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Articles

CRIMINAL AND CIVIL LIABILITY FOR USER GENERATED CONTENT:
CRAIGSLIST, A CASE STUDY

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I. Introduction

On April 14, 2009, Julissa Brisman was shot to death in an expensive Boston hotel.¹ The now infamous Philip Markoff-allegedly her murderer-was first put in contact with Brisman through an online ad in the "Erotic Services" section of the popular website Craigslist.com.² Additional investigation has revealed that Markoff discovered at least one additional victim through Craigslist.³

Although Markoff's arrest and trial have captured popular attention, similar stories have gone largely unreported.⁴ Kirk Williams, for instance, has been charged with the assault and robbery of two women he met through Craigslist's "Erotic Services" section.⁵ California prosecutors allege that Williams arranged a meeting with one woman in a motel in Redwood City, where he "held a knife to the woman's throat, demanded money, and ran off after she told him she had none."⁶ Just two weeks later, Williams contacted another woman from Craigslist, and was successful in taking two cell phones and a Bluetooth headset from her.⁷

Kamari Nelson also "targeted women touting erotic services on Craigslist," and was convicted in 2008 of sexual assault, kidnapping, and robbery.⁸ At trial, two of Nelson's victims testified that he had "called them over to his apartment to perform 'services' on them," but instead Nelson robbed and sexually assaulted them.⁹ A third victim reported the same series of events to police, but committed suicide before she could testify.¹⁰ In May 2009, Nelson was sentenced to 169 years imprisonment.¹¹

Margery Tannenbaum, on the other hand, used the "Casual Encounters" section of Craigslist to orchestrate an online scheme to harass one of her daughter's peers;¹² police suspect that Tannenbaum placed a sexually suggestive ad on the "Casual Encounters" section of Craigslist, but provided the home phone number of a nine-year-old neighbor.¹³ Tannenbaum's neighbors received 22 phone calls in response to the ad.¹⁴

That the real-world murders, assaults, and robberies alleged to have been committed by Markoff, Williams, and Nelson are criminal is beyond doubt.¹⁵ Tannenbaum's online hoax was the subject of criminal investigation and is now part of an ongoing criminal case.¹⁶ Craigslist itself however, like similar online forums, exists in a legal grey area that has, until now, limited its exposure to civil liability.¹⁷ In spite of increased attention from state and federal law enforcement agencies, Craigslist continues to escape criminal prosecution. Some authority even suggests that Craigslist is immune from legal action against it.¹⁸ Nevertheless, the negative media attention from Markoff's case has forced Craigslist to make alterations to its "Erotic Services" section.¹⁹ Specifically, Craigslist has changed the name of the "Erotic Services" section to "Adult Services," has increased fees for posts placed in the "Adult Services" section, and has agreed to "better monitor ads and delete 'blatant' prostitution ads."²⁰

Congress may have intended to definitively resolve the question of website liability by its passage of the Communications Decency Act of 1996 (CDA),²¹ but in light of Craigslist's recent capitulation to legal pressure, the time is ripe to revisit the question of the civil and criminal liability that websites risk by opening forums to the public. This Article argues that recent court decisions have already limited the extent of the protection websites enjoy from civil suits, and that the changes Craigslist has made to its "Erotic Services" section places the website even further outside the immunity the company has hitherto enjoyed. In reaching its conclusion, this Article proceeds in two sections, considering first the extent of Craigslist's criminal liability, and then considering the nature of the civil liability to which Craigslist is now exposed.

The first section begins by briefly discussing the various crimes which law enforcement officials allege have been facilitated by Craigslist. Next, first section considers whether Craigslist may claim immunity from criminal prosecution under the First Amendment. After concluding that Craigslist's part in the alleged crimes does not fall within the ambit of the First Amendment, the first section considers three alternative prosecution strategies: Obscenity, Aiding & Abetting, and Promotion of Prostitution.

The second section begins by examining the traditional defamation law under which civil claims against websites were brought prior to the enactment of the CDA. It goes on to examine how the CDA changed defamation law with respect to website operators, and how subsequent decisions have interpreted the scope of CDA protection. The second section notes that recent decisions have moved away from the blanket immunity which was previously held by courts to have been granted by the CDA, and concludes by examining how Craigslist's recent changes might fare under the most recent interpretations of the CDA.

II. Criminal Liability

In May 2009, the South Carolina Attorney General threatened Craigslist with criminal prosecution for aiding and abetting prostitution.²² Discussions between Craigslist and the New York Attorney General, on the same subject, are ongoing.²³ In spite of their participation in negotiations, however, it has been reported that state officials are now "looking for creative ways to charge the company."²⁴

In what turned out to be a fruitless civil complaint filed on March 5, 2009, Sheriff Thomas Dart of Cook County, Illinois, paints a disturbing picture of the effect Craigslist has had on law enforcement efforts both locally and nationwide.²⁵ Preliminarily, Cook's complaint alleges that "erotic services consistently garner the highest number of individual visitors . . . almost always twice as many as the next ranking category, averaging 260,000 people per city."²⁶ According to the complaint, the popularity of this section makes Craigslist "the single largest source for prostitution, including child exploitation, in the country."²⁷ Sheriff Dart claims that "Craigslist and similar sites account for 85% of the sexual liaisons men arrange in Atlanta with boys and girls."²⁸ "Authorities across the country have also found Craigslist's erotic services to be popular with sex traffickers."²⁹

"Arrests continue as well," Dart goes on, "On February 20, 2009, federal and local authorities participated in a nationwide sting, arresting more than 571 individuals on prostitution related charges. They also uncovered 48 teenage prostitutes, some as young as thirteen."³⁰

With respect specifically to Cook County, Dart alleges that

Since January of 2007, the Sheriff has arrested over 200 people through Craigslist on charges ranging from prostitution, juvenile pimping, and human trafficking. The Sheriff arrested one woman on December 31, 2006 for pimping a 16-year-old girl on Craigslist. The Sheriff made another arrest a week later for the pimping of a 14-year-old girl on Craigslist. That arrest also netted nine weapons and ninety grams of crack cocaine.

In December of 2007, the Sheriff conducted a sting that resulted in the arrests of four men charged with running a prostitution ring through Craigslist. The ring involved eleven women, some of whom were high school freshman [sic] and sophomores. The Sheriff conducted another sting in the summer of 2008 that resulted in the arrest of 76 people on prostitution-related charges in a crackdown aimed at Craigslist.³¹

The complaint continues for an additional two pages with the details of the Craigslist related arrests in Cook County alone.³² Dart concludes that the arrests made between January and November, 2008, cost Cook County "approximately \$105,081," not

including “the additional costs relating to the prosecution of these individuals, the healthcare costs incurred through treating STDs and HIV, or the rehabilitation and counseling of prostitutes.”³³ Although the complaint only seeks civil remedies, Dart premises his action on what he alleges is Craigslist’s violation of “federal, state, and local law.”³⁴ In spite of Sheriff Dart’s vigorous prosecution of his case, the U.S. District Court for the Northern District of Illinois granted Craigslist Judgment on the Pleadings.³⁵ As has previously been held, the Court reasoned that the Communications Decency Act immunized Craigslist from civil prosecutions, including Dart’s requested injunction.³⁶

As a result of Sheriff Dart’s suit, the negative media attention Craigslist has recently received, and pressure from law enforcement groups across the nation, Craigslist has decided to require would-be “Erotic Services” posters to use a credit card to pay a nominal fee of five or ten dollars in order to identify themselves and create a paper trail for law enforcement officials, and to change the name of its “Erotic Services” section to “Adult Services.”³⁷ Postings to the new “Adult Services” category “will be reviewed by employees who will look for indications of activity that is illegal or violates the site’s guidelines.”³⁸ Ironically, these decisions may ultimately weaken, instead of strengthening Craigslist’s criminal defenses.

