

# Protection Under CDA § 230 and Responsibility for “Development” of Third-Party Content

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For fifteen years, Section 230 of the federal Communications Decency Act (CDA)<sup>1</sup> has provided protection to publishers, broadcasters, and other media entities from a broad range of claims relating to content posted on their websites by third parties.

Lawyers for media entities that sought to regulate this user-generated content (or UGC) were initially asked how the company could treat that content and still receive the protection of Section 230. Can we host it? Can we delete it? Are we required to delete it when asked? Can we edit it to remove objectionable content? What other types of editing are allowed without assuming responsibility for the content?

But as we have entered Web 2.0, audience participation and UGC have become more the norm than the exception. In addition, many media entities are seeing a reduction in their resources along with a growing need to populate their websites and social media sites with greater volumes of instant content. As a result, a different set of questions has arisen. Can we give assignments to our users/readers and still receive the protection of Section 230? Can we contract with our users? Can we pay them? Are we responsible if we host a blog operated by someone else? How does CNN's iReport<sup>2</sup> work? Can we create our own

team of “citizen journalists” to help us deliver the news?

This article summarizes the development of the case law under Section 230 relating to these and similar questions, and is intended to provide guidance in determining when a website owner becomes liable as publisher of third-party content in these more complicated situations.

## Another Information Content Provider

By its text, Section 230(c) protects a “provider or user” of an “interactive computer service” from certain types of liability as “publisher” of content that is “provided by another information content provider.”<sup>3</sup> [See sidebar on next page.]

For media entities seeking to solicit substantive submissions from users, the issue then becomes: what is “another information content provider”? Section 230 defines an information content provider as “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.”<sup>4</sup> So, what makes someone “responsible, in whole or in part, for the creation or development” of the content?

Thus far, courts have rarely found website owners to be responsible for the creation or development of content outside of materials authored by their own employees.<sup>5</sup> But there are exceptions, and while some areas of concern have more established case law to provide guidance, in other areas the law is less settled and more controversial.

## Providing Forum for Others to Post

The law is clear that websites and other services that merely allow users to post content that may be actionable, without any interaction with the content or its source, are not “responsible” for “the creation or development” of the content—and are thus immunized from

liability for defamation and similar claims by Section 230.<sup>6</sup> As noted by the U.S. Court of Appeals for the Fourth Circuit in *Zeran v. American Online, Inc.*:

It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.<sup>7</sup>

## Failure to Remove After Notice or Promise to Remove

The case law is equally clear that a website owner or other interactive computer service cannot be held liable in tort for failing to remove defamatory or other harmful content posted by third parties, even after receiving notice of the content's objectionable nature.<sup>8</sup> When the website promises to remove the content, however, the website may be susceptible to claims under other legal theories such as promissory estoppel.<sup>9</sup>

In *Barnes v. Yahoo!, Inc.*, for example, the U.S. Court of Appeals for the Ninth Circuit denied Yahoo!'s motion to dismiss a claim for promissory estoppel based on Yahoo!'s promises to remove offending content and subsequent failure to do so.<sup>10</sup> In *Barnes*, plaintiff's ex-boyfriend allegedly created a false Yahoo! member profile for her.<sup>11</sup> Plaintiff complied with Yahoo!'s takedown policies and contacted Yahoo! multiple times about the false profile.<sup>12</sup> Despite a telephone promise to remove the profile by Yahoo!'s director of communications, Yahoo! failed to remove the profile until after the lawsuit was filed.<sup>13</sup> The Ninth Circuit held that plaintiff's

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claim for promissory estoppel, based on Yahoo!'s agreement to remove the content, was not barred by Section 230.<sup>14</sup>

Similarly, in *Scott P. v. Craigslist*, a California court denied Craigslist's demurrer of plaintiff's promissory estoppel claim where plaintiff alleged that he had asked Craigslist to remove offensive posts and take steps to prevent future harmful posts, and Craigslist allegedly said that it would "take care of it" but failed to do so.<sup>15</sup> In an earlier case reaching the opposite conclusion, however, a Southern District of New York court held that a search engine could not be liable for failing to remove content despite allegedly promising to remove it.<sup>16</sup>

### Review of Content Posted by Others

The vast majority of courts have held that Congress intended to allow websites and other interactive computer services to decide for themselves whether or not to review user-generated content without fear of liability in either case.<sup>17</sup> In *Green v. America Online, Inc.*, for example, plaintiff sought to recover from America Online, Inc. for the negligent failure to police its services and protect him against allegedly defamatory statements sent through its network.<sup>18</sup> The Third Circuit held that AOL was statutorily immune from liability under Section 230 and affirmed dismissal of all of plaintiff's claims.<sup>19</sup> Similarly, a Southern District of New York judge dismissed plaintiff's claims against Craigslist for "failure to block, screen or otherwise prevent the dissemination" of third-party content.<sup>20</sup>

The Seventh Circuit, however, has questioned the majority's view. In *Doe v. GTE Corp.*, plaintiffs sued GTE for its role in providing web hosting services to youngstuds.com, a website selling hidden-camera videos of plaintiffs in locker rooms, showers, and bathrooms.<sup>21</sup> The question before the court was whether the claims against GTE for failure to censor materials it hosted were barred by Section 230.<sup>22</sup> Judge Easterbrook, writing for the court, noted that there are different possible readings of Section 230(c)(2): as a grant of immunity or as a definitional clause.<sup>23</sup> If Section 230(c)(2) is read as granting immunity, as it is by the majority of other courts, GTE could not be liable under "any state-law theory to the persons harmed by [the third-party's]

material."<sup>24</sup> On the other hand, if it is merely a definition, Judge Easterbrook asserted that Section 230(c)(2) "would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interest of third parties, such as the spied on plaintiffs, for such laws would not be 'inconsistent with' this understanding of 230(c)(1)."<sup>25</sup> As there was no such state or common law at issue, however, the court did not need to determine which reading of Section 230(c) is correct.<sup>26</sup>

A few years later, in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* [*Chicago Lawyers' I*], a Northern District of Illinois judge picked up on Judge Easterbrook's opinion and noted that because, under its interpretation, Section 230 does not grant absolute immunity, state legislatures may be able to "enact . . . initiatives that induce or require online service providers to protect the interest of third parties."<sup>27</sup>

Despite raising these questions, however, the *GTE* and *Chicago Lawyers' I* courts each held that defendant was not liable.<sup>28</sup>

### Selection of Material for Publication

Courts have repeatedly held that Section 230 immunizes a website or other interactive computer service from liability for selecting which third-party content to publish,<sup>29</sup> as long as the website reasonably believed that the content was provided by a third party with the intent that it be published on the Internet.<sup>30</sup> As one New Jersey court said, "[T]here is no relevant distinction between a user who knowingly allows content to be posted to a website he or she controls and a user who takes affirmative steps to republish another person's content; CDA immunity applies to both."<sup>31</sup>

Nonetheless, one Ninth Circuit judge has published several dissents contending that selection of content for publication is tantamount to creation or development of the information. In his opinions, Judge Gould argues that where a defendant takes "an active role in selecting information for publication, the information is no longer 'information provided by another' within the meaning of § 230."<sup>32</sup> Judge Gould would not allow any protection where the defendant engaged in prepublication selection or editing of

### CDA Section 230(c)

Section 230(c) reads as follows in its entirety:

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).

the content and would only allow protection for post-publication removal.<sup>33</sup> Thus far, Judge Gould's opinions have been relegated to the dissent.

