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Peter Adamo

Pace University School of Law, padamo@law.pace.edu

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**CRAIGSLIST, THE CDA, AND
INCONSISTENT INTERNATIONAL
STANDARDS REGARDING LIABILITY FOR
THIRD-PARTY POSTINGS ON THE
INTERNET**

Peter Adamo¹

INTRODUCTION

Internet use has grown immensely in the last decade.² Reciprocally, crime and civil violations have grown along with it.³ The website Craigslist operates as an online classified advertisement tool allowing users to post and view ads pertaining to diverse subject matters. From political and social discourse to

¹ Peter Adamo is a candidate for a J.D. at Pace University School of Law and a graduate of Montana State University.

² See *Internet Growth Statistics: Today's Road to eCommerce and Global Trade*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited Jan. 14, 2010).

³ See 2008 INTERNET CRIME REPORT, INTERNET CRIME COMPLAINT CENTER (2008), http://www.ic3.gov/media/annualreport/2008_IC3Report.pdf (reporting a 33.1% increase in complaints received between 2007 and 2008).

unlocking untapped sources of revenue for its users,⁴ Craigslist's positive qualities are enumerable. Even so, from murder to defamation, Craigslist has become a recurring topic in contemporary discourse so much that it has actually spawned a blog focused solely on crime associated with it as well as a Lifetime telefilm entitled *The Craigslist Killer*, which brought in the highest ratings of similar films in two years for the Lifetime network.⁵ Despite widespread misuse, sites like Craigslist almost never bear any responsibility for the harm that occurs through them.⁶ This is because Federal legislation entitled Section 230 of the Communications Decency Act ("CDA") immunizes publishers of third party content.⁷ As Craigslist continues to grow nationally and internationally,⁸ there is growing pressure to do more to regulate it and similar sites.⁹ Yet with inconsistent international legal standards pertaining to content posted by third parties¹⁰ and tension from a conflicting aim of encouraging free-flowing information, the international community and the United States are hamstrung

⁴ 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 BERKELEY TECH. L.J. 583, 591 (2008) (citing Dealbook, *Craigslist Meets the Capitalists*, N.Y. TIMES, Dec. 8, 2006, <http://dealbook.blogs.nytimes.com/2006/12/08/craigslist-meets-the-capitalists/>).

⁵ Mike Reynolds, *'Craigslist Killer' Telefilm Premiere Buys Lifetime 5.4 Million Viewers*, MULTICHANNEL NEWS (Jan. 4, 2011), http://www.multichannel.com/article/461773-Craigslist_Killer_Telefilm_Premiere_Buys_Lifetime_5_4_Million_Viewers.php.

The FBI found more than 2,800 ads for child prostitution in a recent sting. *Lawsuit Accuses Craigslist of Promoting Prostitution*, CNN, Mar. 5, 2009, <http://www.cnn.com/2009/CRIME/03/05/craigs.list.prostitution/index.html>.

⁶ See, e.g., *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009); Chicago Lawyers' Comm'n for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008) (*Chicago Civil Rights II*); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 U.S. Dist. LEXIS 53246 (S.D.N.Y. June 15, 2009); but see *Fair Housing Council v. Roommates.com, LLC.*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

⁷ 47 U.S.C. § 230 (2006).

⁸ Craigslist is now present in more than 70 countries and is in several languages. See Craigslist, fact sheet, <http://www.craigslist.org/about/factsheet> (last visited Jan. 14, 2010).

⁹ Kenneth M. Kambara, THICKCULTURE (Sept. 7, 2010, 6:13 PM), <http://thesocietypages.org/thickculture/2010/09/07/craigslist-bans-adult-services-under-pressure-making-matters-worse/>.

¹⁰ Scott Sterling, Comment, *International Law of Mystery: Holding Internet Service Providers Liable for Defamation and The Need for a Comprehensive International Solution*, 21 LOY. L.A. ENT. L. REV. 327, 328 (2001).

in their abilities to address this growing source of crime and lawlessness.

