

## **Indecent Exposure: Can the CDA protect your web site from liability?**

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Although the legal profession has been criticized and heckled for its slow adaptation to technological advances<sup>1</sup>, many of us represent individuals and corporations that are on the cutting edge of technology. While there is value in improved speed with which we can communicate with, and gain information about, one another, there are also many areas of legal liability with which we should be concerned. Attorneys are continually bombarded with information concerning the benefits and pitfalls associated with electronically stored information, particularly related to its maintenance and production during litigation. However, the information stored and presented on the World Wide Web has a whole host of challenges for our clients. Today, it seems that everyone maintains a website. Everyday, more businesses (including attorneys) are starting and maintaining blogs. In this economy, one of the most challenging aspects of running a business is locating new business. As a result, many of our clients are “optimizing” their websites by building links to other websites which is just one factor in increasing one’s profile on the World Wide Web. As a result, many of our

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clients may obtain information from other web sites for inclusion on their own web site, or for transmission on their blog, which could open them up to liability from creative Plaintiff attorneys. As their attorney, you will hope that their actions are protected by the provisions of the Communications Decency Act [hereinafter “CDA”].

While many praise the breadth of the CDA<sup>2</sup>, the Act has also been criticized as being difficult to interpret.<sup>3</sup> As with many laws, it is used as both a shield and a sword and will undoubtedly continue to be tested for years. For now, at least one court has ruled that “the message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune.”<sup>4</sup>

#### Communications Decency Act<sup>5</sup>

The Communications Decency Act, 47 U.S.C. § 230, was signed into law on February 6, 1996. Entitled “Protection for private blocking and screening of offensive material,” this was Congress’ initial effort to define the appropriate scope of federal regulation of the internet.<sup>6</sup> In 1996, Congress recognized that “the rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.”<sup>7</sup> Congress further noted that it was the policy of the United States to, among other things, “promote the continued development of the Internet and other interactive computer services and other interactive media.”<sup>8</sup> In furtherance of that policy, Congress determined 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.”<sup>9</sup> The result of the legislation was to “encourage web sites and other interactive computer services to create forums for people to exchange their thoughts and ideas by protecting web sites and

interactive computer services from potential liability for each message republished by their services.”<sup>10</sup>

Congress was perhaps most concerned with protecting children’s access to objectionable or inappropriate online materials<sup>11</sup> while balancing the need and desire for continued development of the Internet and other interactive computer services and other interactive media. However, as the internet evolved and the application of the CDA was tested, it had far reaching implications for various consumers and distributors. The CDA’s immunity has been tested and challenged in tort actions involving unfair competition claims based on trademark infringement<sup>12</sup>, defamation<sup>13</sup>, invasion of privacy<sup>14</sup>, nuisance and premises liability<sup>15</sup>, misappropriation of right of publicity<sup>16</sup>, negligent failure to control third party's illegal postings<sup>17</sup>, intentional infliction of emotional distress<sup>18</sup> and tortious interference with a business contract.<sup>19</sup>

Immunity under the CDA requires three elements: 1) that the Defendant is an interactive service provider; 2) that the cause of action treats the Defendant as a publisher or speaker of information; and 3) that a different information content provider provided the problematic information.<sup>20</sup> Courts have made clear that this Act is to be construed broadly.<sup>21</sup> An interactive service provider is defined under the CDA as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”<sup>22</sup> While the definition, at first blush, may seem narrowly tailored, courts have made clear that many different online web sites and blogs are considered interactive computer service providers immune from suit.<sup>23</sup> However, the courts have also been quick to point out that not all internet communication should be immune from liability.

For instance, courts have uniformly ruled that emails are not immune from liability as “doing so would exempt virtually all Internet use from liability, expanding the statute’s reach beyond that which Congress intended.”<sup>24</sup>

One particularly beneficial use of the CDA for Defense attorneys may result from its application to employers as a shield for the actions of their employees. The court visited the issue in *Delfino v. Agilent Technologies, Inc.*,<sup>25</sup> which involved the alleged receipt of anonymous messages by the Plaintiffs from an employee of Agilent. The employee, Cameron Moore, who was also a defendant, ultimately admitted that he sent the alleged emails while he was logged on at work.<sup>26</sup> Agilent moved for, and was ultimately granted, summary judgment on the basis that, as Moore’s employer, it was a provider of interactive computer services and therefore entitled to immunity under the CDA.<sup>27</sup> In reaching its conclusion, the Court referenced various law reviews and journal articles in its lengthy discussion relative to the question of whether a corporate employer is a provider of interactive computer services.<sup>28</sup> Recognizing that a number of courts had broadly interpreted the term interactive computer service under the CDA<sup>29</sup>, but had not yet necessarily addressed the issue specifically as it relates to a corporate employer, this Court ultimately determined that Agilent fell within the protections of the CDA as it “provide[d] or enable[d] computer access by multiple users [i.e., Agilent’s employees] to a computer server.”<sup>30</sup> In reaching that conclusion, the Court listed examples of the “expansive application of interactive computer service in determining CDA immunity, including Ebay<sup>31</sup>, Craigslist<sup>32</sup>, Amazon.com<sup>33</sup> and Google.<sup>34</sup>