### Editing—by Insertion or Deletion

Subsection (c)(2) of Section 230 explicitly provides that,

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 . . .<sup>34</sup>

Therefore, websites and other interactive computer services cannot be held liable for good faith deletion of obscenities and other objectionable content.<sup>35</sup> Moreover, courts have consistently held that Section 230 preempts liability for “exercise of a publisher’s traditional editorial functions—such as deciding whether to . . . alter content.”<sup>36</sup>

Nonetheless, altering or editing third-party content is considered “creation or development” of the content, and can lead to liability, if the revisions “materially contribut[e] to [the] alleged unlawfulness” of the content.<sup>37</sup> In other words, if the third-party statement is not defamatory before the web publisher edits it, but is defamatory afterward (such as by removing the word “not” from a submission that read “Mr. Smith did *not* steal the artwork”), then the web publisher loses CDA protection.<sup>38</sup> If, on the other hand, the statement is defamatory or otherwise harmful prior to editing, and the editing does not add to the harmful nature of the statement, then the website is protected by the CDA against liability for the statement.<sup>39</sup>

For example, in *Doe v. City of New York*, one defendant, a counterterrorism advisor for the City of New York, allegedly added his own comments to emails containing anti-Muslim and anti-Arab American Muslims statements and forwarded them to other city employees, including plaintiff.<sup>40</sup> Plaintiff was required to receive these emails as part of his job and sued claiming a hostile work environment.<sup>41</sup> Defendant asserted that he was protected by the CDA for publishing the emails.<sup>42</sup> The district court held that because defendant added his own commentary to the emails and that speech was also allegedly tortious, “he fell out of the statute’s protections.”<sup>43</sup> On the other hand, in another case a court determined that where a defendant added lines to a forwarded email but none of the added content could be interpreted as referring to plaintiff, defendant was shielded by the CDA from plaintiff’s libel claim.<sup>44</sup>

Similarly, where a website or other interactive computer service adds headings and titles to third-party content, and the headings or titles themselves contain objectionable material, CDA protection can be lost,<sup>45</sup> as happened in *MCW Inc. v. BadBusinessBureau.com, LLC* and *Hy Cite Corp. v. BadBusinessBureau.com, LLC*. Both cases involved the same defendant, BadBusinessBureau.com, LLC, and its website containing “Rip-Off Reports” published by consumers about various businesses.<sup>46</sup> In *MCW*, a Northern District of Texas judge held that because plaintiff’s claims were based on the “disparaging titles, headings, and editorial messages that [the plaintiff] allege[d] the defendants created,” defendants were information content providers with respect to the postings and not immune under Section 230.<sup>47</sup> Likewise, in *Hy Cite*, a District of Arizona judge found that plaintiff’s allegations that the defamatory content appeared in editorial comments and headings created by defendant were sufficient to survive defendants’ motion to dismiss (asserting the claims were barred by Section 230).<sup>48</sup>

### Questionnaires and Forms

The issue of CDA protection becomes less clear as web publishers interact with users by soliciting responses. Many websites provide questionnaires or forms, such as for dating, classified advertisements, and the like, for users to fill out. Thus far, case law indicates that the website will be immune when using such forms as long as these forms ask neutral questions that are not themselves unlawful and do not require unlawful responses.<sup>49</sup>

For example, in *Carafano v. Metro-splash.com, Inc.*, an actress brought an action against Matchmaker.com relating to a false dating profile created by a third party with the actress’s actual contact information.<sup>50</sup> Matchmaker.com provided its users with a questionnaire to be filled out, along with essay questions to be answered.<sup>51</sup> The Ninth Circuit found that although the third party used Matchmaker’s questionnaire, “the selection of the content was left exclusively to the [third-party] user.”<sup>52</sup> Further, “[t]he fact that Matchmaker classifie[d] user characteristics into discrete categories and collect[ed] responses to specific essay questions”

did not make Matchmaker responsible for the creation or development of the information.<sup>53</sup> The court also rejected plaintiff’s argument that because Matchmaker provided “pre-prepared responses” for users that Matchmaker was responsible for the misinformation.<sup>54</sup> Finally, the court determined that the responses to the essay questions did not bear more than “a tenuous relationship to the actual questions asked.”<sup>55</sup> Therefore, Matchmaker was not responsible for the creation or development of the content and was protected by Section 230.<sup>56</sup>

Similarly, in *Dart v. Craigslist, Inc.*, the Northern District of Illinois held that Craigslist was not an information content provider with respect to illegal advertisements posted by its users under its “adult services” category.<sup>57</sup> In *Dart*, the court rejected the bare allegations that Craigslist “provides” the illegal content or “arranges” and “directs” the illegal content.<sup>58</sup> The court examined the allegedly illegal content and determined that the heading “adult services” and its subcategories were not themselves unlawful—nor did they “necessarily call for unlawful content.”<sup>59</sup> The court also noted that Craigslist’s express policies prohibited such content.<sup>60</sup> Finally, the court found that Craigslist’s search function was merely a “neutral tool” and did not render it an information content provider.<sup>61</sup>

On the other hand, if the language of the form itself is unlawful, or if the form or questionnaire requires responses that are unlawful, the website may be considered to have “created or developed” the content and lose its CDA protection.<sup>62</sup> For example, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, local fair housing councils brought an action against Roommates.com alleging violations of the Fair Housing Act.<sup>63</sup> Roommates.com required its users to input their sex, family status, and sexual orientation, and displayed those answers on the user’s profile page.<sup>64</sup> The website also required users to list their preferences for a roommate in those categories.<sup>65</sup> The Ninth Circuit held that “[b]y requiring subscribers to provide the information as a condition of service, and by providing a limited set of pre-populated answers, Roommates.com becomes much more than a passive transmitter of information



provided by others; it becomes the developer, at least in part, of that information.”<sup>66</sup> Where “unlawful questions solicit (a.k.a. ‘develop’) unlawful answers,” the website becomes an information content provider with respect to those answers.<sup>67</sup>