This Comment explores the nature and purpose of the CDA, the legislative upbringing, and the application of the CDA to Craigslist. It compares the CDA to approaches taken abroad through legislation and judicial proceedings. It explains, contrary to the one other commentator to broach the subject matter, how the CDA continues to provide robust protection to Craigslist.¹¹ Finally, it explores potential avenues for redrafting the CDA as well as the difficulties and trade-offs associated with implementing such change.

I. CDA BACKGROUND

A. *Cubby, Inc. v. CompuServe, Inc*

Prior to the enactment of the CDA, courts applied traditional common law defamation standards to third party internet postings. Publishers of content were held to a higher standard than mere distributors like telephone and telegraph companies.¹² As such, hosting internet service providers (“ISPs”) could be held liable upon notice of and failure to remove defamatory content.¹³ *Cubby, Inc. v. CompuServe, Inc.* was the first case to tangle with the issue of imposing liability on an ISP regarding content posted by a third party.¹⁴ There, the ISP CompuServe operated a bulletin board forum where third party postings were alleged to have defamed the plaintiffs.¹⁵ CompuServe moved for summary judgment on the grounds that it was a distributor rather than a publisher and thus could not be held liable under common law defamation standards unless it either knew or had reason to know the

¹¹ *Contra* John E. D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, A Case Study*, 15 J. TECH. L. & POL’Y 85 (2010) (contending Craigslist may be subject to civil and criminal liability).

¹² *O’Brien v. W. Union Tel. Co.*, 113 F.2d 539, 541 (1st Cir., 1940).

¹³ *See* Bryan J. Davis, Comment, *Untangling The “Publisher” Versus “Information Content Provider” Paradox of 47 U.S.C. § 230: Toward A Rational Application of the Communications Decency Act in Defamation Suits Against Internet Service Providers*, 32 N.M. L. REV. 75, 78 (2002).

¹⁴ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

¹⁵ *Id.* at 138.

third party post was defamatory.¹⁶ The court agreed holding that CompuServe could not be held liable as a publisher because it exercised no editorial control over the bulletin board.¹⁷

B. Stratton Oakmont, Inc. v. Prodigy Services, Co.

A few years later, the line between publisher and distributor was further tested by the New York state court decision *Stratton Oakmont, Inc. v. Prodigy Services*.¹⁸ There, the ISP Prodigy operated a similar type of bulletin board and a defamatory post was created by a third party. However, in this case, Prodigy employed board leaders and installed screening software to monitor and occasionally censor notes posted on the bulletin board. According to the court, this meant Prodigy was no longer a distributor of the content and instead became a liable publisher.¹⁹ Importantly, Congress cited the overruling *Stratton Oakmont* as a reason for drafting the CDA.²⁰

C. Legislative History

According to Congress, the *Stratton Oakmont* case created disincentives for an ISP to filter out potentially obscene content,²¹ a premise that has since been called into question.²² The

¹⁶ *Id.* at 139.

¹⁷ *Id.* at 140.

¹⁸ *Stratton Oakmont, Inc. v. Prodigy Services, Co.*, No. 31063194, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

¹⁹ *Id.* at 5.

²⁰ “In the Conference Report [to create the CDA], the conferees specifically stated that they were overturning *Stratton*.” Chicago Lawyers' Comm'n For Civil Rights Under the Law, *Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 697 (N.D. Ill. 2006) (*Chicago Civil Rights I*) (citing H.R. Conf. Rep. No. 104-458, at 194 (1996); see also Ziniti, *supra* note 4, at 584.

²¹ Eric Weslander, Comment, *Murky “Development”: How The Ninth Circuit Exposed Ambiguity Within The Communications Decency Act, And Why Internet Publishers Should Worry [Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)]*, 48 WASHBURN L. J. 267, 274 (2008) (citing 141 Cong. Rec. 16025 (1995) (statement of Sen. Coats); see also *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

