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**What About Wikipedia: An Analysis of the Application of CDA §230 to Interactive Websites Populated with Predominately User-Generated Content**

Section 230 of the Communications Decency Act<sup>1</sup> immunizes Internet Service providers (ISPs) from liability for harmful or defamatory speech written or posted by another and transmitted by the ISP to its users or subscribers. *Zeran v America Online* defines AOL as an Internet Service Provider (ISP) not a publisher and therefore protected by the safe harbor provisions of §230.<sup>2</sup> In *Blumenthal v. Drudge*<sup>3</sup> America Online was again protected liability under §230 for transmitting a particular copy of the Drudge Report containing a defamatory item about White House aide Sidney Blumenthal. The safe harbor provision for ISPs protects sites that deliver, but do not "publish" in the traditional sense, content generated by others.

In the new millennium, the Internet has become a highly participatory medium of communication. Almost all websites have content either written by users, or comments posted by users about a newspaper article, blog entry or a picture on a Facebook page. The question of whether CDA §230 protection should apply to interactive websites comprised largely, if not entirely of user-generated, lightly monitored content that hold themselves out as authoritative and as reliable sources of information as their print counterparts is a controversial issue.

In 2006, the Chicago Lawyer's Committee for Civil Rights Under the Law sued popular classified advertising site Craigslist Chicago for posting "roommate wanted" ads that contained terms such as "African Americans and Arabians tend to clash with me so

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<sup>1</sup> 47 USC 230, also known as CDA §230 or simply §230.

<sup>2</sup> *Zeran v. America Online, Inc*, 958 F.Supp. 1124, 1134 (E.D.Va. 1997)

<sup>3</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44 ( D.D.C.1998)

that won't work out.”<sup>4</sup> A public interest consortium of 45 law firms filed suit under Fair Housing Act (FHA) alleging Craigslist published ads that indicated “preference, limitation or discrimination on basis of race, color, national origin, sex, religion, and familial status. The Court held that CDA §230 barred causes of action that would require treating Craigslist as publisher of third-party content, and the subject claim was barred based on immunity afforded under CDA.<sup>5</sup>

The Craigslist decision caused some legal scholars to rethink the original purpose of the statute. Legal scholar and well-known legal blogger Eugene Volokh says the CDA should continue to apply to sites like Craigslist. Volokh said one of the great advantages of the Internet is that you can have people who create really great products on a shoestring. If Craigslist were liable, they would really have shut down that part of the site.<sup>6</sup>

Others argue that ordinary rules of law should be applied to online classified ads just as they are for "hard copy" ads in newspapers and magazines.<sup>7</sup>

Rodney A. Smolla, dean the dean of the University of Richmond School of Law and the author of "Free Speech in an Open Society" argues that the Internet has now matured to the point that we are beginning to see that the ordinary rules of law that govern our lives in physical space should also govern our lives in cyberspace."<sup>8</sup>

The potential §230 immunity of a Web site such as Wikipedia from libel claims arose in 2005 after a noted journalist and author John Seigenthaler, Sr. wrote a strong criticism

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<sup>4</sup> *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist*, 461 F. Supp. 2d. 681,686 (N.D.Ill., 2006).

<sup>5</sup> *Craigslist*, at 698.

<sup>6</sup> Adam Liptak, "The Ads Discriminate but does the Web?" *The New York Times*, March 5, 2006, available at <http://www.nytimes.com/2006/03/05/weekinreview/05liptak.html>. (last visited 12/05/07)

<sup>7</sup> In his article, Liptak notes that if the *Times* had run the same ad that appeared on Craigslist, it would have been liable for housing discrimination under the federal Fair Housing Act

<sup>8</sup> *Liptak, supra*.

of Wikipedia after bogus, almost entirely fictional entry was posted in May, 2005 was posted anonymously, as all Wikipedia entries are.<sup>9</sup> The post implied that Seigenthaler was a suspected in the assassination of Robert Kennedy. The hoax was not discovered or corrected for over four months, which as some have pointed out "is a lifetime on the Internet." The incident raised questions about the reliability of Wikipedia and other online sites that lack the accountability of traditional news sites.<sup>10</sup>

Seigenthaler, founder of the First Amendment Freedom Forum at Vanderbilt University wrote that he wanted to unmask his "biographer" but Wikipedia by nature or by design had no idea who the poster was. Chase's Internet protocol address was traced to an account with BellSouth's Internet division, but BellSouth and other major communications Internet companies are bound by federal privacy laws that protect the identity of their customers, even those who defame online. Only if a lawsuit resulted in a court subpoena would BellSouth give up the name. Federal Law also protects the BellSouth and other online corporations from libel suits.<sup>11</sup>

The issue is whether for the purposes of CDA §230 Wikipedia is an online communications company that merely relays content written by others or because of its intended purpose as a reliable source of knowledge, should it be treated differently.