More difficult in these cases than the issue of whether one is an interactive service provider seems to be whether the client is the publisher or speaker of the information. The CDA defines an information content provider as one who “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>35</sup> One of the first cases to address the issue was *Zeran v. America Online, Inc.*<sup>36</sup>, where an AOL user sought to hold the company liable for posting defamatory speech that originated from a third party. In the case, the Plaintiff’s name and personal information were affixed to notices on a bulletin board advertising t-shirts and other items with slogans glorifying the bombing of the Oklahoma City federal building.<sup>37</sup> The pleadings alleged a cause of action for liability associated with the distribution of information which the Defendant knew or should have known was of a defamatory character.<sup>38</sup> In the case, the user contended that once he notified AOL of the defamatory posting that “AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message’s false nature, and to effectively screen future defamatory material.”<sup>39</sup> The *Zeran* Court held that the CDA barred the user’s claim, ruling that Congress made a policy choice not to deter harmful online speech by way of tort liability on companies that serve as intermediaries for the other parties’ potentially injurious messages, regardless of knowledge.<sup>40</sup>

The *Zeran* Court noted that the CDA was enacted to maintain the robust nature of Internet communication and to keep government interference to a minimum.<sup>41</sup> Further, the Court held that the practical implications of notice liability in the interactive computer service context would defeat the dual purposes advanced by the CDA.<sup>42</sup> The Court recognized that while such “notice liability” might be feasible and applicable to the traditional print publisher, it would be an insurmountable burden for the internet service provider as it would produce a chilling effect on the freedom of Internet speech and might even provide easier access for litigious users in that “whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply notify the relevant service provider claiming the information to be

legally defamatory.”<sup>43</sup> The Court concluded that it could not assume that “Congress intended to leave liability upon notice intact.”<sup>44</sup>

With attorneys on the never ending quest for the proverbial “deep pockets,” the CDA provides certain protections for corporate clients who may be the more attractive targets than those individuals who actually posted the allegedly libelous speech. The owners of the web sites are often wealthier than the speaker and are often easier to locate. For these, and other reasons, it is important that the client is educated on what is exactly protected by the CDA. *Doe v. MySpace*<sup>45</sup> is perhaps one of the best examples of the immunity that is created by the CDA. This case involved MySpace.com, a social networking website that is provided to members for free which allows users to create web pages and post personal information.<sup>46</sup> In order to use the services, however, one must agree to the “MySpace Terms of Use” where “[e]very new member of MySpace.com, including Julie Doe, agrees to be bound by the MySpace.com Terms of Service, by clicking a check box on the website.”<sup>47</sup> According to the Court in *Doe*, MySpace's Terms of Service Agreement includes the fact that “MySpace cannot verify the age or identity of MySpace.com members. . . .”<sup>48</sup> Despite these cautions, and according to the allegations contained within the Plaintiffs' Complaint, Julie Doe was only 13 years old at the times she created her MySpace page although she represented that she was 18 years old when she joined MySpace.com.<sup>49</sup> She was, thereafter, contacted by Pete Solis, a nineteen-year-old, and they eventually arranged to meet for a date, after which Julie Doe alleged that Mr. Solis sexually assaulted her.<sup>50</sup> Julie Doe's mother subsequently contacted the authorities to report the alleged sexual assault of her daughter and Mr. Solis was arrested and eventually indicted for sexually assaulting Julie Doe.<sup>51</sup> The civil pleading included claims for negligence, gross negligence, fraud, and negligent misrepresentation against Myspace.com.<sup>52</sup> The Defendant moved to dismiss the

Complaint, asserting, among other things, that it was immune from suit under the CDA.<sup>53</sup> Finding that the protections provided by the CDA applied, the Court found Plaintiffs failed to state a claim for negligence or gross negligence because MySpace had “no duty to protect Julie Doe from Pete Solis's criminal acts nor to institute reasonable safety measures on its website. If anyone had a duty to protect Julie Doe, it was her parents, not MySpace.”<sup>54</sup> The Court recognized that My Space was likely the very type of service that was contemplated by Congress when enacting the protections afforded by the Act.<sup>55</sup>