Notably, Roommates.com allegedly did more than merely “encourage or solicit” the unlawful content: it supposedly forced users to provide the unlawful content in order to use the website’s service.<sup>68</sup> In so doing, Roommates.com “contribute[d] materially to the alleged illegality of the conduct” and was not shielded by the CDA.<sup>69</sup>

According to courts interpreting the CDA in the wake of the *Roommates* decision, simply supplying a broad choice of categories for third-party selection is

## The issue of CDA protection becomes less clear as web publishers interact with users by soliciting responses.

not sufficient to lose CDA protection, even when some of the choices may be harmful.<sup>70</sup> However, “[w]ebsite operators lose immunity where the questions posed and/or choice of answer is responsible for the creation [or] development of the alleged harmful content.”<sup>71</sup>

### Solicitation

A number of CDA cases have arisen recently in which website defendants have encouraged or directed third-party submissions more “actively” than merely providing questionnaires and forms. As with the decisions relating to questionnaires and forms, the majority of courts have held that the website operators will not lose CDA protection if they neutrally solicit content to be submitted, even if the submission contains defamatory statements or other unlawful content.<sup>72</sup> The Tenth Circuit and several lower courts have held, however, that websites may lose CDA protection if they actively solicit or encourage submission of what is offensive about the content.<sup>73</sup>

For example, in *Federal Trade*

*Commission v. Accusearch Inc.*, Accusearch provided confidential telephone records to its customers over the Internet.<sup>74</sup> Collection of the records at issue violated the Telecommunications Act, so the Federal Trade Commission alleged that Accusearch was engaged in an unfair practice in violation of the Federal Trade Commission Act.<sup>75</sup> To obtain the confidential records, Accusearch assigned searches to third-party researchers who sent the records and an invoice directly to Accusearch. Accusearch then passed the records on to its customers via email and its website.<sup>76</sup> Accusearch argued that the researchers were third parties, i.e., “another information content provider,” so Accusearch could not be treated as publisher of the unlawful content under the CDA.<sup>77</sup>

In affirming the grant of summary judgment against Accusearch, the Tenth Circuit defined “development” and “being responsible for development” of information.<sup>78</sup> First, the court stated that “when confidential telephone information was exposed to public view through [defendant’s website], that information was ‘developed.’”<sup>79</sup> In so doing, the court relied on *Webster’s Third New International Dictionary* definition for *develop*, i.e., “to make actually available or usable something previously only potentially available or usable.”<sup>80</sup>

Although this broad definition would include many activities where courts have affirmed CDA immunity, including acting as a mere conduit for information, the court then narrowed liability for websites and other interactive computer services by holding that that the term *responsible* must mean something more than merely being a “neutral conduit” for the content.<sup>81</sup> Specifically, the Tenth Circuit found that one is not “responsible” for the development of harmful content submitted by third parties if “one’s conduct was neutral with respect to the offensiveness of the content.”<sup>82</sup> The court noted, “We would not ordinarily say that one who builds a highway is ‘responsible’ for the use of that highway by a fleeing bank robber, even though the culprit’s escape was facilitated by the availability of the highway.”<sup>83</sup> As a result, the court concluded that an interactive computer service is “‘responsible’ for the

development of offensive content only if it in some way specifically encourages development of what is offensive about the content.”<sup>84</sup>

Accusearch could not claim protection under the CDA because it: (1) “solicited requests for confidential information,” (2) “paid researchers to obtain it,” (3) “knowingly sought to transform virtually unknown information into a publicly available commodity,” and (4) “knew that its researchers were obtaining the information through fraud or other illegality.”<sup>85</sup> Therefore, the Tenth Circuit affirmed the grant of summary judgment for the plaintiff.<sup>86</sup>

Arguably, the Tenth Circuit’s decision inserts a good faith element into portions of the CDA that do not explicitly require such analysis: did the defendant act in good faith when soliciting the third-party content?<sup>87</sup> Avoiding such an analysis, Judge Tymkovich’s concurring opinion in *Accusearch* argued that the CDA only protects against content, not conduct; and because Accusearch’s conduct (or the conduct of its agents) in acquiring the information was itself an unfair practice, the CDA would not apply.<sup>88</sup>

Another solicitation case yields a broader (although unpublished) holding in favor of plaintiffs. In *MCW*, the court denied a motion to dismiss filed by defendant websites *BadBusinessBureau.com* and *RipoffReport.com* under the CDA for numerous reasons including that they

encouraged a consumer to take [and submit] photos of (1) the owner [of plaintiff company], (2) the owner’s car, (3) the owner handing out Rip-off Reports in front of [plaintiff’s] offices, and (4) the [plaintiff’s corporate] sign . . . all so that defendants could include these photos on the websites.<sup>89</sup>

Noting that the CDA “does not immunize an interactive computer service if it also functions as an information content provider for the portion of the statement or publication at issue,”<sup>90</sup> the Northern District of Texas court held that the “defendants cannot disclaim responsibility for disparaging material that they actively solicit.”<sup>91</sup> The court asserted that “actively encouraging and instructing a consumer

to gather specific detailed information” goes beyond traditional publishing roles and constitutes development under the CDA.<sup>92</sup>

In *Doctor’s Associates, Inc. v. QIP Holder LLC a/k/a Subway v. Quiznos*, a District of Connecticut judge also found loss of CDA protection for “active solicitation” of content.<sup>93</sup> Sandwich company Quiznos started an advertising campaign with television commercials and a website at *meatnmeat.com* that compared the amount of meat in Quiznos’ sandwiches to that in Subway sandwiches.<sup>94</sup> Through the website, Quiznos encouraged consumers to enter into a contest called the “Quiznos v. Subway TV Ad Challenge,” whereby participants submitted videos showing “why [they] think Quiznos is better.”<sup>95</sup> Quiznos also posted sample videos to guide participants.<sup>96</sup>

Because Subway evidently offered selections with a comparable amount of meat to Quizno’s sandwiches, Subway sued alleging false and misleading advertising in violation of the Lanham Act.<sup>97</sup> Quiznos asserted that it was protected by the CDA for entrant submissions because it did not alter them.<sup>98</sup> Subway responded by asserting that (1) because Quiznos claimed ownership of all content under the contest rules, and (2) Quiznos provided direction in the submission requirements, Quiznos was responsible for the creation or development of entrant content.<sup>99</sup> Quiznos maintained that because the contest rules expressly prohibited “false or misleading” content, any false or misleading submissions were in violation of those rules, and Quiznos should not be responsible for them.<sup>100</sup>

The court denied summary judgment to Quiznos on the grounds that “[a] reasonable jury may well conclude that the Defendants did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos.”<sup>101</sup>