Congress enacted §230 to encourage ISPs and other online companies posting third party content to monitor and edit that content for libelous or harmful content without fear of being tagged a "publisher" and subject to litigation.<sup>12</sup> As a result, §230 is typically

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<sup>9</sup> John Seigenthaler, *A False Wikipedia Biography* USA TODAY, Nov. 29, 2005, available at [http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm) (last visited 12/6/07).

<sup>10</sup> Seigenthaler Controversy post on Wikipedia, available at [http://en.wikipedia.org/wiki/John\\_Seigenthaler\\_Sr.\\_Wikipedia\\_biography\\_controversy](http://en.wikipedia.org/wiki/John_Seigenthaler_Sr._Wikipedia_biography_controversy) (last visited 12/6/07).

<sup>11</sup> *Seigenthaler, supra.*

<sup>12</sup> *Zeran*, at 330-31

raised as an affirmative defense to charges of libel or defamation when the receiving or defending party has been sued over third party content.<sup>13</sup>

To raise CDA §230 as a defense, the defendant must satisfy each of the following to gain the benefit of immunity: 1) The defendant must be a “provider” or “user” of an interactive computer service; 2) The cause of action asserted by the plaintiff must “treat the defendant as the publisher or speaker” of the harmful information at issue; 3) The Information must be “provided by another information content provider,” i.e. the defendant must not be the information content provider of the harmful information at issue.<sup>14</sup>

Section 230 mirrors a pre-CDA case, *Cubby v. CompuServe*. Here, the plaintiff claimed defamatory material about his business was posted by a user in a CompuServe bulletin board forum. The Court held that a computerized database is the functional equivalent of a more traditional news vendor [as opposed to a news *publisher*], and the application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory ... statements. Only in cases where CompuServe had some prior “actual knowledge” or a reasonable person in CompuServe’s position could hardly have avoided knowing of the defamatory character of a user-posting) could it be held liable for that posting.<sup>15</sup>

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<sup>13</sup> What Does the CDA 230 Tag Mean? Citizen Media Law Project Website, <http://www.citmedialaw.org/faq/what-does-cda-230-tag-mean>. (last visited 12/3/07).

<sup>14</sup> 47 U.S.C. §230 (c)

<sup>15</sup> *Cubby, Inc. v. CompuServe*, 775, F. Supp. 135, 140-141 (S.D.N.Y. 1991)

In more recent cases, courts have expanded §230 immunity to include Websites, like Wikipedia that provide a template for users to place third party content. *Gentry v. eBay* held that online auctioneer eBay was not liable for postings to its highly structured and rigidly controlled Feedback Forum As the law stands now, Wikipedia's merely provides a template for a third party to place and that is insufficient for liability.);<sup>16</sup>

Wikipedia describes itself as the largest and dominant general reference work currently available on the Internet. The English Wikipedia edition December 4 it had over 2,114,000 articles. Wikipedia's articles have been written collaboratively by volunteers around the world and the vast majority of them can be edited by anyone with access to the Internet. Wikipedia currently ranks among the top ten most-visited websites worldwide.<sup>17</sup> The question is how accountable should Wikipedia be for the "encyclopedia" entries on its site that are generally viewed as authoritative by millions of people all over the world.

Even with tighter editing and vetting policies, it's likely that Wikipedia can claim §230 protection. Under the same statute, a court would most likely find immune a chat room or message board host whose forum ended up hosting a libelous posting. Sites like Wikipedia falls somewhere in between. A wiki is a type of message board but it also holds itself out as a reliable source of information. However, it depends on knowledgeable users and careful readers like Seigenthaler the veracity to ensure it maintains the impression of institutional reliability of a bona fide reference work.<sup>18</sup>

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<sup>16</sup> *Gentry v. Ebay, Inc.*, 99 Cal.App. 4th 816 (2002)

<sup>17</sup> Wikipedia main page, <http://en.wikipedia.org/wiki/Wikipedia> (last visited 12/5/07).

