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Blurred Lines: When Does Internet Service Provider Lose Immunity?

By **Joseph D'Ambrosio**

And **Andrew I. Mandelbaum**

Section 230 of the Communications Decency Act of 1996 (CDA 230) protects Internet service providers (ISP), website hosting services (hosts), and domain name registrants / site administrators (site owners), and certain other providers of online services (collectively, websites), from being treated as the publisher of actionable content placed on their websites by third parties. Courts around the country have consistently held that unless the website creates or develops the content, CDA 230 protects them from liability for such content. However, recent decisions have suggested, and one court has recently held, that the term "develop" encompasses more than creating or authoring the allegedly actionable content, which could limit the immunity provided by CDA 230.

Background

CDA 230 was enacted to respond to the growing wave of claims against websites for the "publication" of unlawful content on their sites. See 47 U.S.C. §230. Before CDA 230, any ISP, host, or site owner responsible for providing access to, hosting, or owning a website or blog was a possible target for litigation if unlawful content was published on that website or blog.

The genesis of CDA 230 was a pair of New York cases in the 1990s which served to underscore why websites should be treated differently than traditional "publishers" for purposes of tort liability. In *Cubby v. CompuServe*, 776 F.Supp. 135 (S.D.N.Y. 1991), the court held that CompuServe was not a "publisher," and therefore not liable for defamations because it did not monitor or filter the posts. *Stratton Oakmont v. Prodigy Servs.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995), also involved an online message board, but Prodigy took affirmative steps to filter content and the court held Prodigy was therefore a "publisher" and liable in tort. This created the odd result of rewarding an ISP for doing nothing, but punishing one for trying to prevent unlawful content. This unfairness prompted Congress to take action.

The immunity found in section 230 of the CDA provides in relevant part that:

> 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.

47 U.S.C. §230. "Information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Id.

Where to Draw the Line?

Since the adoption of CDA 230, courts have uniformly interpreted the statute to provide broad immunity to websites for unlawful content created by others. See, *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997). For example, if a defamatory comment is published by a user on a message board website like Reddit, the site owner, host, and ISPs are immune. Similarly, Yahoo! is immune from liability when an anonymous poster in a chat room contributes allegedly defamatory statements, and Facebook is immune when members post actionable content on other members' Facebook pages. This broad interpretation of immunity is consistent with the intent and purpose of CDA 230. But how far does this immunity extend? Does the immunity extend when the website does more than just provide a neutral forum for users to post comments online?

The CDA itself does place limitations on this broad immunity. By its very language, CDA 230 does not immunize parties who are "responsible, in whole or in part, for the creation or *development* of information…" (emphasis added). It is easy to determine who creates content. It is the "development" part of this test that has created some recent confusion. The early cases interpreting the CDA involved now-defunct ISPs such as

JOSEPH D'AMBROSIO *and* ANDREW I. MANDELBAUM *are partners at Ford Marrin Esposito Witmeyer & Gleser. They can be reached at jdambrosio@fmew.com and aimandelbaum@fmew.com.* ADAM CASSADY, *an associate at the firm, assisted in the preparation of this article.*

AOL and Prodigy, and search engines like Google, which have historically been neutral when it comes to content posted by users. With the explosion of blogs and gossip websites over the past decade, however, courts have been forced to re-examine the breadth of CDA 230 immunity when the website is less than neutral as to the content. For example, would the website www.IHateDonaldTrump.com be responsible for unlawful content posted by third parties?[1] We contend that the simple answer is "no."

The question courts now face is when does a website cross the line and "develop" the allegedly unlawful content? Should a lack of neutrality matter when assessing immunity under the CDA? We argue that notions of neutrality, morality and offensiveness with regard to site administration have no proper place in the interpretation of CDA immunity.[2]

Meaning of Key Words

Why have issues of neutrality and offensiveness become significant to CDA 230 interpretation? Some courts have suggested that merely encouraging unlawful content through site administration is sufficient to constitute the "development" of such content, thereby stripping certain websites of CDA immunity. *Jones v. Dirty World*, 840 F.Supp.2d 1008 (E.D. Ky. 2012); *Shiamili v. Real Estate Group of N.Y.*, 17 N.Y.3d 281, 294-94 (N.Y. 2011) (Lippmann, J, dissenting) (The authors represented the defendant in *Shiamili*.) We do not believe that this is a reasonable construction of CDA 230.