Following Doe, there have been continued challenges to the CDA, including *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*<sup>56</sup>, in which an online roommate matching service was sued for alleged violations of the Fair Housing Act. Roommates.com defended the claim, asserting that it was an interactive service provider and provided no content as it simply compiled information from questionnaires and posted it on the website.<sup>57</sup> Initially, the Court decided that Roommates was an information content provider, deciding that “[b]y categorizing, channeling and limiting the distribution of users' profiles, Roommate provides an additional layer of information” thereby taking it from the status of interactive service provider to information content provider, thereby opening itself up to liability.<sup>58</sup> Following that ruling, an *en banc* court remanded the case after reversing in part, vacating in part, and affirming in part, the prior ruling and determined that “the fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping “develop,” at least “in part,” the information in the profiles.”<sup>59</sup> In the decision, the court determined the CDA’s immunity did not apply to acts of Roommates.com because it posted questionnaires which included questions which were both discriminatory and in violation of the FHA.<sup>60</sup> The questions forced subscribers to divulge protected

characteristics and discriminatory preferences contrary to the mandates of the FHA.<sup>61</sup> By doing so, Roommates became more than just a passive transmitter of information.<sup>62</sup>

The Court distinguished what Roommates.com did from what previous interactive service providers have done by stating that the it was designed to “steer users based on discriminatory criteria” thus differing materially from other interactive service providers.<sup>63</sup> Ultimately, the dissenting opinion questioned the motivation of the majority, suggesting that the result may have been more the result of the facts of the case, i.e., housing discrimination, and less about the analysis of immunity pursuant to the CDA.<sup>64</sup> While the majority attempted to justify its reasoning which, admittedly, looked to be inconsistent with a number of other courts, the dissent acknowledged that the majority opinion provides “no bright lines and little comfort in finding a home within §230(c)(1).<sup>65</sup> Fortunately, the opinions since *Roommates.com* have been more in line with the previous cases, favoring the immunity provided under the CDA.<sup>66</sup> One can only hope that future decisions will continue the tradition of construing the term "information content provider" narrowly while continuing to liberally apply the definition of “interactive computer service,” thereby granting immunity, and all the benefits that come with that immunity, under the CDA.<sup>67</sup>

### Conclusion

Since its passage in 1996, the Communications Decency Act has been one of the most important factors in preserving free speech and freedom of expression on the internet. Our clients are looking for more efficient and effective marketing, and turn to new technology such Twitter and other social networking tools like MySpace and Facebook for promotion of their business endeavors. Many host blogs or maintain their own bulletin boards as a part of their websites. The CDA has proved to be instrumental in promoting continued technological development and communication for attorneys and clients alike. The CDA will continue to be a valuable asset in combating liability for

the information contained on those websites.

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1. *Partner's Report*, December, 2008, Keeping Current, TECHNOLOGY, Institute of Management and Administration Inc. (discussing the ABA 2008 Legal Technology Survey Report).
2. *See e.g.*, *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, (9<sup>th</sup> Cir. (Cal) Aug 13, 2003 (recognizing that “reviewing courts have treated §230 (c) immunity as quite robust, adopting a relatively expansive definition of “interactive computer service” and a relatively restrictive definition of “information content provider.” Under the statutory scheme, an “interactive computer service” qualifies for immunity so long as it does not also function as an “information content provider” for the portion of the statement or publication at issue.”)
3. *See e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (majority) and 1189 (dissenting), (9th Cir.(Cal.) Apr 03, 2008)(wherein majority tries to “grapple with the difficult statutory problem posed by the fact that section 230(c) uses both “create” and “develop” as separate bases for loss of immunity” and the dissent describes the statute itself as “cumbersome to interpret in light of today's Internet architecture.”
4. *Id.* at 1175.
5. The Supreme Court struck down part of the Communications Decency Act in *American Civil Liberties Union v. Reno*, 929 F.Supp. 824 (E.D.Pa.1996) (Sloviter, C.J., Buckwalter, and Dalzell, JJ.), *affirmed*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), but 47 U.S.C. § 230, remains intact.
6. 47 U.S.C. § 230.
7. 47 U.S.C. § 230(a)(1).
8. **Error! Main Document Only.**47 U.S.C. § 230(b) (1).
9. 47 U.S.C. § 230(c) (1).
10. *Doe v. MySpace, Inc.*,474 F. Supp. 2d 843, (W.D. Tex. 2007); *citing Carafano v. Metrosplash.com., Inc.*, *supra* n.2; **Error! Main Document Only.***Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31, certiorari denied, 118 S.Ct. 2341, 524 U.S. 937, 141 L.Ed.2d 712 (4<sup>th</sup> Cir. (Va.) 1997).