On the other hand, in *Nemet v. Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, ConsumerAffairs.com was given protection under the CDA for solicitation of submissions.<sup>102</sup> ConsumerAffairs.com operated a forum

for consumers to review goods and services<sup>103</sup> and allegedly “used the site to ‘solicit donations, sell advertising space, assist and encourage the formation of class action law suits, charge promotional fees on amounts collected by consumers, and advertise and sell ‘rip-off revenge’ packs that encourage consumers to avenge themselves on companies.”<sup>104</sup> In deciding defendant’s motion to dismiss under the CDA, the Fourth Circuit noted that the ConsumerAffairs website did not “require[] users to input illegal content as a necessary condition of use”<sup>105</sup> and thus held in favor of the defendant.<sup>106</sup> The court distinguished ConsumerAffairs.com’s actions from those of the defendant in *Roommates.com*<sup>107</sup> and the lower court distinguished them from the actions of the defendants in *MCW*.<sup>108</sup>

#### Contract/Payment

The text of the CDA provides that if a website or other “interactive computer service” is “responsible, in whole or in part” for the “creation or development” of the content, the website loses its CDA protection.<sup>109</sup> As a result, one might assume that if the unlawful content is provided pursuant to a contract with the website, then the publisher becomes “responsible” at least “in part” for the content and thus loses CDA immunity.

Courts have not interpreted the CDA this way, however. Merely contracting for rights to publish the content, where the contract is neutral and does not specifically seek or encourage the defamatory or unlawful nature of the content, is not sufficient to lose CDA immunity.<sup>110</sup> One federal court indicated that immunity is not lost even if payment is made for the content and the publisher has the ability to remove harmful content,<sup>111</sup> although two other federal courts considered payment a factor in ruling that CDA protection was lost.<sup>112</sup>

In *Blumenthal v. Drudge*,<sup>113</sup> defendant American Online, Inc. (AOL) entered into a “written license agreement” with co-defendant Matt Drudge that allowed AOL to make Drudge’s *Drudge Report* “available to all members of AOL’s [Internet] service for a period of one year.”<sup>114</sup> Pursuant to the license agreement, Drudge “received a flat monthly ‘royalty payment’ of \$3,000 from AOL.”<sup>115</sup> Moreover, “during the time relevant to this case,

defendant Drudge has had no other source of income.”<sup>116</sup> In addition, although Drudge was to “create, edit, update and ‘otherwise manage’ the content of the Drudge Report,” AOL could “remove content that AOL reasonably determine[d] to violate AOL’s then standard terms of service.”<sup>117</sup>

Notwithstanding AOL’s contract with Drudge, the court held that AOL had no role in “creating or developing any of the information in the Drudge Report,” and thus was protected from liability by the CDA.<sup>118</sup>

Although indicating some annoyance with the broad protection offered by the CDA and AOL’s exploitation of such protection,<sup>119</sup> the court nonetheless held that the CDA’s “language is clear: AOL is immune from suit.”<sup>120</sup> The court pointed to two factors that appeared to particularly influence its decision: (1) “plaintiffs affirmatively state that ‘no person, other than Drudge himself, edited, checked, verified, or supervised the information that Drudge published in the Drudge Report’”<sup>121</sup>; and (2) “there is no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of AOL, and plaintiffs seem to have all but abandoned that argument.”<sup>122</sup> AOL’s contractual ability to remove content from the *Drudge Report* was insufficient to result in loss of immunity.

This decision comports with the approach of the terms of use on most media websites. Users generally must “click” their agreement to those terms of use prior to submitting content for publication on the website, and terms typically specify that the media publisher may freely edit or delete content submitted by its users. Thus, if the *Drudge* court had held that publishers were liable for third-party content merely due to contractual provisions allowing the publisher to edit the content, nearly every publisher with a website would have to change its terms of use to provide for less control over content published on its site. This outcome would seem to have the reverse effect on web publishers than that which Congress intended when enacting the CDA. As noted by numerous courts, the CDA was intended to immunize publishers from liability for a “publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone

or alter content. . . .”<sup>123</sup>

The *Drudge* decision that a mere contract is insufficient to trigger CDA immunity was reinforced by the Washington Court of Appeals in *Schneider v. Amazon.com*<sup>124</sup> and by the Tenth Circuit in *Ben Ezra, Weinstein, and Company v. America Online Inc.*<sup>125</sup> In *Schneider*, Amazon.com’s posting terms stated that “if you post reviews or comments on the site, you grant Amazon.com and its affiliates a non-exclusive, royalty-free, perpetual, irrevocable, and fully sublicensable right to use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute and display such reviews and comments throughout the world in any media.”<sup>126</sup> Plaintiff argued that because Amazon claimed licensing rights in the posted material, CDA protection was lost. The Washington Court of Appeals held, however, that “Schneider’s licensing rights argument was rejected in *Blumenthal v. Drudge*” and ruled for Amazon.com.<sup>127</sup>

In *Ben Ezra*, AOL entered into contracts with two vendors that provided stock quotations for publication on AOL’s Internet service.<sup>128</sup> When AOL published allegedly inaccurate stock quotations provided by one of the vendors, plaintiff alleged that AOL “worked so closely” with the vendors “in the creation or development of the stock quotation information that [AOL] also operated as an information content provider.”<sup>129</sup> The Tenth Circuit held that AOL was not an information content provider because plaintiff “presents no evidence to contradict [AOL’s] evidence that [the vendors] alone created the stock information at issue.”<sup>130</sup> Although not specifically ruling that the contract was insufficient to convert AOL into an information content provider, the court rejected the plaintiff’s claim that AOL was “responsible, in whole or in part, for the creation or development” of the incorrect stock quotes by noting that “in fact, the contract between [AOL] and [one of the vendors] specifically provided that ‘AOL may not modify, revise or change’ the information which [the vendor] provided.”<sup>131</sup>

Contract terms disclaiming responsibility are not necessarily sufficient to yield protection under the CDA, however. In *Accusearch*, defendant’s third-party vendors were “required

by Accusearch to provide assurances that they would perform their work in accordance with applicable law.”<sup>132</sup> Nonetheless, the Tenth Circuit found that because Accusearch “knew” that its vendors obtained the submitted content “through fraud or other illegality” and continued to solicit and pay for it anyway, Accusearch was “responsible” for “development” of the offensive content under the CDA.<sup>133</sup>

In addition, despite the fact that the payment in *Drudge* was insufficient to cause a loss of CDA immunity, in *Hy Cite*, the court denied a website defendant’s motion to dismiss when plaintiff alleged that defendant “solicit[ed] individuals to submit [content] with the promise that individuals may ultimately be compensated for their reports.”<sup>134</sup> The court held that these “allegations arguably could support a finding that Defendants are ‘responsible . . . for creation or development’” of the information provided in response.<sup>135</sup>