The words encourage and develop have different meanings. "Develop" means "to cause to grow or become bigger or more advanced."[3] "Encourage" means to "make more appealing or more likely to happen."[4] The importance of the distinction is plain when considered in the context of microblogging platforms such as Tumblr.

When a user posts content onto Tumblr, that content is immediately published to that user's "followers." Each Tumblr user has a certain list of other users whom they follow, and content from all of the blogs a user follows appears in each user's feed. Thus, if defamatory content is published by a Tumblr user, it would appear in the feed of each of that user's followers. Each follower would thereby "publish" the actionable content (which, itself, is usually content hosted somewhere else on the web).

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The essential feature of Tumblr is the "reblog" feature. When a user reblogs content that appears in the feed of other users—such as, in this instance, putatively defamatory content—that content is then instantly published to all of the users in the re-blogger's feed. The more reblogs an item of content has, the more users to whom and by whom that content is published. Many items of content have hundreds of thousands of reblogs, and are viewed by millions of Tumblr users.

Without question, those items of content (exclusive of images of cats) on Tumblr that are most reblogged are those that are most controversial. Indeed, Tumblr is designed to permit each user to comment on a reblog, such that a controversial item picks up long strings of comments. Users may endorse or disapprove of content, with or without stated reasons. Clearly, the reblogging architecture of Tumblr encourages defamatory content, in that it permits such content to, with a single click, be republished to other users.

The distinction between encouragement by design, and development, is illustrated by events surrounding the recent George Zimmerman trial. During the trial, film director Spike Lee infamously "re-tweeted" a false address for Zimmerman's family. Lee himself did not create the content and, by publishing the content to his more than 240,000 followers, developed the content from the marginal user base "following" the publisher of the original tweet.

In so doing, Lee published the false information to all of his followers, some of whom then re-tweeted the content, often adding incitements to violence. The Twitter microblogging platform plainly encourages re-tweeting, but does not create defamatory content developed by the re-tweets of its users. Recently, Lee was served with a lawsuit regarding his errant retweet. Twitter was not named in the suit. The distinction, then, between user-driven "development," and design-driven "encouragement," is clear in the context of microblogging.

The Ninth Circuit did not expand the definition of 'develop' to include 'encourage.' The seminal decision interpreting the word "development" in the context of the CDA, *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008), does not extend "development" to include "encouragement." Although the Fair Housing decision has been relied upon extensively by those trying to curtail the broad immunity of CDA 230, the Ninth Circuit's definition of "develop" is consistent with the plain meaning of the word, and cannot logically be used to justify expansion of the term to cover mere encouragement. In *Fair Housing*, the Ninth Circuit held that to be a "content developer," the website must "materially contribute to the alleged illegality of the conduct." Id. at 1174.

Fair Housing is the primary case cited by those seeking to limit the CDA's broad immunity because it is one of very few cases in which a court held that the website "developed" unlawful content. However, the website in *Fair Housing* actually did develop allegedly unlawful content. In that case, the website was responsible for developing a user registration process containing questions drafted by the site owner that allegedly violated the Fair Housing Act, by requiring users to disclose their sex, sexual orientation, and family status as well as describe the sex, sexual orientation, and family status they would prefer in a roommate.[5]

The U.S. Court of Appeals for the Ninth Circuit held that the website could be considered an "information content provider" as to those questions and, as a

result, was not immune for those questions and their responses. Id. at 1164. However, with respect to the message board that allowed third-party users to post comments, the court specifically held that the CDA provided immunity, holding, "[t]his is precisely the kind of situation for which section 230 was designed to provide immunity." Id. at 1173-74. Nevertheless, proponents of limited immunity have promoted the Fair Housing decision as signaling the end of broad immunity.

The recent decision expanding 'development' to include 'encouragement.' In the recent, headline-grabbing decisions arising out of the former NFL cheerleader who was allegedly defamed on a gossip website called "the Dirty," the federal district court relied on *Fair Housing* in ruling that CDA immunity is limited, and that the site's encouragement of defamatory and offensive content deprived the site owner of CDA 230 immunity. *Jones v. Dirty World*, 840 F.Supp.2d 1008 (E.D. Ky. 2012), *Jones v. Dirty World*, 2013 U.S. Dist. LEXIS 113031, 41 Media L. Rep. 2408 (Aug. 12, 2013). The Kentucky district court found that the website "specifically encourage[d] development of what is offensive about the content" and thus was not entitled to CDA 230 immunity.