A. First Amendment Concerns

Dart’s complaint requests that the court issue an injunction forbidding Craigslist to offer its “Erotic Services” section to posters.³⁹ This, however, raises issues of prior restraint that implicate the First Amendment, which deserve to be briefly considered. The First Amendment forbids Congress from making any law “abridging the freedom of speech, or of the press.”⁴⁰ At first blush, this prohibition seems to prevent criminal liability for posts in Craigslist’s “Erotic Services” section. Commercial speech, however, has historically been treated as low value speech, and therefore has been held to merit less protection than other kinds of expression, such as political and religious speech.⁴¹ Expression has been held to be commercial speech where it is “related solely to the economic interests of the speaker and its audience.”⁴²

The leading case regarding regulation of commercial speech is *Central Hudson Gas & Electric v. Public Services Commission*, in which the Supreme Court announced a four part test to determine whether suppression is constitutional.⁴³ There, the Supreme Court noted that:

For commercial speech to come within [the ambit of the First Amendment,] it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary

to serve that interest.⁴⁴

Courts continue to apply the “four-part Central Hudson framework today to evaluate commercial speech cases.”⁴⁵

Where posts in the “Erotic Services” section of Craigslist’s site advertise prostitution, or solicit money in exchange for sex, they are unprotected by the First Amendment as interpreted by the Court in Central Hudson because (1) the ads do not concern lawful activity, and because (2) the governmental interest against prostitution is substantial.⁴⁶ Therefore, where the posts in Craigslist’s “Erotic Services” section violate federal and state law, the First Amendment is no bar to prosecution.

B. Craigslist and Corporate Criminal Liability

Although Craigslist may not be able to claim protection under the First Amendment, the question of whether it, as a corporate entity, may be held liable for posts placed on its website by third-parties, is nontrivial. Indeed, the concept of corporate criminal liability itself is relatively new, and the boundaries of corporate liability are still largely untested.⁴⁷ Nineteenth century decisions preferred to impose criminal sanctions on individual actors, and not the corporate ‘person.’⁴⁸ Early decisions in the twentieth century, however, focused on vicarious liability for criminal acts, and in New York *Central & Hudson River Railroad v. United States*, the Supreme Court of the United States held that “since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done.”⁴⁹

Since 1909 and the New York *Central & Hudson* decision, courts have split on the level of scienter necessary to establish corporate criminal liability.⁵⁰ Federal courts and state courts from fourteen jurisdictions,⁵¹ as well as legislatures in another eleven states,⁵² have explicitly adopted the rule of New York *Central & Hudson* that corporations may be criminally liable for the “act, omission, or failure of any officer, agent, or other person acting for or employed by [that corporation], acting within the scope of his employment.”⁵³ Under this rule, the corporation may be exposed to criminal sanctions by any employee, acting within the scope of his employment, regardless of his importance or placement within the corporation.

The Model Penal Code (MPC), on the other hand, holds corporations criminally responsible only where “the commission of the offense was authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.”⁵⁴ The MPC goes on to define “high managerial agents” as officers “of a corporation or an unincorporated association, or, in the case of a partnership, a partner,

or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association."⁵⁵ Twenty jurisdictions limit corporate criminal exposure to crimes committed at the behest of high managerial officials.⁵⁶

The original "Erotic Services" section of the Craigslist website was never intended to be a forum for prostitution,⁵⁷ and Craigslist implemented features like "community flagging" in order to weed out illegal content.⁵⁸ Although this "community flagging" feature proved to be ineffective,⁵⁹ Craigslist nevertheless might successfully assert as a defense against criminal prosecution that it lacked the requisite knowledge and mens rea to be prosecuted for any particular prostitution charge, and that it had instituted policies prohibiting the illegal use of its website in good faith. Some precedent supports such a defense. For instance, in *People v. Raphael*, the defendant apartment company was charged with violations of the Sharkey Act, "which makes it unlawful for any person to demand or receive any rent or other consideration for any housing . . . in excess of that prescribed by rent regulations."⁶⁰ There, the superintendent of the apartment building was accused of charging a bonus as a condition of rental agreements.⁶¹ The Court refused to impose criminal sanctions on the corporation, however, because there was "no evidence that the corporation profited or benefited from the illegal bonus" nor was there "proof that any officer of the corporation had knowledge of the illegal acts of the superintendent"⁶² Here, because Craigslist could probably be successful in alleging that it did not profit from any of the "Erotic Services" posts, and because it could almost certainly allege that it had no knowledge of any particular post's content, this defense would be meritorious, if not robust.⁶³

The new "Adult Services" section of Craigslist's website, on the other hand, is a different story. Because Craigslist will now employ a staff of censors to manually review each post, it can no longer claim to be ignorant of the content of each post.⁶⁴ Thus, where a staff-member acts within his authority and authorizes a post which in fact solicits illegal activity, that staff-member exposes Craigslist to criminal liability. Corporate policy that illegal posts should be deleted will be no defense.⁶⁵ For instance, in *United States v. Hilton Hotels*, the defendant hotel chain was accused of colluding with other hoteliers to organize a boycott against suppliers who refused to contribute to a local association which promoted conventions in the Portland area.⁶⁶ Hilton defended against the charges by asserting that "it would be contrary to the policy of the corporation for the manager of one of its hotels to condition purchases upon payment of a contribution to a local association by the supplier."⁶⁷ Both the hotel president, and the hotel's manager testified that they had explicitly instructed the purchaser of the illegality of participating in a boycott.⁶⁸ Nevertheless, the Ninth Circuit Court of Appeals held that a corporation was liable for the acts of its agents and employees, even when carried out against policy, or explicit instructions.⁶⁹ Thus, like in *Hilton Hotels*, if a Craigslist censor were to permit an ad soliciting prostitution to reach the Internet in spite of corporate policy or instructions to the contrary, the corporation as a whole would incur criminal liability.

C. Prosecution Strategies: Obscenity

The strongest avenue of criminal attack against Craigslist in the federal courts is probably for distribution of obscenity in violation of 18 U.S.C. § 1465.⁷⁰ Section 1465 prohibits the use of

an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) . . . for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character.⁷¹

By its terms, the law is appropriately applied against Craigslist as an interactive computer service (ICS) under Section 230.⁷²

Materials have been held to be obscene where they deal with sex in a manner that appeals to prurient interests.⁷³ In *Miller v. California*, the Supreme Court expressed the test for obscenity as “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest”; “(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and “(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁷⁴

Craigslist’s “Erotic Services” section, inasmuch as it transmits obscene images and text as part of advertisements for prostitution, clearly fails the *Miller* test; although the first two prongs of this test are determined on a locality by locality basis where “community standards” are key, it seems unlikely that photographs of prostitutes performing sex acts would be deemed protected speech in any jurisdiction.⁷⁵

Only slim precedent exists for criminal action taken against corporate website operators under Section 1465, but two cases are worth noting. In *United States v. Extreme Associates, Inc.*, an action against a website distributing “hard core” sadomasochistic videos, the Third Circuit Court of Appeals concluded that the charges did not violate First Amendment protections, and remanded the case for trial.⁷⁶

In *United States v. Hair*, on the other hand, the defendant was accused of, *inter alia*, aiding and abetting the interstate transmission of child pornography.⁷⁷ In *Hair*, the government argued that because the defendant had used an e-mail account provided by Yahoo.com, it was Yahoo and not the defendant who had transmitted pornography over the Internet, and thus the defendant was properly charged with aiding and abetting.⁷⁸ The Eleventh Circuit Court of Appeals agreed that this was a reasonable construction, and affirmed the defendant’s conviction.⁷⁹

The defendant website in *Extreme Associates* is similar to Craigslist inasmuch as it was an ICS under Section 230, and was engaged in distributing obscene content.⁸⁰ Unlike Craigslist, however, the defendant website in *Extreme Associates* was also responsible for the creation of the obscene content, and thus no serious issues of mens rea were contested in that case. In a criminal action asserting violations of Section 1465, Craigslist might attempt to distinguish itself from *Extreme Associates* by alleging that Craigslist's operators were unaware of the content of any individual "Erotic Services" posts. Hair, however, undercuts that defense; if Yahoo can be sufficiently guilty of transmitting child pornography to support an aiding and abetting conviction for using their e-mail service, then Craigslist almost certainly can be held accountable for transmission of obscenity. Moreover, where charges of obscenity are filed for violations that occurred after Craigslist began manually filtering their new "Adult Services" section, mens rea will be all but a non-issue.