#### **Badging**

Badging occurs when website operators or users of a website invest a user with some symbol of authority or trustworthiness. eBay.com, for example, allows users to recommend or rate other users by providing feedback; as positive feedback accrues, users gain stars indicating their positive ratings.<sup>136</sup> eBay.com also awards a “Power Sellers” endorsement to users with a large number of sales and positive feedback ratings. In *Gentry v. eBay, Inc.*, a California Court of Appeal held that this rating and endorsement system was not enough to remove eBay.com from the protections of the CDA for the content provided by its users. However, where the website rather than a user provides the badging, commentators have suggested the website may have vested the badged user with some authority as an agent and may then be liable for the badged user’s posts.<sup>137</sup>

#### **Employment/Agency**

When the posting is made by an authorized agent of the website or an employee within the scope of employment, CDA protection is likely to be lost, because under agency and vicarious liability principles, the principal or employer would be responsible for the actions of its agent or employee in

creating or developing the content.<sup>138</sup>

The question of whether an agency or employment relationship has been formed, however, has taken on greater significance recently as media entities consider whether they can contract with freelancers (such as bloggers) to submit content to their websites without losing CDA immunity. Although decisions about specific freelancer relationships are likely to be determined on a case-by-case basis using numerous factors,<sup>139</sup> several cases arising under the CDA are instructive.

In *Blumenthal v. Drudge*, content provider Matt Drudge was under contract and paid by AOL.<sup>140</sup> The court considered whether Drudge was an employee or agent of AOL and found “no evidence” to support such a claim.<sup>141</sup> Although the court did not provide its reasoning, the court did note that: (1) Drudge published his *Drudge Report* on his own website as well, independently of its publication through AOL; (2) Drudge had a list of regular readers or subscribers to whom he emailed each edition; and (3) during the term of the license with AOL, Drudge continued to distribute each new edition via e-mail and his own website.<sup>142</sup> This list suggests that the court believed Drudge was not an agent of AOL because AOL was not the exclusive publisher of the content.

In *Raggi v. Las Vegas Metropolitan Police Department*, police union members posted offensive content on the union’s online bulletin board.<sup>143</sup> The Nevada district court acknowledged that in some instances a principal-agent relationship can be formed when a union member commits a tort while acting within the scope of union business (such as causing an automobile accident for the purposes of intimidating a person for crossing the union picket line), but held that in the present case no principal-agent relationship was formed.<sup>144</sup> Citing *Batzel v. Smith*, the court held that “a principal can be liable for ratifying an unauthorized tort only if a principal-agent relationship existed at the time of the tort,” but “here it is clear that the posters were not acting as agents” of the union.<sup>145</sup> As a result, the court held the police union was immune under Section 230.<sup>146</sup>

Similarly, where employees act outside of the scope of their employment,



employers may receive CDA protection. In *Delfino v. Agilent Technologies, Inc.*, the allegedly defamatory statements were written by defendant's employee, often using defendant's computers and network.<sup>147</sup> The court found, however, that the employee's conduct was outside the scope of his employment.<sup>148</sup> The court reasoned that (1) "the injury he inflicted was 'out of personal malice, not engendered by the employment,'" and (2) using the defendant employer's computers and network to access and send message through his personal email account was never part of the employee's job description.<sup>150</sup> As a result, the employer was granted protection under the CDA.<sup>151</sup>

### Conclusion

As interpreted by case law over the past fifteen years, Section 230 provides broad protection for neutral actions that media entities and other interactive computer services might take concerning third-party content posted on their websites. Hosting, reviewing, editing, and even soliciting content all typically are protected activities as long as the media entity does not create or solicit the offensive portion of the third-party submission.

Case law indicates, however, that CDA protection may be lost when (1) the media entity promises to remove the offensive content and fails to do so; (2) the posting is made pursuant to an authorized agency or employment relationship with the media entity; (3) the media entity engages in conduct that is unlawful apart from the publication of the content; (4) the media entity inserts the offensive content; or (5) the media entity actively solicits the offensive portion of the third-party submission.

### Endnotes

1. 47 U.S.C. § 230.

2. See CNN iREPORT, available at <http://ireport.cnn.com>.

3. Note, however, that while most publication-based torts such as defamation are clearly covered, Section 230 excepts claims under criminal law, intellectual property law, consistent state laws, and certain communications privacy laws from these protections. 47 U.S.C. § 230(e).

4. 47 U.S.C. § 230(f)(3).

5. See discussion below. Moreover, on at

least one occasion, the company was protected by the CDA even for content written by an employee using a company computer where the content was written by the employee outside of the scope of his employment and published without knowledge of the company on a website not owned by the company. *Delfino v. Agilent Tech., Inc.*, 52 Cal. Rptr. 3d 376 (Cal. Ct. App. 2006), cert. denied, 128 S. Ct. 98 (2007).

6. See, e.g., *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420–21 (1st Cir. 2007); *Green v. Am. Online, Inc.*, 318 F.3d 465, 470 (3d Cir. 2003), cert. denied, 540 U.S. 877 (2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Collins v. Purdue Univ.*, 703 F. Supp. 2d 862, 879 (N.D. Ind. 2010); *Dimeo v. Max*, No. 06-3171, 2007 WL 2717865, at \*2 (3d Cir. Sept. 19, 2007) (*Dimeo II*); *Parker v. Google*, No. 06-3074, 2007 WL 1989660, at \*4 (3d Cir. July 10, 2007), cert. denied, 552 U.S. 1156 (2008).

7. *Zeran*, 129 F.3d at 331.

8. *Universal Commc'n Sys.*, 478 F.3d at 420; *Green*, 318 F.3d at 471–72; *Zeran*, 129 F.2d at 330–33; *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536–37 (D. Md. 2006); *Parker v. Google*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006), aff'd, 2007 WL 1989660 (3d Cir. July 10, 2007), cert. denied, 552 U.S. 1156 (2008); see also *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102–05 (9th Cir. 2009).

It is important to note that the CDA differs from the Digital Millennium Copyright Act (DMCA) concerning the effect of notice. The DMCA creates a safe harbor for online service providers if they meet certain guidelines and requirements, but one of those includes having and following takedown procedures upon notice of content that infringes a copyright. 17 U.S.C. § 512. Because intellectual property claims are not preempted by the CDA (17 U.S.C. § 230(e)(2)), a media entity or other website operator must still comply with the DMCA for content provided by others that infringes a copyright.

9. *Barnes*, 570 F.3d at 1106–09; *Scott P. v. Craigslist*, No. CGC-10-CV-496687 (First Amended Complaint ¶ 77, Mar. 3, 2010; Order Sustaining in Part and Overruling in Part *Craigslist, Inc.*'s Demurrer, Cal. Sup. Ct. filed July 6, 2010).

10. *Barnes*, 570 F.3d at 1104–09.

11. *Id.* at 1098.

12. *Id.*

13. *Id.* at 1098–99.

