some unspecified limitations. CDT was disheartened by the court's failure to embrace a broader reading of the provision, but is confident that the court's ruling will not narrow §230's applicability.

[Seventh Circuit Court Ruling](#) [7]

[CDT Amicus](#) [8]

4) Future Uses of Section 230

In addition to the §230 intermediary liability cases, the so-called "Good Samaritan" provision of the CDA is receiving attention. This subsection provides immunity from claims by content creators against online service providers for voluntary acts taken in good faith to restrict objectionable content.

Late last year, Zango (a company alleged to distribute spyware) brought suit against Kaspersky Lab, an anti-malware manufacturer. In its claim, Zango maintained that Kaspersky was interfering with its business platform by blocking the installation of its software on end-users' computers. By invoking §230, Kaspersky successfully argued that it was immune from civil liability under subsection (c)(2)(A) of the Act. Though the District Court granted Kaspersky's motion for summary judgment, Zango has appealed the case to the Ninth Circuit, and CDT expects to file an amicus brief on behalf of Kaspersky in May. In the future we will likely see more unique applications of §230 as technology advances.

Section 230 is part of a broader U.S. policy that takes a hands-off approach when considering Internet regulation. That policy recognizes that the Internet, and those who drive its growth, should be as free as possible from burdens that might stifle innovation and chill freedom of expression.

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