D. Prosecution Strategies: Aiding and Abetting

The South Carolina Attorney General has threatened suit against Craigslist for aiding & abetting prostitution, and thus this prosecution strategy is worth consideration. This would be a difficult charge to make out in federal court. Under Section 2 of the U.S. Crimes Code, defendants are liable "as a principal" if that defendant either (1) "aids, abets, counsels, commands, induces or procures its commission" or (2) "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States."⁸¹ The difficulty is that the federal prostitution statute,⁸² criminalizes the transportation of "any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution."⁸³ Showing that Craigslist "willfully caused" such transportation under Section 2 would probably be impractical.

On the other hand, creative prosecutors might attempt to make out a charge against Craigslist for aiding and abetting wire fraud. A person commits wire fraud if he (1) devises "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," (2) "transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce," (3) "any writings, signs, signals, pictures, or sounds," (4) "for the purpose of executing such scheme or artifice."⁸⁴

Posters on Craigslist often attempt to disguise their criminal solicitation by using crude code words like "roses" or "diamonds" instead of dollars.⁸⁵ Where they do so, they have used interstate wires to further a scheme to obtain money by means of fraudulent pretenses, and thus committed wire fraud,⁸⁶ the offense on which Craigslist's aiding and abetting charge would be predicated.⁸⁷ Craigslist-and the posters-might defend against this charge, however, by claiming that the posters lacked specific intent to defraud. After all, the posters are seeking payment, not actual flowers, and they have every incentive to

make their posts sufficiently intelligible to communicate that to interested parties.⁸⁸

The law in South Carolina permits a more straightforward prosecution for aiding and abetting, but still presents problems. In South Carolina, unlike in the federal system, prostitution is criminal irrespective of transport in state commerce.⁸⁹ Knowingly aiding and abetting prostitution is prohibited in the same statute.⁹⁰ Proving that Craigslist “knowingly” aided and abetted prostitution, however, would be difficult under the older “Erotic Services” model in which posts were unmonitored. Even where censors manually check each post for illegal content, proving knowledge-as opposed to recklessness or negligence-would be difficult. In other words, although a censor might miss even an obvious advertisement for prostitution, Craigslist could mount a defense to aiding and abetting prostitution in South Carolina by pointing out that each censor is expected to review hundreds of posts per day, and that this volume prevents its censors from having sufficient “knowledge” of each post to satisfy the statute’s scienter requirement.⁹¹

E. Prosecution Strategies: State Prosecutions

Although South Carolina may encounter difficulties with its proposed prosecution for aiding and abetting, state prosecutions are still probably the most fertile ground for criminally sanctioning Craigslist.⁹² The similarity of Promotion of Prostitution laws across multiple states makes Promotion a crime which uniquely subjects Craigslist to nationwide prosecution, giving state prosecutors the opportunity to cooperate, and learn from one another’s successes and mistakes. This is of particular importance, given that the majority of the law enforcement interest in Craigslist to date has been at the state level, and that the state attorneys general have already formed a coalition to negotiate in opposition to Craigslist.⁹³

The fifty state promotion statutes can be profitably divided into three categories. In the first category are states like Kansas,⁹⁴ Louisiana,⁹⁵ Nebraska,⁹⁶ New Mexico,⁹⁷ North Dakota,⁹⁸ Ohio,⁹⁹ and Utah,¹⁰⁰ each of which includes detailed descriptions of what transactions constitute “promoting prostitution.” Because these statutes were enacted prior to the advent of the Internet, and long before the media attention which has recently been focused on Craigslist in particular, none of these statutes have application to Craigslist as strictly construed.

The majority of state Promotion laws fall into the second category, all of which include some variation on the theme that a “person who knowingly receives money or other valuable thing from the earnings of a person engaged in prostitution” is guilty of Promotion.¹⁰¹ Prior to Craigslist’s recent decision to start charging nominal fees for posting in the “Adult Services” section of its site, this common provision would have little application to the site. Now that Craigslist is receiving such a nominal fee, however, even a single advertisement for prostitution that slips by its censors will be sufficient to

create criminal liability.

In the third category of promotion statutes, the language is even broader than that of the statutes in the second category and thus is most likely to be interpreted so as to include crimes committed via the Internet. Thus, the broad language of the promotion statutes in Arkansas,¹⁰² Georgia,¹⁰³ Maine,¹⁰⁴ Michigan,¹⁰⁵ Oklahoma,¹⁰⁶ Oregon,¹⁰⁷ Pennsylvania,¹⁰⁸ South Carolina,¹⁰⁹ Tennessee,¹¹⁰ and Vermont,¹¹¹ are probably the most likely to succeed a motion by Craigslist to dismiss. Maine, for instance, merely notes that "A person is guilty of promotion of prostitution if he knowingly promotes prostitution."¹¹² Georgia's statute, on the other hand, is longer, and makes it a crime to (1) "arrange a meeting of persons for the purpose of prostitution," (2) direct "another person to a place when he or she knows or should know that the direction or transportation is for the purpose of prostitution," (3) "[r]eceives money or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution," or (4) "[a]ids or abets, counsels, or commands another in the commission of prostitution."¹¹³ Georgia's statute thus includes both specific prohibitions, and an "aiding and abetting" provision as a catch-all.¹¹⁴ Of the ten states which employ the broadest language in their promotion statutes, Maine, Oklahoma, South Carolina, Tennessee, and Vermont are all jurisdictions which also follow the rule of New York Central & Hudson, and thus states in which violations of state promotion statutes by even low ranking censors are most likely to form the basis of successful criminal prosecutions against the corporation.¹¹⁵

III. Civil Liability

Civil liability for printing user supplied content is an area of law which has undergone radical changes in the last two decades. Under traditional defamation law, a distinction exists between speakers, publishers, and printers.¹¹⁶ Until the passage of the CDA, this distinction was employed by courts to determine whether a website should be held liable for the statements made by its users.¹¹⁷ After the passage of the CDA, in 1996 courts were forced to change their analysis from that of defamation law, to a new test under which websites were either Internet Content Providers¹¹⁸ (ICPs) or Interactive Computer Services (ICSs).¹¹⁹ Early interpretations of the CDA granted broad immunity to websites, essentially immunizing them against defamation claims.¹²⁰ Subsequent decisions, however, have limited website immunity considerably.¹²¹