14. *Id.* at 1104–09. Furthermore, on

remand the district court held that the plaintiff provided sufficient facts in support of her promissory estoppel claim to survive defendant's motion to dismiss. *Barnes v. Yahoo!, Inc.*, 2009 WL 4823840 (D. Or. Dec. 11, 2009) (*Barnes II*).

15. *Scott P. v. Craigslist*, No. CGC-10-CV-496687 (Cal. Sup. Ct.) (First Amended Complaint ¶ 77, filed Mar. 3, 2010; Order Sustaining in Part and Overruling in Part *Craigslist, Inc.*'s Demurrer, filed July 6, 2010).

16. *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) ("Deciding whether or not to remove content or deciding when to remove content falls squarely within [website operator's] exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity") (citing *Zeran* and the lower court's decision in *Barnes* that dismissed the promissory estoppel claim on CDA grounds but was later reversed by the Ninth Circuit).

17. See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir.), cert. denied, 129 S. Ct. 600 (2008) (dismissing plaintiff's claims against MySpace for failing to take security precautions to protect its users); *Green*, 318 F.3d at 470–71 (dismissing plaintiff's claims against AOL for negligence in "failing to address certain harmful content on its network"); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 696 (N.D. Ill. 2006) (*Chicago Lawyers I*) ("[W]hen Congress enacted Section 230(c), it did so to address the problem of holding liable for defamation ICSs that reviewed third-party content . . . while leaving free from liability ICS that did not review content."); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 WL 1704355, at \*4 (S.D.N.Y. June 15, 2009) (dismissing plaintiff's claims against Craigslist for "failure to block, screen or otherwise prevent the dissemination" of third-party content); see also *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (*Chicago Lawyers II*) (noting the expense and burden an interactive computer service would be forced to incur if required to vet all content posted through its service).

18. *Green v. Am. Online*, 318 F.3d 465 (3d Cir.), cert. denied, 540 U.S. 877 (2003).

19. *Green*, 318 F.3d at 468.

20. *Gibson*, 2009 WL 1704355, at \*4.

21. *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).

22. *Id.*

23. *Id.* at 659–60.

24. *Id.* at 659.

25. *Id.* at 660. Section 230(e)(2) reads: “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 imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(2).

26. *GTE*, 347 F.3d at 660.

27. *Chicago Lawyers I*, 461 F. Supp. 2d at 697 (disagreeing with the proposition from *Zeran* that 230(c)(1) provides immunity for “all causes of action,” and stating that as such, state legislatures may be able to “enact . . . initiatives that induce or require online service providers to protect the interest of third parties,” but not “definitively” reaching the issue of whether such initiatives are permissible).

28. In *GTE*, the Seventh Circuit found *GTE* was not liable to plaintiffs for the claim at issue (negligent entrustment of a chattel) because plaintiffs could not provide a “case in any jurisdiction holding that service provider must take reasonable care to prevent injury to third parties.” *GTE*, 347 F.3d at 661–62. In *Chicago Lawyers I*, the Northern District of Illinois found that defendant was protected by the CDA for alleged violations of the Fair Housing Act. *Chicago Lawyers I*, 461 F. Supp. 2d at 698.

29. See e.g., *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003) (“So long as a third party willing provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”); *Batzel v. Smith*, 333 F.3d 1018, 1032 (9th Cir.), *reh’g denied*, 351 F.3d 904 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (*Batzel I*) (“The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.”); *Dimeo v. Max*, 433 F. Supp. 2d 523, 530–31 (E.D. Pa. 2006), *aff’d*, No. 06-3171, 2007 WL 2717865 (3d Cir. 2007) (*Dimeo I*); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (quoting *Carafano*, 339 F.3d at 1125); *Shiamili v. Real Estate Group*, 892 N.Y.S.2d 52, 54 (N.Y. App. Div. 2009); *Riet v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 414 (N.Y. Sup. Ct. 2010); *Kruska v. Perverted Justice Found. Inc. Org.*, No. CV-08-00054-PHX-SMM, 2011 WL 1260224, \*4 (D. Ariz. Apr. 5, 2011); *Novins v. Cannon*, No. 09-5354, 2010 WL

1688695, at \*2 (D.N.J. Apr. 27, 2010).

30. *Batzel I*, 333 F.2d at 1034 (stating that whether content was provided by another depends on whether a “reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other ‘interactive computer service.’”).

31. *Novins*, 2010 WL 1688695, at \*2.

32. *Batzel I*, 333 F.3d at 1038 (Gould, C.J., concurring in part, dissenting in part) (“If the defendant took an active role in selecting information for publication, the information is no longer “information provided by another” within the meaning of § 230”); see also *Batzel v. Smith*, 351 F.3d 904, 909 (9th Cir. 2003) (*Batzel II*) (Gould, C.J., dissenting) (“Section 230 demonstrates a clear Congressional intent to immunize screening and post-publication removal, but shows no corresponding Congressional intent to immunize pre-publication selection and editing.”).

33. See generally *Batzel I*, 333 F.3d at 1036–41 (Gould, C.J., concurring in part, dissenting in part); see also *Batzel II*, 351 F.3d at 905–10 (Gould, C.J., dissenting).

34. 47 U.S.C. § 230(c)(2)(A).

35. See *Barnes*, 570 F.3d at 1105 (“Subsection (c)(2), for its part, provides an additional shield from liability, but only for ‘any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable.’”); *GTE*, 347 F.3d at 659 (“Under Section 230(c)(2), “[a] web host that does filter out offensive material is not liable to the censored customer.”); *Donato v. Moldow*, 865 A.2d 711, 726 (N.J. Super. Ct. App. Div. 2005) (defendant’s “act of deleting profanity from a posted message and then reposting it in redacted form” did not transform him into an “information content provider” or cause him to lose CDA protection); but see *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (deleting a single word can result in liability if it changes the submitted statement from harmless to harmful).

36. *Zeran*, 129 F.3d at 330; see also *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009) (“[Section] 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.”); *Barnes*, 570 F.3d at 1102 (citing *Zeran*, 129 F.3d at 330); *Universal Comm’n Sys., Inc.*, 478

F.3d at 422 (quoting *Zeran*, 129 F.3d at 330–31); *Green*, 318 F.3d at 471 (quoting *Zeran*, 129 F.3d at 330); *Batzel I*, 333 F.3d at 1031 n.18 (quoting *Zeran*, 129 F.3d at 330); *Ben Ezra, Weinstein and Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000) (citing *Zeran*, 129 F.3d at 331); *Dimeo II*, 2007 WL 2717865, at \*1 (quoting *Zeran*, 129 F.3d at 330). But see *Batzel I*, 333 F.3d at 1036–41 (Gould, C.J., concurring in part, dissenting in part); *Batzel II*, 351 F.3d at 905–10 (Gould, C.J., dissenting); *Chicago Lawyers I*, 461 F. Supp. 2d at 695 (disagreeing with the proposition from *Zeran* that 230(c)(1) protects traditional publishing functions, including alteration of content, and asserting that “[b]y altering content, an ISP would no longer be posting information provided by “another content provider—a prerequisite under Section 230(c)(1),” but noting that “to succeed on any claim, [a plaintiff] would still have to show that [the defendant’s] alteration is what caused the alleged injury.”).