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11. *Dimeo v. Max*, 433 F. Supp.2d 523, (E.D.Pa. 2006)(Congress's main goal in enacting the CDA was to limit the exposure of minors to indecent material on the Internet) *citing*, S.Rep. No. 104-23, at 9 (1995).
  12. *See, e.g., Perfect 10, Inc. v. CCBill, LLC*, 340 F.Supp.2d 1077 (C.D.Cal. 2004) (holding that unfair competition law was not intellectual property law within meaning of exception to CDA immunity and for that reason the defendant was immune).
  13. *See e.g., Ben Ezra, Weinstein, and Company, Inc. v. America Online Inc.*, 206 F.3d 980 (10<sup>th</sup> Cir. (N.M.) 2000) (holding that AOL was immune under the CDA in a claim by the Plaintiff alleging negligence and defamation as a result of AOL inaccurately publishing corporate stock as the operator of interactive computer service was not the information content provider and was instead disseminating information that was created solely by third parties.); *Blumenthal v. Drudge*, 992 F.Supp 44, (D.D.C. 1998) (holding that an interactive computer service provider was immune from defamation liability because the information contained on the web site was provided by a completely separate source and the fact that the defendant maintained some editorial rights did not take it outside of the immunity provided by the CDA); *see also, Zeran, supra* n. 10 (holding that AOL was a publisher under the CDA with respect to a claim that AOL failed to promptly remove defamatory statements posted by third party when informed of those statements; thus, CDA precluded liability); *Doe v. Friendfinder Network, Inc.*, 540 F.Supp.2d 288 (D.N.H. 2008) (holding that operators of adult web communities were immune under the CDA because the allegedly injurious postings were created by an unknown source and not the website operator).
  14. *Prickett v. InfoUSA, Inc.*, 561 F.Supp.2d 646 (E.D.Tex.2006) (holding that the owner of a website which published personal information about plaintiffs under the heading “Entertainers—Adult” was not an information content provider, and thus, protected by the CDA when confronted with claims of defamation and invasion of privacy)
  15. *Kathleen R. v. City of Livermore*, 87 Cal.App.4th 684, 104 Cal.Rptr.2d 772 (Cal. 1st App. 2007) (affirming the dismissal of a mother’s complaint on behalf of her minor son who allegedly downloaded sexually explicit photos from the Internet on a computer at the city library. She pled causes of action for waste of public funds, nuisance, premises liability, and denial of substantive due process, all of which were precluded by 47 U.S.C. § 230).
  16. *Carafano v. Metrosplash.com., Inc, supra* n.2.
  17. *Doe v. America Online, Inc.*, 783 So.2d 1010, cert. denied 534 U.S. 891, 122 S.Ct. 208, 151 L.Ed.2d 148 (2001)(approving decision of the lower court to dismiss a Plaintiff’s complaint alleging that AOL was negligent because it allowed the sale and dissemination of child pornography and although AOL knew it was happening, did nothing to stop it. The court held that AOL was afforded the protections under the CDA).