²² Broder Kleinschmidt, *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*, 18 INT'L J.L. & INFO. TECH. 4, 355 (2010) (citing Internet Watch Foundation, 2006 Half Yearly Report, 5, available at http://www.iwf.org.uk/documents/20060803_2006_bi-annual_report_v-7_final4.pdf) (suggesting that the CDA creates a lack of incentive to filter out hosted illegal content because the host benefits directly from the arrange-

decision was framed as creating “an all-or-nothing situation: either do not screen any third-party postings and avoid being treated as a publisher and open to liability; or screen every message and risk liability if a defamatory survives the screening process.”²³ Senator Exon of Nebraska, in sponsoring the CDA, sought to protect children from online obscenity by creating a statutory defense for the good faith efforts of ISPs to restrict access to questionable content as well as to create penalties for spreading obscenities online.²⁴ While passing easily, the CDA was not without its foes in the Senate. Senator Leahy of Vermont expressed concern about giving the federal government such a broad role in regulating the web.²⁵ Additionally, Senator Feingold of Wisconsin, questioning its constitutionality, was concerned about the chilling effect on free speech the CDA might have in regards to its creation of penalties for spreading obscenities.²⁶ Senator Feingold's concerns proved valid following the Supreme Court's decision in *Reno v. ACLU*, which held that portions of the CDA, § 223 (the Exon Amendment), prohibiting transmissions of obscene or indecent communication, created an unconstitutional, content-based blanket restriction on speech in violation of the 1st Amendment.²⁷

ment, which has contributed to 51.1% of worldwide child abuse content being traced to hosts in the U.S. according to one study conducted by a U.K. organization called IWF). Courts have also latched on. The court in *Doe v. GTE Corp.* commented on the in-apt naming of § 230 of the CDA (Protection for Good Samaritan Blocking and Screening of Offensive Material) noting that “its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.” 347 F.3d 655, 656 (7th Cir. 2003). The court explained that because of the significant outlay of funds for an ISP to monitor content as well as the loss of revenues from filtered customers, it is economically more desirable for ISPs under the current law to do nothing. *Id.* at 660. *But see* Ziniti, *supra* note 4, at Fn. 123. (arguing businesses do have an incentive to keep subscribers happy and the content legal).

²³ Zac Locke, Comment, *Asking For it: A Grokster-Based Approach to Internet Sites That Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151, 156 (2008).

²⁴ 141 Cong. Rec. S. 1944 (1995) (statement of Sen. Exon).

²⁵ *Id.* at 275 (citing 141 Cong. Rec. 16009-10 (1995) (statement of Sen. Leahy)); *see also* Weslander, *supra* note 18, at 276 (citing 141 Cong. Rec. 16009-10, 16026 (1995) (statement of Sen. Leahy) (noting Exon's proposal passed in the Senate 84 to 16)).

²⁶ 141 Cong. Rec. S. 8334-35 (1995) (statement of Sen. Feingold).

²⁷ *See Reno v. ACLU*, 521 U.S. 844, 874 (1997).

What remains of the CDA does not regulate obscene content consistent with its purpose as introduced by Senator Exon.²⁸ Instead, the surviving portion of the CDA, the Cox-Wyden Amendment or § 230, merely kept internet content services (ICS or ISP) from being considered publishers of third party content under law.²⁹

II. THE CDA

While some courts have suggested that the CDA is worded more like a definition,³⁰ most courts have described its effect to be that of a statutory safe-harbor or immunity.³¹ There are three elements, all of which must be met, before an ISP qualifies for the CDA safe-harbor.³² First, the safe-harbor is only available to ISPs and users of service provided by an ISP.³³ Secondly, the safe-harbor only provides immunity for the ISP for liability based on the ISP having acted as a publisher or speaker ("ICP").³⁴ Finally, the immunity only applies to content

²⁸ Commenting on the legislative history of the Cox/Wyden Amendment, Robert Cannon stated:

When the House voted on its version of the Telecommunications Bill, the House gave what appeared to be a resounding rejection of the CDA [§ 223] and any attempt to meddle with the Internet. The younger House, having more experience with the Internet, wanted nothing of the CDA and sought to distance itself from the appearance of the regulatory hungry federal government ready to trample the prized freedoms found in cyberspace.

Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 67 (1997). While according to Robert Cannon, the House disapproved of the CDA as presented by the Senate, "[t]he Cox/Wyden Amendment specifically and curiously stated that '[n]othing in this section shall be construed to impair the enforcement of § 223 of Title 47 [the unconstitutional Exon Amendment].'" *Id.* at 68.