The court based its decision on three facts: (1) the name of the site, thedirty.com, itself "encourages the posting of 'dirt,' that is material which is potentially defamatory…"; (2) defendant selected a small percentage of submissions to be posted, added tag lines, and reviewed postings but did not verify their accuracy; and (3) defendant added his own comments to postings, including those about plaintiff. In the August 2013 post-trial decision, the court reiterated its holding and added that comments that effectively ratified user posts, had "encouraged" the unlawful content. Id. The district court's expansive definition of "development" in the Jones decisions is currently on appeal to the U.S. Court of Appeals for the Sixth Circuit. Oral argument in the case will be held in early 2014, with a decision expected this summer.

We believe that *Jones* was wrongly decided and that the legal test for "development" of unlawful content should not be whether the website agrees with, endorses, adopts, ratifies or encourages the unlawful content. Such a restriction on CDA immunity will serve to create confusion, uncertainty and open the floodgates to litigation. It would also have a chilling effect on legal speech on the Internet because ISPs, hosts, and site owners will have a major financial incentive to avoid exposure to liability. For every website or blog that is dedicated to "offensive" or "negative" content, there are countless that are not. Nevertheless, websites will have to decide whether it is worth the headaches, endless cease and desist letters and threats of litigation to continue operating a blog, website, or message board that permits users to post content freely. The risk of liability would remain since one would still be subjected to liability for the acts of others.

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With regard to the term "develop," the Fair Housing court stated that in the broadest sense of the term, "develop" could include the functions of an ordinary search engine—indeed, just about any function performed by a website. But to read the term so broadly would defeat the main purpose of CDA 230 by swallowing up every bit of the immunity that the section otherwise provides. It is for this reason that companies such as Facebook, Google, Twitter, and Amazon have submitted briefs with the Sixth Circuit in opposition to the Jones decision. Ultimately, this issue will have to be addressed by the U.S. Supreme Court.

If the test for development were to include encouragement-by-design, such as in the microblogging examples discussed above,[6] every person wronged on the Internet would have a claim not just against the person making the unlawful comment, but against every person who allegedly "encouraged" that conduct, even after the fact. Contrary to the stated purpose of promoting early dismissal of cases, an "encouragement" test would make it impossible for websites to extricate themselves from litigation at an early stage. How could courts dismiss cases against such defendants at the pleading stage if pleading "encouragement" is sufficient to state a claim? Such a relaxed standard for overcoming immunity would create even more litigation in this area.

Conclusion

Putting aside the arguments for and against such a policy, whether to eliminate CDA 230 immunity for "encouragers" is an issue for Congress to address through legislation, not through strained judicial interpretation of existing legislation. If Congress feels a need to curtail Internet speech, then it should amend the language of the CDA to state clearly that the mere encouragement of content will render the "encourager" responsible for the content.[7] Congress is in a better position than the courts to weigh the advantages and disadvantages of more restricted CDA immunity.

1. This was an example provided by Judge Robert Smith of the New York Court of Appeals during oral argument in *Shiamili*, infra.

2. Consistent with this interpretation, the New York Court of Appeals held that the statute does not differentiate between "neutral" and selective publishers. *Shiamili v Real Estate Group of N.Y.*, 17 N.Y.3d 281, 289 (N.Y. 2011).

3. See "Develop." Def. 1. Oxford Dictionaries Online. Oxford University Press. Web.

4. See "Encourage." Def. 2. Merriam-Webster Online, Merriam-Webster, n.d. Web.

5. The questions were ultimately held not to have violated the FHA. 666 F.3d 1216.

6. There are now countless ways to like, +1, recommend, retweet, reblog, upvote, and otherwise "approve" of content published on the Internet.

7. Congress has regularly reiterated and even extended the protections provided by CDA 230. See, e.g., the SPEECH Act of 2010 (amending 28 U.S.C. §1 et seq., applying CDA 230 protections to foreign defamation judgments).