37. *Roommates.com*, 521 F.3d 1157, 1167–68 (9th Cir. 2008); see also *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) (quoting *Roommates*, 521 F.3d at 1167–68); *Milo v. Martin*, 311 S.W.3d 210, 217 (Tex. App. 2010) (citing *Roommates*, 521 F.3d at 1167–68); *Hung Tan Phan v. Lang Van Pham*, 105 Cal. Rptr. 3d 791, 793 (Ct. App. 2010), *reh’g denied* (Mar. 23, 2010), *review denied* (May 12, 2010) (citing *Roommates*, 521 F.3d at 1165, 1167–68, and 1169); *Swift v. Zynga Game Network, Inc.*, No. C 09-05443 SBA, 2010 WL 4569889, at \*4 (N.D. Cal. Nov. 3, 2010) (citing *Roommates*, 521 F.3d at 1163); *Hill v. StubHub, Inc.*, No. 07 CVS 11310, 2011 WL 1675043, at \*3–4 (N.C. Super. Ct. Feb. 28, 2011) (discussing *Roommates*, 521 F.3d at 1163–64); *Certain Approval Programs, LLC v. XCentric Ventures, LLC*, No. CV08-1608-PHX-NVW, 2009 WL 596582, at \*2 (D. Ariz. Mar. 9, 2009).

38. *Roommates.com, LLC*, 521 F.3d at 1169 (“A website operator who edits user-created content, such as by correcting spelling, removing obscenity or trimming for length, retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality, such as by removing the word ‘not’ from a user’s message reading ‘[Name] did not steal the artwork’ in order to transform an innocent message into a



libelous one-is directly involved in the alleged illegality and thus not immune.”).

39. *Carafano*, 339 F.3d at 1124 (“[S]o long as a third party willing provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”); *Donato*, 865 A.2d at 726 (because the “essential published content,” the defamatory statements, were provided by third parties,” CDA protection was not lost (citing *Carafano*, 339 F.3d at 1124–25); *Mitan v. A. Neumann & Assocs., LLC*, No. 08-6154, 2010 WL 4782771, at \*5 (D.N.J. Nov. 17, 2010) (holding that where defendant added nondefamatory language to an allegedly defamatory email before forwarding to others, defendant was protected by the CDA); see also *Batzel I*, 333 F.3d at 1031 (holding that defendant was not a content provider where he made “minor alterations,” including wording changes, to the email being forwarded).

40. *Doe v. City of New York*, 583 F. Supp. 2d 444, 446 (S.D.N.Y. 2008).

41. *Id.* at 446.

42. *Id.* at 449.

43. *Id.*

44. *Mitan*, 2010 WL 4782771, at \*5; see also *Batzel I*, 333 F.3d at 1031.

45. *Hy Cite Corp. v. BadBusinessBureau.com, LLC*, 418 F. Supp. 2d 1142 (D. Ariz. 2005); *Global Royalties, Ltd. v. XCentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007 WL 2949002, at \*3 (D. Ariz. Oct. 10, 2007) (holding *BadBusinessBureau.com* was protected by the CDA where it only supplied the title of “Con Artists” as an option to the third party who provided the content); *MCW Inc. v. BadBusinessBureau.com, LLC*, No. 3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004).

46. See e.g., *Hy Cite*, 418 F. Supp. 2d at 1142; *MCW*, 2004 WL 833595.

47. *MCW*, 2004 WL 833595, at \*10.

48. *Hy Cite*, 418 F. Supp. 2d at 1148–

49. Note that in another case involving *ripoffreport.com*, summary judgment was granted to the defendant pursuant to the CDA. *GW Equity LLC v. Xcentric Ventures LLC*, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009). In that case, plaintiff failed to produce sufficient evidence that defendant had in fact created the allegedly defamatory titles and headings. *Id.* at \*6. Thus, while allegations of such creation may be sufficient to survive a motion to dismiss, failure to prove such allegations may still result in CDA protection at the summary judgment stage.

49. See e.g., *Roommates.com*, 521 F.3d at 1157; *Chicago Lawyers II*, 519 F.3d at 666; *Carafano*, 339 F.3d at 1119; *Doe v. Friendfinder Networks, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Tex. 2006); *GW Equity*, 2009 WL 62173, at \*5.

50. *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003).

51. *Id.* at 1124.

52. *Id.*

53. *Id.*

54. *Id.* at 1125.

55. *Id.*

56. *Id.*; see also *Friendfinder*, 540 F. Supp. 2d at 296 (citing *Carafano*, 339 F.3d at 1124, for the proposition that because a profile has no content until a user creates it, the defendant website operator cannot be an information content provider for that content).

57. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009); see also *Chicago Lawyers I*, 461 F. Supp. 2d at 681 (holding that *Craigslist* was protected by the CDA when it provided forms for placing allegedly illegal advertisements, but noting that a website should only receive CDA protection when it is “treated like a publisher” by the claim, not in every instance when it “acts like a publisher.”); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Tex. 2006) (holding that where anonymous third parties posted advertisements for “adult services” with plaintiff’s contact information, the website operator was protected by the CDA).

58. *Dart*, 665 F. Supp. 2d at 967.

59. *Id.* at 968.

60. *Id.* at 969.

61. *Id.* at 967.

62. See *Roommates.com*, 521 F.3d at 1157.

63. *Id.* at 1162.

64. *Id.* at 1161–63.

65. *Id.*

66. *Id.* at 1166.

67. *Id.*

68. *Id.* at 1166 n.19.

69. *Id.* at 1168.

70. See e.g., *GW Equity*, 2009 WL 62173, at \*5 (holding defendant, *BadBusinessBureau.com*, was protected by the CDA where defendant provided only “a broad choice of categories [some negative, some neutral] from which a user must make a selection in order to submit a report”).

71. *GW Equity*, 2009 WL 62173, at \*5.

72. See e.g., *Nemet*, 591 F.3d at 258;

*Shiamili*, 892 N.Y.S.2d at 54; *Best W. Int’l, Inc. v. Furber*, No. CV-06-1537-PHX-DGC, 2008 WL 4182827, at \*10 (D. Ariz. Sept. 5, 2008).