²⁹ Telecommunications Act of 1996, Pub. L. No. 104-140, 110 Stat. 133 (Cox-Wyden Proposal codified at 47 U.S.C. § 230). The Cox/Wyden Amendment was greatly supported. 141 Cong. Rec. H8471 (Westlaw). 141 Cong. Rec. H 8460-01, 1995 WL 460967, at *28 (1995).

³⁰ *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003).

³¹ *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1195 (N.D. Cal. 2009) (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). As a procedural matter, the CDA must be plead by a defendant as an affirmative defense or it will be considered waived. *Therion, Inc. v. Media by Design, Inc.*, 2010 WL 5341925, at 10 (E.D.N.Y., 2010).

³² *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009).

³³ *Id.* (citing CDA fl 230(c)(1)).

³⁴ *Id.*

created by a third party and not to content created by the ISP itself.³⁵

The effect of the CDA's immunity applies most generally to protect ISPs "against any state law cause of action that would hold ISPs liable for information originating from a third party."³⁶ The scope of the CDA's protection for ISP's is broad when the content comes from third parties³⁷ resulting from "courts adopting a relatively expansive definition of 'interactive computer service' [or ISP] and a relatively restrictive definition of information content provider [ICP]."³⁸ The CDA has been interpreted to provide ISP's with wide design and display discretion in regards to how the third party content is used.³⁹ Even when an ISP makes minor modifications to content provided by a third party prior to posting, the CDA has in some cases provided immunity.⁴⁰ While drafted in the context of defamation, to date the immunity has applied to all causes of actions not

³⁵ *Id.*

³⁶ *Doe v. Franco Prods.*, 2000 WL 816779, at *4 (N.D. Ill., 2000).

³⁷ *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *but see Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

³⁸ *Goddard*, 640 F. Supp. 2d at 1196 (citing *Carafano v. Metro-splash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)).

³⁹ *See Ziniti*, *supra* note 4, at 611 (citing *Donato v. Moldow*, 865 A.2d 711, 725-26 (N.J. Super. Ct. App. Div. 2005) (plaintiff's allegation that defendant controlled and shaped the tone of content by choosing to display and highlight content to the exclusion of other content insufficient to make the ISP an ICP.)) *See also Id.* at 592 (citing *Universal Comm'n Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (allegation website enabled posters to spread false information more credibly through its design characterized by plaintiff as culpable assistance held insufficient to circumvent CDA immunity).

⁴⁰ *Chicago Civil Rights I*, 461 F. Supp. 2d 681, at 695 (N.D. Ill. 2006) (quoting *Ben Ezra, Weinstein & Co. v. AOL, v. AOL, Inc.*, 206 F.3d 980, 985 (10th Cir. 2000) ("the defendant's editing of stock information provided by a third party did not transform it into an information content provider.")). *See also Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (minor alterations to e-mail insufficient for ISP to be considered an ICP). *But cf. Doe v. City of New York*, 583 F. Supp. 2d 444 (S.D.N.Y., 2008) (defendant's addition of his own tortious speech to third-party content made him an ICP). *Fair Housing Council v. Roommates.com, LLC.*, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc) (where ISP options limiting the capacity of third party to create content to illegal content, the ISP is said to have induced this content and thus is considered an ICP regardless of whether the ISP actually manipulated the content in any way).

expressly excluded by the CDA itself.⁴¹ Those laws expressly excluded from the CDA's defense include the Electronic Communications Privacy Act of 1986,⁴² any federal criminal statute,⁴³ any state law consistent with the CDA, and any law pertaining to intellectual property.⁴⁴ While CDA-consistent state criminal laws are left unaffected by the CDA, currently no violation of any state criminal law has eroded the immunity.⁴⁵

⁴¹ *Doe v. Sex Search.com*, 502 F. Supp. 2d 719, 724 (N.D. Ohio 2007). *See also Carafano*, 339 F.3d at 1123 (“reviewing courts have treated Section 230 immunity as quite robust.”); *Beyond Sys. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (applying Section 230 to a claim under the Maryland Commercial Electronic Mail Act); *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) (applying the CDA to a claim based on Title II of the Civil Rights Act of 1964).