A. Traditional Defamation Law & Early Internet Defamation Cases

Generally speaking, in order to make out a claim for defamation, a plaintiff must demonstrate that the defendant made (1) a false and defamatory statement concerning the plaintiff, in (2) an unprivileged publication to a third party, where there was (3) fault amounting at least to negligence on the part of the publisher, and which either (4) caused

the plaintiff special harm, or was actionable per se.¹²²

Special conditions apply, however, where a plaintiff names not just the original speaker as a defendant, but also the publisher and distributor of the statement. For instance, in *Cianci v. New Times Publishing Co.*, the plaintiff mayor of Providence Rhode Island filed suit against the publishers of *New Times Magazine*.¹²³ The mayor alleged that an article claiming that he had raped a woman at gunpoint was defamatory and libelous.¹²⁴ In considering *New Times*'s potential liability, the Court noted that although the defendant was not the author of the contested statement, "one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement."¹²⁵ Any other rule, the court went on to note, "would permit the expansion of a defamatory private statement, actionable but without serious consequences, into an article reaching thousands of readers, without liability on the part of the republisher."¹²⁶

Distributors, on the other hand, are treated differently. For instance, in *Lerman v. Flynt Distributing Co.*, the plaintiff actress sued the distributor of *Playpen Magazine* for incorrectly labeling a nude photograph with her name.¹²⁷ The Second Circuit Court of Appeals noted that distributors are protected under the First Amendment, and that "the imposition of liability without adequate proof of fault would unquestionably chill the exercise of distributors' First Amendment rights."¹²⁸ The Court required that the plaintiff show that the defendant distributor "had a high degree of awareness of [the statement's] probable falsity, or to have in fact entertained serious doubts as to the truth of his publication."¹²⁹ Other cases have suggested that "distributors" of potentially libelous communications like telephone and telegraph companies are per se immune from distributor liability because of their inability to monitor communication.¹³⁰

Before receiving guidance from Congress, courts determined the issue of website defamation liability by analyzing whether the website had acted more like a speaker, a publisher, or a distributor. For instance, in 1991, the U.S. District Court for the Southern District of New York considered the issue of website liability for user generated content in *Cubby v. Compuserve*.¹³¹ In *Cubby*, the plaintiff alleged that Compuserve's website "Rumorville"-which was written by a third party-had published false and defamatory statements about the plaintiff's competitor website, "Skuttlebut."¹³² The District Court held that because the content of Rumorville was written by a third party, Compuserve had acted as a distributor (as opposed to a publisher) and should not be held liable for the site's content.¹³³ To hold otherwise, the court noted, would require Compuserve to "examine every publication it carries for potentially defamatory statements," something which the court believed not to be feasible.¹³⁴

A New York State Supreme Court heard the similar case of *Stratton Oakmont, Inc. v. Prodigy* four years later, in which the plaintiff, a securities firm, sued Prodigy for

defamatory statements made on Prodigy's website "Money Talks."¹³⁵ Like in *Cubby*, the defamatory statements on Prodigy's website were made by a third party; but, unlike in *Cubby*, Prodigy had a policy of electronically reviewing posted content.¹³⁶ The New York State Supreme Court made much of this distinction, and noted that "[b]y "actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste' . . . Prodigy is clearly making decisions as to content and such decisions constitute editorial control."¹³⁷ This editorial control, the court went on, was sufficient to make Prodigy a publisher (as opposed to a distributor).¹³⁸ Based on this reasoning, the court held that "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."¹³⁹

B. The Communications Decency Act of 1996

The *Stratton Oakmont* decision created two disincentives for website operators. First, the operators of online forums like Prodigy's "Money Talks" were discouraged from creating forums in the first place, for fear of exposing themselves to liability.¹⁴⁰ Second, website operators were discouraged from exercising editorial control over the content of their forums.¹⁴¹ The U.S. Congress, which believed the Internet to be "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,"¹⁴² resolved to overturn *Stratton Oakmont* by statute in Section 230 of the CDA.¹⁴³

Section 230 provides that:

(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) [subparagraph (A)].¹⁴⁴

These provisions overrule *Stratton Oakmont*, and depart sharply from the jurisprudence of defamation at common law, (in which liability for third-party content is determined by the level of control exercised by the publisher or distributor).¹⁴⁵

Federal courts were first called to interpret Section 230 a year after its passage in *Zeran v. America Online, Inc.*¹⁴⁶ The plaintiff in *Zeran* had been the victim of a hoax in the days immediately following the bombing of the Federal Building in Oklahoma City.¹⁴⁷ Specifically, the plaintiff alleged that an unidentified person posted a message on an AOL bulletin board advertising 'Naughty Oklahoma T-Shirts' that featured: offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call 'Ken' at *Zeran's* home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, *Zeran* received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats.¹⁴⁸

The Court began its analysis by noting that Section 230 barred courts from entertaining claims which "place a computer service provider in a publisher's role" and hold service providers liable for their exercise of editorial functions.¹⁴⁹ As in *Cubby, Inc.*,¹⁵⁰ the Court went on to point out that "it would be impossible for service providers to screen each of their millions of postings for possible problems," and that imposing liability on America Online in this case would have a chilling effect.¹⁵¹ After considering these factors, and the legislative intent behind the enactment of Section 230, the Court affirmed the decision of the district court granting summary judgment to American Online.¹⁵²

The *Zeran* decision has had significant ramifications with respect to website operator liability.¹⁵³ Although the language of Section 230 immunizes ICS Providers from liability as a "publisher or speaker,"¹⁵⁴ the *Zeran* court went a step further and immunized ICS Providers from liability as distributors.¹⁵⁵ In other words, even where plaintiffs could prove that defendant website operators "had a high degree of awareness of [the statement's] probable falsity, or to have in fact entertained serious doubts as to the truth of his publication," *Zeran* would deny relief.¹⁵⁶ Until very recently, this additional protection has made it virtually impossible to successfully implead website operators as civil defendants.¹⁵⁷

The strength of Section 230 as a shield against website liability is borne out by *Zeran's* progeny.¹⁵⁸ For instance, in *Doe v. SexSearch.com*, the plaintiff filed suit against an "online adult dating service."¹⁵⁹ He alleged that a minor had used the dating service's forms to lie about her age and entice him into a sexual relationship, because of which he was eventually arrested for three counts of engaging in unlawful sexual conduct with a minor.¹⁶⁰ The District Court for the Northern District of Ohio found *SexSearch.com* to be

immune from civil liability pursuant to Section 230.¹⁶¹ The Sixth Circuit Court of Appeals affirmed the decision of the lower court without expressly adopting the District Court's interpretation of the CDA.¹⁶²

In the more extreme case of *Barrett v. Rosenthal*, two plaintiff doctors filed suit against an individual who had posted an article "on the web sites of two newsgroups devoted to alternative health issues and the politics of medicine. . . ." ¹⁶³ Although the defendant operated her own website, the contested posting was made elsewhere.¹⁶⁴ The California Supreme Court relied on *Zeran*, and cited *Zeran's* concern that to require ICS providers to review every post "would create an impossible burden in the Internet context."¹⁶⁵ Ultimately, the court held that even though the defendant was simply using an ICS at the time she posted the contested article, she was entitled to protection under Section 230.¹⁶⁶

C. Chipping Away at Website Operator Immunity

Although Section 230 has heretofore provided a strong defense for website operators, more recent decisions have begun to erode some of that protection. For instance, in *Carafano v. MetroSplash.com*, the plaintiff filed suit, alleging that the defendant's dating website "MatchMaker.com" had participated in a hoax which had subjected her to harassment and embarrassment.¹⁶⁷ *Carafano*, who had previously appeared in numerous movies and television shows, alleged that a third party had created a dating profile using her name and contact information, in which she was portrayed as "licentious."¹⁶⁸

Unlike the Plaintiffs in *Zeran*, *SexSearch*, and *Barrett*, however, *Carafano* pointed out that the content added to her profile was one of a pre-defined set of options set by the MatchMaker website.¹⁶⁹ In other words, MatchMaker required users to create profiles in which they answered certain multiple choice questions, where both the questions and the set of possible answers were supplied by MatchMaker.¹⁷⁰ This, *Carafano* argued, made MatchMaker an information content provider (ICP),¹⁷¹ and thus placed MatchMaker beyond the scope of Section 230 immunity. Although the District Court dismissed her claims on other grounds, it agreed with her characterization of MatchMaker as an ICP, holding that "MatchMaker does not just provide a site for people to post whatever information they choose. . . . MatchMaker is an entity that is responsible . . . in part, for the creation or development of information provided through the Internet or any other interactive computer service."¹⁷²

For the first time since the passage of the CDA, the Court in *Carafano* declined to apply Section 230 immunity to a website operator.