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18. *Prickett v. InfoUSA*, *supra* n. 14
  19. *Novak v. Overture Services, Inc.*, 309 F.Supp.2d 446 (E.D.N.Y.2004) (holding that internet discussion group host was statutorily immune from liability to user for failing to remove third-party communications that purportedly, due to their objectionable nature, tortiously interfered with user's prospective economic opportunities).
  20. *Whitney Information Network, Inc., v Verio, Inc.*, 2006 WL 66724, 2 (M.D. Fla 2006); *citing, Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1118 (W.D.Wash. 2004) and *Ben Ezra*, *supra*, n. 13.
  21. *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007).
  22. 47 U.S.C.A. § 230 (f)(2).
  23. *See, e.g., Faegre & Benson, LLP, v. Purdy*, 367 F.Supp.2d 1238 (D. Minn 2005) (holding that those who operate web sites on which internet users can post comments are providers of interactive computer services); *Donato v Moldow*, 374 N.J.Super. 475, 865 A.2d 711 (N.J.Super.A.D. 2005) (holding that under CDA the operator of an electronic community bulletin board website was immune from liability for postings by a third party, anonymous postings that were alleged to be defamatory, harassing and intentionally inflicted emotional distress); *Schneider v Amazon.com, Inc.*, 108 Wash. App. 454, 31 P.3d 37, 41 (2001) (holding that Amazon.com was immune from liability for negative comments posted on its web site because, as an interactive web site operator, it was a provider of interactive computer services and, although it could edit postings, it was not an information content provider); *Zeran v. America Online, Inc.*, *supra* n. 10; *Nemet Chevrolet, Ltd., v. Consumeraffairs.com, Inc.*, 564 F.Supp.2d 544 (E.D. Va. 2008) (holding that the host of a consumer protection bulletin board was immune).
  24. *Doe v. City of New York*, 583 F.Supp.2d 444, 449 (S.D.N.Y.,2008).
  25. *Delfino v. Agilent Technologies, Inc.*, 145 Cal.App.4<sup>th</sup> 790, 52 Cal.Rptr.3d 376, (Cal.App. 6 Dist. 2006), *cert. denied*, 128 S.Ct. 98, 169 L.Ed.2d 22 (2007).
  26. *Id.* at 382.
  27. *Id.* at 380.
  28. *See Id.*; *citing Zion, Protecting the E-Marketplace of Ideas by Protecting Employers: Immunity for Employers Under Section 230 of the Communications Decency Act* (2002) 54 Fed. Comm. L.J. 493, 496 (“it is evident from the language and legislative history of the CDA that Congress intended employers to be covered under § 230”; Garvey, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology* (1999) 25 U. Dayton L.Rev. 133, 139 (“corporations with direct Internet connections are indeed “Internet service providers” and, therefore, should receive CDA immunity from employee

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computer abuse”).

29. See, e.g., *Batzel v. Smith*, 333 F.3d 1018 (9<sup>th</sup> Cir. (Cal.) 2003), *cert. denied*, 541 U.S. 1085, 124 S.Ct. 2812, 159 L.Ed.2d 246 (2004).
30. *Delfino v. Agilent Technologies, Inc.*, *supra* n.25 at 389, *citing* 47 U.S.C. § 230 (f)(2).
31. *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703 (Cal.App. 4 Dist. 2002), *rev. denied* (2002).
32. *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.* 461 F.Supp.2d 681 (N.D.Ill. 2006).
33. *Schneider v. Amazon.com, Inc.*, *supra* n. 23.
34. *Parker v. Google, Inc.* 422 F.Supp.2d 492 (E.D.Pa. 2006), *cert. denied*, 128 S.Ct. 1101, 169 L.Ed.2d 834 (2008).
35. 47 U.S.C.A. § 230 (f)(3).
36. *Zeran v. America Online, Inc.*, *supra*. n. 10.
37. *Id.* at 329.
38. *Id.* at 330.
39. *Id.* at 330-31.
40. *Id.*
41. *Id.*
42. *Id.* at 333.
43. *Id.*
44. *Id.*
45. *Doe v. MySpace*, 474 F.Supp.2d 843 (W.D.Tex. 2007), *aff'd*. 528 F.3d 413, (5th Cir.(Tex.) 2008), *cert. denied*, 129 S.Ct. 600, 172 L.Ed.2d 456 (2008).
46. *Id.* at 845.
47. *Id.* at 846.
48. *Id.*

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- 49 . *Id.*
- 50 . *Id.*
- 51 . *Id.*
- 52 . *Id.*
- 53 . *Id.*
54. *Id.* at 852.
55. *Id.* at 851 (“To impose a duty under these circumstances for MySpace to confirm or determine the age of each applicant, with liability resulting from negligence in performing or not performing that duty, would of course stop MySpace's business in its tracks and close this avenue of communication, which Congress in its wisdom has decided to protect.”)
56. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, (9<sup>th</sup> Cir.(Cal.) 2008).
- 57 . *Id.*
58. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921 (9<sup>th</sup> Cir.(Cal.) 2007), *rehearing en banc granted*,506 F.3d 716, (9th Cir. (Cal.) 2007), *on rehearing*, 521 F.3d 1157, (9th Cir.(Cal.) 2008).
59. 521 F.3d 1157, (9<sup>th</sup> Cir.(Cal.) 2008) (*citing Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir.2003)).
- 60 . *Id.*
61. *Id.*
- 62 . *Id.*
63. *Id.* at 1167.
- 64 . *Id.* at 1177 (*dissenting opinion*).
- 65 . *Id.*
- 66 . *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F.Supp.2d 690, 701 (S.D.N.Y. 2009).

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67 *Id.*, citing *Carafano*, *supra* n.2.