⁴² E.C.P.A., 18 U.S.C. § 2510 (1986).

⁴³ While Federal criminal statutes are excluded by the CDA, private litigants are not permitted to bring civil claims based on alleged criminal violations, leaving no private right of action. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009) (citing *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *22 (E.D. Tex. 2006) (“holding that a civil claim . . . did not constitute “enforcement” of a criminal statute for purposes of 230(e)(1).”)).

⁴⁴ § 230(e)(2) (1998).

⁴⁵ *See, e.g., People v. Gourlay*, No. 278214, 2009 WL 529216, at *3 (Mich. App. Mar. 1, 2009); *Voicenet Commc'n., Inc. v. Corbett*, No. 04-1318, 2006 WL 2506318, at *4 (E.D. Pa. 2006). “The defendants argued that the CDA allows for the operation of state criminal laws by relying on the first sentence of subsection (e)(3), which provides that a state may enforce ‘any State law that is consistent with [the CDA].’” This argument is inapposite because the plaintiffs’ claim is that the enforcement of Pennsylvania’s child pornography law against them is not consistent with the CDA, as they did not provide such pornography themselves.”

Some attempts to claim a state statute is consistent with the CDA have misinterpreted the statute. In explaining how *Craigslist* would not be protected by the CDA if charges were filed, state Attorney General *McMaster* does not explain how South Carolina law, particularly state prostitution laws, are consistent with the CDA. Instead, *McMaster* expresses that these state laws are consistent with the Mann Act, a federal law which prohibits interstate or foreign commerce for immoral purposes. *Motion to Dismiss ¶¶ 1-4, Craigslist, Inc. v. McMaster*, No. 2:2009cv01308 (D. S.C. 2009). Here, *McMaster* is erroneously suggesting that CDA immunity applies only to state law that is consistent with any federal law rather than specifically consistent with the CDA. This, according to *Dart* is not the proper interpretation of the CDA because it would incorrectly hold *Craigslist* liable as a publisher of postings of third parties. *Dart*, 665 F. Supp. 2d at 967-68.

III. CASES CONSTRUING THE CDA

A. *Zeran v. AOL*

The first case to address the scope of the CDA was *Zeran v. AOL*.⁴⁶ There, an anonymous individual posted defamatory messages on an online bulletin board operated by AOL suggesting the plaintiff was selling offensive T-shirts related to the Oklahoma City bombing.⁴⁷ Plaintiff asked AOL to remove the post and to print a retraction.⁴⁸ The initial posts were removed without a retraction. By the following day, however, new posts relating substantially the same content were available.⁴⁹ Despite assuring the plaintiff the posts would be removed, AOL was granted CDA immunity against the claim they unreasonably delayed the removal of the defamatory posts.⁵⁰ The *Zeran* court elaborated that Congress' purpose in enacting § 230 was out of a concern about chilling freedom of speech with expansive tort liability "in the new and burgeoning Internet medium."⁵¹ The court held that the CDA bars any cause of action against an ISP for content posted by a third party,⁵² noting that holding AOL liable here would subject them to potential liability every time they received notice of a potentially defamatory statement.⁵³

B. *Cutting back the broad immunity, but only slightly*

Zeran was followed by an extensive line of cases affirming the same principles and applying them to other causes of action.⁵⁴ Later on, Congress also affirmed the correctness of the

⁴⁶ *Chicago Civil Rights I*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006).

⁴⁷ *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 328.

⁵¹ *Id.* at 330.

⁵² *Id.* at 333.

⁵³ *Id.* at 330.