<sup>18</sup> Anita Ramasastry: *Is an Online Encyclopedia, Such as Wikipedia, Immune From Libel Suits?* FindLaw.com, Dec. 5, 2005, <http://writ.news.findlaw.com/ramasastry/20051212.html>. (last visited 12/6/07).

Had the Seigenthaler case gone to trial, one question might be exactly how much control Wikipedia exercised over each one of its millions of entries. *Zeran* adhering to §230 holds that providers and users of interactive computer services have complete immunity from liability for transmitting the defamation of a third party. Wikipedia very probably would be considered an interactive computer service. Users can both author and alter its content and is arguably is a computer service not a journalism service, such as CNN.com, Salon.com or WashingtonPost.com.<sup>19</sup>

The *Zeran* court notes that Congress' intention in enacting CDA §230 was to "encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted either by the interactive computer service provider itself or by the families and schools receiving information via the Internet. If this objective is frustrated by the imposition of distributor liability on Internet providers, then preemption is warranted."<sup>20</sup>

After the Seigenthaler incident, Wikipedia said it would ask users to register before adding any new entries to the site. Anonymous users could still alter those entries and registrants weren't required to enter an e-mail address.

Jennifer Granick of the Center for Internet and Society at Stanford University Law School says Wikipedia has no liability, period. Section 230 gives immunity from this. Wikipedia will probably be protected from liability by the provisions of CDA §230 regardless of how long an inaccurate article stays on the site. Unlike online publishers such as Salon.com or CNN.com, Wikipedia is considered a service provider. (They

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<sup>19</sup> Ramasastry, *supra*.

<sup>20</sup> *Zeran*, at 1134-35.

provide the template for users to post material with very minimal, if any editing or vetting done by Wikipedia employed.)<sup>21</sup>

Even though Wikipedia has tightened its standards and its caveats to users, there is still the question of whether Wikipedia is protected by the safe harbor provision of §230. "Granick says it's a fascinating issue "because here you have Wikipedia, which is a great thing, which was able to flourish and thrive because of the absence of liability. On the other hand, the collaborative, decentralized nature of it means pieces of it are broken, and it's unavoidable. So the question is what can we do to stop this in the future and at what price?"<sup>22</sup>

There is some talk about modifying §230 to hold Internet companies liable if it can be shown they took no action to remove questionable material. James Goodale, the former vice chairman of the *New York Times* and well-respected media lawyer believes argues that §230 should be amended to impose liability in cases where a website operator "knowingly causes defamation by refusing to take down libelous posts." Goodale, a distinguished media lawyer, is not alone in his concern that Congress and the courts have "gone too far" in the direction of protecting website operators at the expense of individuals whose reputations may have been damaged. The argument depends, to a large extent, on the claim that CDA 230 somehow leaves injured plaintiffs with no remedy or recourse for the harm done to them.<sup>23</sup>

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<sup>21</sup> Daniel Terdiman, *Is Wikipedia Safe from Libel Liability?* CNet News.com, Dec. 7, 2005, [http://www.news.com/Is-Wikipedia-safe-from-libel-liability/2100-1025\\_3-5984880.html](http://www.news.com/Is-Wikipedia-safe-from-libel-liability/2100-1025_3-5984880.html) (last visited 12/6/07)

<sup>22</sup> Terdiman, *supra*.

<sup>23</sup> Posting of Sam Baynard to Citizen Media Law Project *Goodale on CDA 230* excerpts from New York Law Review article, <http://www.citmedialaw.org/blog/2007/goodale-cda-230-and-anonymous-speech-online> (last visited 12/9/07).

However, most courts scrupulously follow *Zeran* and provide immunity not just for ISPs but Internet companies as well, citing §230 protection.

Unless Congress modifies the statute to allow sites like Wikipedia and Craigslist to be held liable for harmful, illegal or defamatory posts, both are protected by §230 and are likely to be for the foreseeable future