Six years after *Carafano*, the Ninth Circuit Court of Appeals heard the case of

Fair Housing Council of San Fernando Valley v. Roommates.com.¹⁷³ The defendant in Roommates operated a “website designed to match people renting out spare rooms with people looking for a place to live.”¹⁷⁴ Subscribers to the service, however, were required to disclose their sex, sexual orientation and whether they intended to bring children to the household, as well as preferences in a roommate with respect to the same three categories.¹⁷⁵ These criteria were then posted to subscribers’ housing profiles, and used to filter incompatible lessors and lessees.¹⁷⁶ The plaintiff alleged that Roommates.com violated the Fair Housing Act, but the district court held Roommates.com to be immune under Section 230.¹⁷⁷

The Ninth Circuit noted that:

A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is “responsible, in whole or in part” for creating or developing, the website is also a content provider.¹⁷⁸

Like in Carafano, the Court held that because Roommates.com created the questions and the answers, and because Roommates.com required users to answer its questions as a term of subscription, it was an ICP, and therefore “not entitled to CDA immunity.”¹⁷⁹ Unlike in Carafano, however, the Ninth Circuit vacated the dismissal of the District Court, and remanded the case for further consideration not inconsistent with its interpretation of the CDA.¹⁸⁰

D. Craigslist, the CDA, and Civil Liability

In Chicago Lawyers’ Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc., Craigslist was sued on substantially the same grounds as Roommates.com.¹⁸¹ The plaintiffs alleged that Craigslist housing section permitted notices which proclaimed “‘NO MINORITIES’ and ‘No children,’ along with multiple variations, bald or subtle.”¹⁸² Unlike in Carafano and Roommates, however, the court noted that the “Housing” section of Craigslist’s website did not require users to answer a set of pre-defined questions, nor did it supply pre-written answers, and that “nothing in the service [C]raigslist offers induces anyone to post any particular listing or express a preference for discrimination.”¹⁸³ After rehearsing the now familiar claim that “[a]n online service could hire a staff to vet the postings, but that would be expensive and may well be futile,” the Court concluded that Craigslist was an ICS, and therefore immune under Section 230.¹⁸⁴ Some commentators have taken this decision to end the question of Craigslist’s civil liability.¹⁸⁵

In spite of this liability shield, Craigslist is once again the subject of civil litigation¹⁸⁶ and attention from law enforcement because of the spate of attacks its “Erotic Services” section has caused.¹⁸⁷ As a result of the increased legal and media attention, Craigslist has decided to change its “Erotic Services” section by requiring posters to pay a nominal fee, and by retaining a staff of censors to review each post for illegal content.¹⁸⁸ As discussed above, these changes may ultimately weaken Craigslist’s defenses against criminal prosecution; they will also undercut Craigslist’s immunity under the CDA.

First, certain of the functions specific to the “Erotic Services” section of Craigslist’s website-functions which will presumably continue to exist in the new “Adult Services” section of the website-are more like the pre-written questions and answers found to be determinative in *Carafano* and *Roommates* than the free-form of the housing section of Craigslist’s website from *Chicago Lawyers*. For instance, Craigslist asks would-be posters to the “Erotic Services” section for their gender, and to list which of twenty-one predefined categories of sexual liaison they are offering.¹⁸⁹ Craigslist also has provided a space on its posting form for posters to add their age, and their location.¹⁹⁰ As in *Roommates* and *Carafano*, the information provided in response to these questions is formatted and assembled by Craigslist into a single post.¹⁹¹ Based on these and other criteria, Craigslist has developed a search mechanism which allows interested parties to filter posts. This distinction alone may be sufficient to remove Craigslist’s Section 230 immunity as an ICS, and instead be treated as an ICP; certainly its series of pre-written questions, pre-written answers, and its control over a post’s layout make Craigslist “‘responsible, in whole or in part’ for creating or developing” the post’s content.¹⁹²

Second, Craigslist’s decision to charge would-be adult service posters a fee dramatically distinguishes it from *Zeran*, in which America Online provided access to content publishers gratis.¹⁹³

Requiring users to pay a fee for posting moves Craigslist away from the protection of Section 230 in two ways. On the one hand, where an ICS charges a fee for the opportunity to post to its website, it restricts the “diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity” to those willing to pay for them.¹⁹⁴ By so restricting its content, an ICS excepts itself from the congressional intent behind Section 230,¹⁹⁵ something which has had a significant effect on courts.¹⁹⁶ On the other hand, charging a per-post fee creates revenue which undercuts the holding in *Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist, Inc.* that a manual review of posts would be prohibitively expensive.¹⁹⁷

Third, every court which has granted immunity under Section 230 has noted the impossibility of manually reviewing each post for potential liability.¹⁹⁸ Craigslist’s decision to recruit a staff to review each proposed post undercuts this rationale for immunity. Although Section 230(c) specifically immunizes ICS providers for “any action voluntarily taken in good faith to restrict access to or availability of material that the

provider or user considers to be obscene . . . or otherwise objectionable,"¹⁹⁹ the stated congressional intent suggests that this provision should be interpreted with regards to "the development and utilization of blocking and filtering technologies."²⁰⁰

IV. Conclusion

Craigslist's "Erotic Services" section has, until now, been a thorn in the side of law enforcement agencies across the United States. This nuisance has gone beyond traditional vice crimes like prostitution and extended into areas like statutory rape and human trafficking. The risks associated with online solicitation, moreover, have recently spawned a string of robberies, sexual assaults, and murders. In spite of the harm that has been caused by Craigslist's "Erotic Services" section, however, the company has thus far eluded legal sanction, either civil, or criminal.

Craigslist's exposure to public censure, however, has prompted the popular website to alter its "Erotic Services" section. The new version, rebranded as "Adult Services," will cost money to use, and will be reviewed by a small army of censors. Ironically, the company's decision to be more responsible may have the effect of exposing Craigslist to substantial criminal liability. By adding new agents with the responsibility of censoring posts for illegal content, Craigslist now runs the risk that a corporate agent, acting within the scope of his duty, will permit a post soliciting prostitution or statutory rape to slip past and onto the Internet. In jurisdictions which follow the rule of New York Central & Hudson, this, without more, may create liability for obscenity, or criminal promotion.

The new system, moreover, exposes Craigslist to civil lawsuits for three reasons. First, under the new system, (as under the old,) Craigslist requires posters to fill out a form, many of the fields in which can only be filled with answers which Craigslist's programmers have pre-written, such as the poster's gender, sexual preference, age, and location. Courts have recently shown less deference to websites which provide posters with pre-written answers, and which then automatically configure those answers into a page. Second, Craigslist's decision to charge on a per-post basis removes any disincentive the corporation might have to provide robust censorship, because the company is capable of passing on those costs to users. Third, Craigslist's decision to employ censors directly undercuts the rationale under which courts have extended civil immunity up until this point: namely that such a move could not be cost-effective.