⁵⁴ See e.g., *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

Zeran interpretation of the CDA.⁵⁵ Yet, even so, more recent cases have cut back the broad immunity, suggesting the *Zeran* interpretation overstates the effect of the CDA.⁵⁶ Commentators, however, disagree as to whether the CDA has actually been affected.⁵⁷ In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc v. Craigslist, Inc*, Craigslist was alleged to have been responsible for Federal Fair Housing law violations by allowing discriminatory housing postings on its website.⁵⁸ In defense, Craigslist asserted, and was ultimately granted immunity under the CDA.⁵⁹ Despite granting the immunity, the court noted the CDA limits "the immunity afforded under § 230 to those claims that require 'publishing' as an essential element—as opposed to *any* cause of action—[which would] give effect to the different language in Sections 230(c)(1) and (c)(2)."⁶⁰ While the court here suggests the plain meaning of the CDA is something less than an absolute grant of immunity suggested by *Zeran*, it also noted that future plaintiffs will still have difficulty bringing actions against an ISP.⁶¹

Consonant with the dicta from the *Chicago Civil Rights* case as to the proper reading of the CDA, the decision in *Fair Housing Council v. Roommates.com* dealt with the line in which content posted by a third party becomes so influenced by the ISP that the ISP then becomes an ICP as well.⁶² According to *Zeran*, content posted by third parties is not actionable against the ISP.⁶³ In contrast, the *Roommates.com* court clarified that "[a] website . . . will not automatically enjoy immunity so long as the content originated with another information content provider."⁶⁴ In this case, the defendant website matched

⁵⁵ H.R. Rep. No. 107-449, at *13 (2002).

⁵⁶ *Chicago Civil Rights I*, 461 F. Supp. 2d 681, 693(N.D. Ill. 2006).

⁵⁷ See generally, Ziniti, *supra* note 4 (contending the CDA covers not just defamation but all claims not explicitly excluded in the statute including criminal charges); but see Larkin, *supra* note 11 (contending the CDA has been cut back substantially, so much that Craigslist may now be liable both criminally and civilly).

⁵⁸ *Chicago Civil Rights I*, 461 F. Supp. 2d at 686.

⁵⁹ *Id.* at 687.

⁶⁰ *Id.* at 697.

⁶¹ *Id.* at 698.

⁶² *Fair Housing Council v. Roommates.com, LLC.*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

⁶³ See *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

⁶⁴ *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198 (N.D. Cal. 2009)

people renting spare rooms with people looking for rooms.⁶⁵ As a requirement of using the website, users created profiles and submitted content and criteria conveying the user's desired characteristics of potential roommates.⁶⁶ Holding the ISP liable as an ICP for Federal Fair Housing violations arising from third party content, the court determined the discriminatory preferences posted by the third parties resulted from the defendant's role in inducing those parties to express illegal discriminatory preferences through the service's restrictive application criteria.⁶⁷

While at first glance, the *Roommates.com* court appears to have cut back CDA's reach significantly, a more liberal reading suggests the mere creation of an opportunity to post illegal content may make the ISP an ICP. Decisions following the *Roommates.com* case have characterized the decision as a narrow exception noting that "even if a particular tool 'facilitates the expression of information, it generally will be considered' neutral so long as users ultimately determine what content to post..."⁶⁸ To reach the exception, the website needs to have materially contributed to the unlawfulness requiring the ISP to have had a "[s]ubstantially greater involvement . . . such as the situation in which the website elicits the allegedly illegal content and makes aggressive use of it in conducting its business."⁶⁹ This standard is met only where the ISP literally forces third parties to post illegal content as a condition of using its services.⁷⁰ Thus, the *Roommates.com* exception is not as signif-

(citing *Roommates.com*, 521 F.3d at 1171).

⁶⁵ *Roommates.com*, 521 F.3d at 1161 (9th Cir. 2008).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1165.

⁶⁸ *Goddard*, 640 F. Supp. 2d at 1197 (citing *Roommates.com* at 1172).

⁶⁹ *Goddard*, 640 F. Supp. 2d at 1196 (citing *Roommates.com*, 521 F.3d at 1167-68). (citing *Roommates.com* at 1172).

⁷⁰ See *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198 (citing *Roommates.com*, 521 F.3d at 1171). *But cf.* Larkin, *supra* note 11 (contending the CDA has been cut back substantially, so much that Craigslist may now be liable both criminally and civilly). See also Eric Goldman, *Ninth Circuit Screws Up 47 USC 230--Fair Housing Council v. Roommates.com*, TECHNOLOGY & MARKETING LAW BLOG (May 15, 2007), <http://blog.ericgoldman.org/archives/2007/05/> (characterizing the decision as a significant exception to 230's coverage).

icant as suggested given that websites that allow users to post illegal content neutrally will still be protected.