73. *Fed. Trade Comm’n v. Accusearch Inc.*, 570 F.3d 1187, 1198–99 (10th Cir. 2009); *MCW*, 2004 WL 833595, at \*10; *Doctor’s Assocs., Inc. v. QIP Holder LLC*, No. 3:06-cv-1710(VLB), 2010 WL 669870, at \*24 (D. Conn. Feb. 19, 2010).

74. *Accusearch*, 570 F.3d at 1191–92.

75. *Id.* at 1192.

76. *Id.* at 1191.

77. *Id.* at 1195.

78. *Id.* at 1197–99.

79. *Id.* at 1198.

80. *Id.*

81. *Id.* at 1198–99.

82. *Id.* at 1199.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1190–91.

87. See *Accusearch*, 570 F.3d at 1204 (Tymkovich, C.J., concurring) (labeling the majority’s test as one of “good faith” and arguing that the majority’s opinion relied too heavily on a subjective and unclear analysis of *Accusearch*’s motivations).

88. See *id.* at 1204–06 (Tymkovich, C.J., concurring).

89. *MCW*, 2004 WL 833595, at \*10.

90. *Id.* at \*7.

91. *Id.* at \*10.

92. *Id.*

93. *Doctor’s Assocs.*, 2010 WL 669870, at \*1.

94. *Id.* at \*1.

95. *Id.*

96. *Id.*

97. *Id.* at \*2.

98. *Id.* at \*7, 23–24.

99. *Id.* at \*7.

100. *Id.*

101. *Id.* at \*24. The parties settled the case shortly after summary judgment was denied. *Doctor’s Assocs., Inc. v. QIP Holders LLC*, No. 3:06-CV-01710-VLB (D. Conn. Feb. 23, 2010) (order dismissing case as settled).

102. *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

103. *Id.* at 252.

104. *Id.*

105. *Id.* at 257.

106. *Id.* at 258.

107. *Id.* at 257 (“Whereas the website in *Roommates.com* required users to input illegal content as a necessary condition of use, *Nemet* has merely alleged that

ConsumerAffairs.com structured its website and its business operations to develop information related to class-action lawsuits. But there is nothing unlawful about developing this type of content. . . .”).

108. *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 550 (E.D. Va. 2008) (“In *MCW*, the defendants were encouraging posters to take pictures to add to the website, and were actively soliciting postings. There have been no allegations as to any such active solicitation of information by Defendants in this matter.”).

109. As noted above, parties who “create or develop” the content at issue are “information content providers” under Section 230(f)(3); and the CDA only provides a website with immunity with respect to content “provided by another information content provider.” 47 U.S.C. § 230(c)(1).

110. *See, e.g., Blumenthal v. Drudge*, 992 F. Supp. 44, 51–53 (D.D.C. 1998) (CDA protection granted); *Ben Ezra*, 206 F.3d at 986; *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 43 (Wash. Ct. App. 2001) (CDA protection granted, citing *Drudge*, 992 F. Supp. 44); *but see Accusearch Inc.*, 570 F.3d at 1199 (CDA protection lost where defendant solicited the unlawful content from third-party vendors and paid them for it).

111. *Drudge*, 992 F. Supp. at 44.

112. *Accusearch Inc.*, 570 F.3d at 1199 (a factor in loss of CDA protection was that defendant “paid researchers to obtain” the unlawful content); *Hy Cite*, 418 F. Supp. 2d at 1149 (where a plaintiff alleged that defendants “solicit[ed] individuals to submit [content] with the promise that the individuals may ultimately be compensated for their reports,” the court held that the “allegations arguably could support a finding that Defendants are ‘responsible . . . for creation or development’” of the information provided in response).

113. *Drudge*, 992 F. Supp. at 44.

114. *Id.* at 47.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 50.

119. “While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment.” *Id.* at 52–53.

120. *Id.* at 53.

121. *Id.* at 50.

122. *Id.*

123. *See, e.g., Zeran*, 129 F.3d at 330.

124. *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. Ct. App. 2001).

125. *Ben Ezra, Weinstein and Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000).

126. *Schneider*, 31 P.3d at 42.

127. *Id.* at 43 (citing *Drudge*, 992 F. Supp at 47).

128. *Ben Ezra*, 206 F.3d at 983, 987.

129. *Id.* at 985.

130. *Id.* at 986.

131. *Id.*

132. *Accusearch*, 570 F.3d, at 1191.

133. *Id.* at 1199–1200.

134. *Hy Cite*, 418 F. Supp. 2d at 1149.

135. *Id.*

136. *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703 (Ct. App. 2002), *review denied* (Oct. 16, 2002).

137. Note, *Badging: Section 230 Immunity in a Web 2.0 World*, 123 HARVARD L. REV. 981 (Feb. 2010).

138. *See, e.g., Cornelius v. DeLuca*, 709 F. Supp. 2d 1003, 1022–23 (D. Idaho 2010) (holding that where plaintiff alleged defendant appointed moderators “to act as representatives of the company to control and edit the forum,” such allegations were sufficient under the federal

pleading standard to avoid the CDA on a motion to dismiss); *Faegre & Benson, LLC v. Purdy*, 447 F. Supp. 2d 1008, 1018 (D. Minn. 2006) (plaintiff submitted expert evidence that defendant, “or someone operating with his authorization,” posted the offending comments); *Delfino v. Agilent Tech., Inc.*, 52 Cal. Rptr. 3d 376 (Ct. App. 2006), *review denied* (Feb. 28, 2007), *cert. denied*, 128 S. Ct. 98 (2007); *Raggi v. Las Vegas Metro. Police Dep’t*, No. 2:08-CV-943-JCM(PAL), 2009 WL 653000 (D. Nev. Mar. 10, 2009); *Higher Balance, LLC v. Quantum Future Group, Inc.*, No. 08-233-HA, 2008 WL 5381487, at \*7 (D. Or. Dec. 18, 2008) (holding that defendants “are immunized by the CDA from postings made by forum moderators because they are ‘another information content provider’—in the absence of any evidence that forum moderators are staff members of the defendants”).

139. For a detailed analysis of the factors used to determine whether a freelancer is an independent contractor or an employee of a media entity, see Charles D. Tobin & Drew Shenkman, *Online and Off-Line Publisher Liability and the Independent Contractor Defense*, 26 COMM’NS LAW. 2, at 5 (Spring 2009).

140. *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

141. *Id.* at 50.

142. *Id.* at 47.

143. *Raggi v. Las Vegas Metro. Police Dep’t*, No. 2:08-CV-943-JCM(PAL), 2009 WL 653000 (D. Nev. Mar. 10, 2009).

144. *Id.* at \*1.

145. *Id.* at \*2 (citing *Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir. 2003)).

146. *Id.*

147. *Delfino*, 52 Cal. Rptr. 3d at 397.

148. *Id.* at 395–96.

149. *Id.* at 396.

150. *Id.*

151. *Id.*