Footnotes

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¹ Beverly Ford et al., *Wanna-Be Doc Held in Murder*, N.Y. Daily News, Apr. 21, 2009. According to police, Philip Markoff, a pre-medical student from upstate New York, found Brisman through Craigslist's "Erotic Services" section. They met at a hotel, and when she resisted his attempts to restrain her with plastic "zip ties," Markoff shot her multiple times. The armed robbery of a Las Vegas prostitute in a Rhode Island hotel has also been connected to Markoff. *Id.*

² *Id.*

³ Bill Hewitt et al., *The Craigslist Killing 'There Is More Coming Out,' People*, May 11, 2009, at 152.

⁴ See, e.g., Zachary R. Dowdy & Sophia Chang, *Web Ad Spurs Mom's Arrest*, Newsday, May 9, 2009.

⁵ Daniel Powell, *Redwood City Man Pleads Not Guilty to Craigslist Robberies*, San Mateo County Times, May 19, 2009.

⁶ *Id.*

⁷ *Id.*

⁸ Lisa Fernandez, *169-Year Sentence in Sex Assaults*, San Jose Mercury News, May 20, 2009.

⁹ *Id.*

¹⁰ *Id.*

- 11 Id.
- 12 Dowdy & Chang, *supra* note 4.
- 13 Id. Tannenbaum's story is reminiscent of that of Lori Drew, who created a MySpace.com account to pretend to be a boy and harass 13-year-old Megan Meier, her daughter's former friend. Robert Patrick & David Hunn, *Jury Will Weigh Culpability in Suicide*, St. Louis Post-Dispatch, Nov. 18, 2008.
- 14 Dowdy & Chang, *supra* note 4.
- 15 It should be carefully noted that while the murders, assaults, and robberies themselves are all but certainly illegal, Philip Markoff and Kirk Williams have yet to be convicted, and their criminality—as opposed to that of the acts—continues to be presumed to be null. See Powell, *supra* note 5.
- 16 Zachary R. Dowdy, *Woman Charged in Craigslist Harassment Case*, *Newsday*, May 9, 2009.
- 17 See *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (holding Craigslist to be immune from civil liability for housing discrimination violations pursuant to 47 U.S.C. § 230(c)).
- 18 Cecilia Ziniti, for instance, claims that courts' broad interpretation of 47 U.S.C. § 230 has expanded immunity "not just to publication-related claims, such as defamation, but to all claims not explicitly excluded in the statute," including criminal charges. Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It*, 23 *Berkely Tech. L.J.* 583, 587 (2008).
- 19 Ellen Yan, *Craigslist Revamps 'Erotic Services' Ad Category*, *Newsday*, May 15, 2009.
- 20 Id.; Alan Duke, *Official: Craigslist to Replace 'Blatant Internet Brothel'*, *CNN.com*, May 13, 2009, <http://www.cnn.com/2009/TECH/05/13/craigslist.sex.ads/index.html?iref=allsearch>.
- 21 Communications Decency Act of 1996, 47 U.S.C. 223 (1996).

- 22 Meg Kinnard, *Craigslist CEO Asks SC AG to Apologize for Threat*, Associated Press, May 18, 2009.
- 23 Brad Stone, *Under Pressure, Craigslist to Remove 'Erotic' Ads*, N.Y. Times, May 14, 2009.
- 24 *Id.*
- 25 Complaint ¶¶ 1-142, *Dart v. Craigslist, Inc.*, No. 09-CV-1385, 2009 WL 564291 (N.D. Ill. Mar. 5, 2009). For opinion, see *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009).
- 26 Complaint ¶ 36, *Dart v. Craigslist, Inc.*, No. 09-CV-1385, 2009 WL (citing Stephen Bagg, *Craigslist's Dirty Little Secret, Compete*, Apr. 5, 2007, <http://blog.compete.com/2007/04/05/craigslist-popular-categories>).
- 27 *Id.* ¶ 38 (citing Jim Redden, *Craigslist or Crimeslist?*, Portland Trib., Nov. 27, 2007).
- 28 *Id.* ¶ 42.
- 29 *Id.* ¶ 43.
- 30 *Id.* ¶ 54 (citing Devlin Barrett, *FBI, Police Rescue Child Prostitutes Around U.S.*, Associated Press, Feb. 23, 2009).
- 31 Complaint ¶¶ 58-63, *Dart v. Craigslist, Inc.*, No. 09-CV-1385 (citing *Police Say Two Chicago Women Were Pimping Children*, Associated Press, Jan. 12, 2007; *Michael Higgins et al., 10 Charged in Internet Prostitution; Illinois, Indiana Ring Placed Ads on Craigslist*, Chi. Trib., Dec. 22, 2007; *76 Arrested in Craigslist Sting Project*, Chi. Trib., June 16, 2008).
- 32 *Id.* ¶¶ 57-82.
- 33 *Id.* ¶¶ 78-79.
- 34 *Id.* ¶ 93. *Dart* alleges that Craigslist's conduct violates 720 ILCS 5/11-15 (soliciting a prostitute), Chicago Municipal Code 8-8-020 (directing persons to houses of ill-fame), and

18 U.S.C.S. § 1952(a)(3) (transportation in aid of racketeering enterprises). *Id.* ¶ 102, 113, 116.

35 Memorandum and Order, at *7, *Dart v. Craigslist, Inc.*, No. 09 CV 1385, 2009 WL 3416106 (N.D. Ill. Oct. 20, 2009).

36 *Id.* at *5-*7.

37 Memorandum in Support of Craigslist’s Motion for Judgment on the Pleadings, at 3 n.1; *Dart v. Craigslist, Inc.*, No. 09-CV-1385, 2009 WL 130729 (N.D. Ill. May 4, 2009).

38 *Stone*, *supra* note 23.

39 Complaint ¶ 143-47, *Dart v. Craigslist*, No. 09-CV-1385.

40 U.S. Const. amend I.

41 Megan E. Frese, *Rolling the Dice: Are Online Gambling Advertisers “Aiding and Abetting” Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 *Fordham Intell. Prop. Media & Ent. L.J.* 547, 568 (2005).

42 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

43 *Id.* at 566.

44 *Id.*

45 See, e.g., Frese, *supra* note 41, at 571 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001); *Greater New Orleans Broad. Ass’n v. United States*, 517 U.S. 173, 184 (1999)).

46 See *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

47 William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 *Emory L.J.* 647, 648-51 (1994) (noting corporate liability a product of the twentieth century).

- 48 Id. at 651 (stating that there must be “a proper distinction between the innocent and guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted.”).
- 49 Id. at 651-52 (citing *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 492-93 (1909)).
- 50 Christopher R. Green, Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law, 87 *Neb. L. Rev.* 197, 199 (2008).
- 51 Id. at 202. Green lists Federal courts, as well as the courts of California, the District of Columbia, Florida, Massachusetts, Nebraska, New Hampshire, North Carolina, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wisconsin as adopting the rule of *New York Cent. & Hudson*.
- 52 Id. Green lists Alaska, Indiana, Kansas, and Maine as adopting the rule of *New York Cent. & Hudson* by statute. Green goes on to note that Alabama, Connecticut, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, Puerto Rico, South Carolina, the Virgin Islands, and Wyoming “allow corporate criminal liability without suggesting any food-chain limit,” and therefore presumes they follow the rule of *New York Cent. & Hudson*.
- 53 *N.Y. Cent. & Hudson*, 212 U.S. at 491-92.
- 54 Model Penal Code § 2.07(1)(c) (1962).
- 55 Id. § 2.07(4)(c).
- 56 Green, *supra* note 50, at 205-06.
Five jurisdictions (Arizona, Guam, Kentucky, Pennsylvania, and Texas) adopt the MPC’s own definition of “high managerial agent” in terms of policymaking. Seven states (Colorado, Illinois, Missouri, Montana, New York, Oregon, and Washington) expand the definition of “high managerial agent” to include both policymakers and supervisors of other employees. Georgia uses the term “managerial official” instead of the MPC’s “high managerial agent,” defining it in terms of misbehavior by policymakers or supervisors. Two states (Iowa and North Dakota) define corporate criminal liability directly in terms of misbehavior by policymakers or supervisors. Four states (Arkansas, Delaware, Hawaii, and Utah) have statutes with no definition of “high managerial agent.” Ohio’s statute . . . adds a due-diligence defense to an MPC-style rule that has been interpreted to apply to misbehavior by policymakers. Cases from four states adopt MPC-like restrictive rules for

corporate criminal liability. They apply to misbehavior by supervisors (Michigan), policymakers (Minnesota and Idaho), and “officers” (Louisiana).
Id.