IV. CRAIGSLIST LIABILITY

A. Protection under the CDA

Although disputed by commentators and legal officials, Craigslist is a neutral ISP, unlike Roommates.com.⁷¹ Applying the three CDA elements (*supra* Section II), courts have determined that Craigslist is an ISP;⁷² Craigslist does not also act as an ICP;⁷³ and the content on Craigslist originates from third parties.⁷⁴

Foreclosing the possibility of covering a lawsuit against Craigslist with the *Roommates.com* exception, the court in *Dart v. Craigslist* noted that “[n]othing in the service Craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, Craigslist does not offer a lower price to people who include discriminatory state-

⁷¹ See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 966 (N.D. Ill. 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.” While procedurally correct, the statement is factually inaccurate at least in some regards considering Sherrif Dart unsuccessfully alleged Craigslist was an ICP in regards to unlawful advertisements within Craigslist’s adult service category. *Id.* at 968. See also Tammerlin Drummond, *Craigslist Was Certainly an Enabler*, CONTRA COSTA TIMES, May 17, 2009. *But cf.* Larkin, *supra* note 11; News Release, Office of Attorney General Henry McMaster, Craigslist Told to Remove Illegal Content in Ten Days of Face Possible Prosecution (May 5, 2009), available at http://www.scattorneygeneral.org/newsroom/pdf/2009/craigslist_release.pdf; *Lawsuit Accuses Craigslist of Promoting Prostitution*, CNN (Mar. 5, 2009), <http://www.cnn.com/2009/CRIME/03/05craigs.list.prostitution/index.html> (“Craigslist is the single largest source of prostitution in the nation,” Dart said.”). See also Tammerlin Drummond, *Craigslist Was Certainly an Enabler*, Contra Costa Times, May 19, 2009.

⁷² *Chicago Civil Rights I*, 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006). See also *Universal Commun. Sys. v Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (noting that websites are ISP’s because they enable computer access by multiple users to a computer server that hosts the website within the meaning of 47 U.S.C. § 230(f)(2)).

⁷³ *Chicago Civil Rights I*, 461 F. Supp. 2d at 698.

⁷⁴ *Id.*

ments in their postings.”⁷⁵ In *Dart*, the Sheriff of Cook County (Chicago) claimed:

Craigslist plays a more active role than an intermediary or a traditional publisher. He claims that Craigslist causes or induces its users to post unlawful ads – by having an adult services category with subsections like 'w4m' [women for men] and by permitting its users to search through the ads 'based on their preferences.’”⁷⁶

Applying the approach to inducement used in later decisions interpreting *Roommates.com*,⁷⁷ the court in *Dart* disagreed with the Sheriff stating “[t]he phrase 'adult,' even in conjunction with 'services,' is not unlawful in itself nor does it necessarily call for unlawful content.”⁷⁸ The court then went on to distinguish clearly illegal content from the categorization of topics that occurs on Craigslist, noting “[a] woman advertising erotic dancing for male clients ('w4m') is offering an 'adult service,' yet this is not prostitution.”⁷⁹ The court in *Dart* further explained that Craigslist's repeated warnings prohibiting illegal uses of its services further supports Craigslist's claim that they do nothing to induce illegal content.⁸⁰ Therefore, noting the *Roommates.com* exception's inapplicability, from defamation to claims yet to be discussed, Craigslist is unlikely to be held liable under any civil law theory under the CDA.

1. Negligence

In *Gibson v. Craigslist*, the plaintiff attempted to hold Craigslist liable for negligence after he was shot by a handgun illegally purchased through the site.⁸¹ While the plaintiff contended he was merely attempting to hold Craigslist liable as a business, like other failing attempts to plead around the CDA,

⁷⁵ *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 966 (N.D. Ill. 2009).

⁷⁶ *Dart*, 665 F. Supp. at 968.

⁷⁷ *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198 (citing *Roommates.com*, 521 F.3d at 1171).