57 Neal Conan, *Craigslist Removes ‘Erotic Services’ Ads*, NPR: Talk of the Nation, (May 19, 2009), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=104310419>.

58 David Sarno, *States Want Erotic Ads Off Craigslist: Attorneys General Say the Website Hasn’t Done Enough to Stop the Posting of Ads for Prostitution*, L.A. Times, May 11, 2009, at B1.

59 Id. The office of the Attorney General of Illinois discovered that even when “a substantial number of complaints were registered simultaneously by officials and advocates, very few ads for sex services were taken down.” Id.

60 *People v. Raphael*, 72 N.Y.S.2d 748, 749 (N.Y. Magis. Ct. 1947) (internal citations omitted).

61 Id.

62 Id. at 752-53. Specifically, the Court held that there was no proof that the corporation profited or benefited from the illegal bonus. There is no proof that any officer of the corporation authorized or acquiesced in the acceptance of the illegal gratuities on the part of the superintendent or that any officer of the corporation shared in such gratuities. There is no proof that any officer of the corporation had knowledge of the illegal acts of the superintendent. There is no proof that the corporation was negligent in not discovering that its superintendent was exacting bonuses as a condition precedent to the rental of apartments.
Id.

63 But cf., *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 476 (N.Y. 1918) (holding that corporations have an affirmative duty to inquire into their business, and thus a lack of knowledge, where negligent, is no defense to criminal liability).

64 Yan, *supra* note 19; Alan Duke, *Official: Craigslist to Replace ‘Blatant Internet Brothel’*, CNN.com, May 13, 2009, <http://www.cnn.com/2009/TECH/05/13/craigslist.sex.ads/>.

65 See, e.g., *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

66 Id. at 1002.

67 Id. at 1004.

68 Id.

69 Id.

70 18 U.S.C. § 1465 (2009).

71 Id.

72 This Article argues that Craigslist should, for certain purposes, be treated as a ICP instead of an ICS, but this does not invalidate the action of the obscenity statute; courts have held that a single entity may be both an ICP and an ICS under Section 230. See, e.g., *Carafano v. MetroSplash.com, Inc.*, 207 F. Supp. 2d. 1055, 1065-68 (C.D. Cal. 2002).

73 *Roth v. United States*, 354 U.S. 476, 487 (1957).

74 *Miller v. California*, 413 U.S. 15, 24 (1973).

75 See, e.g., David J. Loundy, *Computer Information Systems Law and System Operator Liability*, 21 *Seattle Univ. L.R.* 1075, 1123-24 (1998).

76 *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 162 (3d Cir. 2005) (No verdict has been reached).

77 *United States v. Hair*, 178 Fed. Appx. 879, 885 (11th Cir. 2006).

78 Id. at 884.

79 Id. at 885.

80 Extreme Assocs., 431 F.3d at 151.

81 18 U.S.C. § 2 (2009).

82 18 U.S.C. § 2421 (2009); see also 18 U.S.C. § 2422 (2009).
Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.
Id.

83 18 U.S.C. § 2421 (2009).

84 18 U.S.C. § 1343 (2009).

85 Douglas Quenqua, *Recklessly Seeking Sex on Craigslist*, N.Y. Times, Apr. 17, 2009.

86 18 U.S.C. § 1343 (2009).

87 18 U.S.C. § 2 (2009).

88 It has been held that actual reliance is not an element of wire fraud. See, e.g., *Neder v. United States*, 527 U.S. 1, 24-25 (1999) (“The common-law requirements of ‘justifiable reliance’ and ‘damages,’ . . . plainly have no place in the federal fraud statutes.”) (citing *United States v. Stewart*, 872 F.2d 957, 960 (C.A.10 1989) (“[Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant’s misrepresentations”). On the other hand, courts have held that schemes to defraud require specific intent to defraud the objects of the deceit, not merely law enforcement. See, e.g., *United States v. Starr*, 816 F.2d 94, 100 (2d Cir. 1987) (“We have defined fraudulent intent as requiring a contemplated harm to the victim.”) (emphasis added). In jurisdictions where courts adopt this rule, showing a specific intent on the part of the poster to deceive interested parties would be all but impossible.

89 S.C. Code Ann. § 16-15-90 (2008).

90 S.C. Code Ann. § 16-15-90(2) (2008).

- 91 Although “knowingly” includes “actual knowledge of the contents of the subject matter of the material,” it also includes “knowledge of its contents which could have been gained by reasonable inspection, when the circumstances are such as would have put a reasonable man on inquiry. One may be found to knowingly violate the statute when it appears that he shuts his eyes to avoid knowing what would otherwise be obvious.” *State v. Thompkins*, 211 S.E.2d 549, 554 (S.C. 1975).
- 92 See Matthew Green, *Sex on the Internet: A Legal Click or an Illicit Trick?*, 38 Cal. W. L. Rev. 527, 530-31 (2002).
- 93 See Kinnard, *supra* note 22.
- 94 Kan. Stat. Ann. § 21-3513 (2009).
- 95 La. Rev. Stat. Ann. § 14:83.2 (2009).
- 96 Neb. Rev. Stat. § 28-802 (2009).
- 97 N.M. Stat. Ann. § 30-9-4 (West 2010).
- 98 N.D. Cent. Code § 12.1-29-02 (2009).
- 99 Ohio Rev. Code Ann. § 2907.22 (West 2010).
- 100 Utah Code Ann. § 76-10-1304 (2009).
- 101 Ariz. Rev. Stat. Ann. § 13-3204 (2010); see also Cal. Penal Code § 266h (West 2008) (“[A]ny person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person’s prostitution, . . . or who solicits or receives compensation for soliciting for the person, is guilty of pimping.”); Colo. Rev. Stat. § 18-7-206 (2009) (“Any person who knowingly lives on or is supported or maintained in whole or in part by money or other thing of value earned, received, procured, or realized by any other person through prostitution commits pimping.”); Fla. Stat. § 796.05 (2009) (“It shall be unlawful for any person with reasonable belief or knowing another person is engaged in prostitution to live or derive support or

maintenance in whole or in part from what is believed to be the earnings or proceeds of such person's prostitution.").

102 Ark. Code Ann. § 5-70-106 (2009).

103 Ga. Code Ann. § 16-6-11 (2009).

104 Me. Rev. Stat. Ann. tit. 17-A § 853 (2009).

105 Mich. Comp. Laws Ann. § 750.457 (West 2010).

106 Okla. Stat. Ann. tit. 21 § 1029 (2009).

107 Or. Rev. Stat. § 167.012 (West 2009).

108 18 Pa. Cons. Stat. Ann. § 5902 (West 2010).

109 S.C. Code Ann. § 16-15-100 (2009).

110 Tenn. Code Ann. § 39-13-515 (2009).

111 Vt. Stat. Ann. tit. 59 § 2632.

112 Me. Rev. Stat. Ann. tit. 17-A § 853 (2009).

113 Ga. Code Ann. § 16-6-11 (West 2009).

114 See *id.*

115 Green, *supra* note 50, at 202.

116 See, e.g., *Cianci v. N.Y. Times Publ'g Co.*, 639 F.2d 54, 68-69 (2d Cir. 1980).

- 117 See, e.g., *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 25, 1995).
- 118 “Internet content provider” is defined in the statute as “any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service” *Shiamili v. Real Est. Group of N.Y., Inc.*, 892 N.Y.S.2d 52, 53 (N.Y.A.D. 1 Dept., 2009). See 47 U.S.C. § 230(f)(3) (2009).
- 119 See 47 U.S.C. § 230(f)(2) (2009).
- 120 See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).
- 121 *Carafano v. MetroSplash.com, Inc.*, 207 F. Supp. 2d 1055, 1064-68 (C.D. Cal. 2002).
- 122 Restatement (Second) of Torts, § 558 (Elements Stated). The Supreme Court reformulated a libel action into six elements in *New York Times Co. v. Sullivan*, requiring that a plaintiff show:
(1) a defamatory communication, (2) a false statement of fact, (3) publication of the false message to a third person, (4) identification of the plaintiff, (5) depending on the private or public nature of the plaintiff, fault on the part of the libeler through either negligence or actual malice, and (6) that the defamation caused injury or harm to the plaintiff.
Sarah Jameson, Comment, Cyberharassment: Striking a Balance Between Free Speech and Privacy, 17 *CommLaw Conspectus* 231, 247 (2008) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280-81, (1964)).
- 123 *Cianci v. N.Y. Times*, 639 F.2d 54, 55 (2d Cir. 1980).
- 124 *Id.* at 55-56.
- 125 *Id.* at 60-61 (citing *Hoover v. Peerless Publ’ns, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978)).
- 126 *Id.* at 61.
- 127 *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 127 (2d Cir. 1984).

- 128 *Id.* at 139.
- 129 *Id.* (internal citations omitted) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).
- 130 See *O'Brien v. W. Union Tel. Co.*, 113 F.2d 539, 541-43 (1st Cir. 1940); see also *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135, 137 (4th Cir. 1950).
- 131 *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).
- 132 *Id.* at 138.
- 133 *Id.* at 141.
- 134 *Id.* at 140.
- 135 *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 25, 1995).
- 136 *Id.* at 5-6.
- 137 *Id.* at 10 (internal citations omitted).
- 138 *Id.* at 10-11.
- 139 *Id.* at 13.
- 140 Thomas D. Huycke, Note, *Licensed Anarchy: Anything Goes on the Internet? Revisiting the Boundaries of Section 230 Protection*, 111 W. Va. L. Rev. 581, 586 (2009).
- 141 *Id.*

142 47 U.S.C. § 230(a)(3) (2009).

143 See Huycke, *supra* note 141, at 586.

144 47 U.S.C. § 230 (2009).

145 Ziniti, *supra* note 18, at 584.

146 *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

147 *Id.* at 329.

148 *Id.*

149 *Id.* at 330.

150 *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

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

152 *Id.* at 335.

153 Huycke, *supra* note 141, at 589.

154 47 U.S.C. § 230(c)(1) (2009).

155 *Zeran*, 129 F.3d at 332 (holding distributor liability “merely a subset, or a species, of publisher liability”).

156 *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984) (internal quotations omitted).

157 Ziniti, *supra* note 18, at 586-87.

158 Some commentators have suggested that Zeran's broad interpretation of Section 230 expanded immunity "not just to publication-related claims, such as defamation, but to all claims not explicitly excluded in the statute," including criminal charges. Ziniti, *supra* note 18, at 587. This claim, however, is undercut by explicit statements to the contrary, both in the body of the statute itself, and in Zeran's progeny cases. 47 U.S.C. § 230(e)(1) (stating "Nothing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute."); Zeran, 129 F.3d at 330 ("While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States 'to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of a computer'" (internal citations omitted); Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1164 (9th Cir. 2008). ("The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet").

159 Doe v. SexSearch.com, 551 F.3d 412, 415 (6th Cir. 2008).

160 *Id.* at 416.

161 *Id.*

162 *Id.* The Circuit Court's decision not to adopt the lower court's interpretation of the CDA, especially in light of later cases which seem to attack the rationale of the district court, makes the validity of the lower court's holding ambiguous at best. See Fair Hous. Council of San Fernando Valley, 521 F.3d at 1175-76.

163 Barrett v. Rosenthal, 146 P.3d 510, 513-14 (Cal. 2006).

164 *Id.* at 514.

165 *Id.* at 517.

166 *Id.* at 527.

167 Carafano v. MetroSplash.com, Inc., 207 F. Supp. 2d 1055, 1061 (C.D. Cal. 2002).

168 Id. at 1061-62. Carafano's complaint is reminiscent of the hoax perpetrated by Tannenbaum,
and by Lori Drew. Dowdy & Chang, *supra* note 4; Patrick & Hunn, *supra* note 13.

169 Id. at 1061.

170 Id. at 1059-60.

171 Id. at 1066.

172 Id. at 1066-67 (internal quotations omitted).

173 Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1161 (9th Cir.
2008).

174 Id.

175 Id.

176 Id. at 1167.

177 Id. at 1162.

178 Id.

179 Id. at 1167-68.

180 Id. at 1175-76.

181 Chi. Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc., 519 F.3d 666, 668 (7th
Cir. 2008).

182 Id.

183 Id. at 671.

184 Id. at 668-71.

185 Tammerlin Drummond, *Craigslist was Certainly an Enabler*, *Contra Costa Times*, May 17, 2009. Although Craigslist has been deemed to be an ICS and not an ICP with respect to its "Housing" section, future litigants are not estopped from arguing that Craigslist is an ICP with respect to its "Erotic Services" section. Such a decision must be undertaken on a case by case basis because a website can be both an ICS and an ICP with respect to some portions of its content, and merely an ICS with respect to others. See *Carafano v. MetroSplash.com, Inc.*, 207 F. Supp. 2d 1055, 1065-68 (C.D. Cal. 2002).

186 See, e.g., *Dart v. Craigslist, Inc.*, 09 CV 1385 (N.D. Ill. 2009).

187 See, e.g., Yan, *supra* note 19.

188 See, e.g., Stone, *supra* note 23.

189 Complaint ¶¶ 23, 24, *Dart*, No. 09-CV-1385. These 21 categories represent the gender of the poster, and the gender of the clients for whom that poster is advertising. The categories are represented by letters and numbers: "w" stands for "woman," "m" stands for "man," "t" stands for "transgender," and "4" stands for "for." Thus, the category "w4m" solicits male clients for a female poster.

190 Id. at 28.

191 Id.

192 *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1162 (9th Cir. 2008).

193 *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). Although the defendant dating service in *SexSearch* did charge its users a fee, the Sixth Circuit explicitly declined to adopt the district court's analysis of the CDA, and thus the relevance of that decision is unclear. *Doe v. SexSearch.com*, 551 F.3d 412 (6th Cir. 2008).

194 47 U.S.C. § 230(a)(3) (2009).

195 47 U.S.C. § 230(b) (2009).

196 See, e.g., *Zeran*, 129 F.3d at 327.

197 *Chi. Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 668-69 (7th Cir. 2008).

198 See *id.*; see also *Zeran*, 129 F.3d at 333; *Barrett v. Rosenthal*, 146 P.3d 510, 517 (Cal. 2006).

199 47 U.S.C. § 230(c)(2)(A) (2009).

200 47 U.S.C. § 230(b)(4) (2009) (emphasis added).