⁷⁸ *Dart*, 665 F. Supp. 2d at 968.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 U.S. Dist. LEXIS 53246, at *1 (S.D.N.Y. June 15, 2009).

the court characterized the plaintiff's complaint as artful pleading on the grounds that the plaintiff improperly sought to hold Craigslist liable as a publisher.⁸² Indeed, the *Gibson* court stated the "CDA provides an absolute bar to any cause of action that would make an interactive service provider, like [C]raigslist, liable for third-party content posted on the internet through its service."⁸³ Even if Craigslist had notice there was something unlawful about a particular third party posting, the CDA would still immunize Craigslist for any claims of unreasonable delay of removing the content.⁸⁴

2. Public nuisance

Craigslist is unlikely to be held liable as a public nuisance, an unreasonable interference with a general public right.⁸⁵ In applying the CDA to the website in question, the court in *Doe v. GTE* mentioned specifically that a "plaintiffs' invocation of nuisance law gets them nowhere; the ability to misuse a service that provides substantial benefits to the great majority of its customers does not turn that service into a 'public nuisance'."⁸⁶ Having already been tested on this ground, the court in *Dart v. Craigslist* easily rejected allegations that Craigslist facilitated prostitution and was thereby a public nuisance.⁸⁷

3. Promissory conduct

The Ninth Circuit's decision in *Barnes v. Yahoo* provides a potential, albeit unlikely, angle for establishing liability upon Craigslist.⁸⁸ There, the court found Yahoo! could be held liable for a claim normally barred by the CDA sounding in negligence

⁸² *Id.* at *8. For more cases demonstrating that artful pleading around the CDA will not be allowed, *see infra* note 112.

⁸³ *Id.* at *2.

⁸⁴ Ian C. Ballon, *The Good Samaritan Exemption and The CDA, Excepted From Chapter 37 (Defamation and Torts) of E-Commerce and Internet Law*, 978 PLI/Pat 515 (2009) (citing Zeran, 129 F.3d at 332-22); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (Cal. 2006).

⁸⁵ RESTATEMENT (SECOND) OF TORTS § 821B(1) (1974); *cf.* Larkin, *supra* note 11.

⁸⁶ *Doe v. GTE Corp.*, 347 F.3d 655, 662 (7th Cir. 2003).

⁸⁷ *Dart*, 665 F. Supp. at 967-68 (N.D. Ill. 2009) (stating "Craigslist does not 'provide' [information for prostitution], its users do").

⁸⁸ *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009).

for failure to remove unauthorized third party content. Yahoo! was alleged to have breached an oral contract to remove the content by engaging in certain promissory conduct giving rise to liability under a theory of promissory estoppel.⁸⁹ In holding Yahoo! liable, the court reasoned that under a contract claim, the plaintiff is suing the defendant as a counter-party as opposed to seeking to hold the ISP liable as an ICP.⁹⁰

In *Barnes*, the court noted that Yahoo! would likely have avoided contract liability by simply disclaiming any intention to be bound, even if it actually attempted to help a particular person.⁹¹ Given Craigslist's extensive use of such disclaimers, a promissory theory claim based on individual interactions Craigslist has with its users is unlikely.⁹² However, there may be another basis. Following extensive pressures from at least 43 state attorneys general across the country, notably Richard Blumenthal from Connecticut⁹³ and Henry McMaster of South Carolina,⁹⁴ Craigslist announced it was taking new measures to combat unlawful activity and improve public safety on its site.⁹⁵ Yet, as to whether such an announcement could be considered promissory conduct, the court in *Barnes* noted the alleged "promise must 'be as clear and well defined as a promise

⁸⁹ *Goddard*, 640 F. Supp. 2d 1193, 1200 (N.D. Cal 2009) (citing *Barnes*, 570 F.3d at 1102-03). The *Barnes* outcome stands at odds with the factual scenario in *Zeran* wherein AOL agreed to remove the defamatory content in question and was still protected by the CDA. See *Zeran*, 129 F.3d at 328.

⁹⁰ *Barnes*, 570 F.3d at 1107, 1109; *Goddard*, 640 F. Supp. 2d at 1200.

⁹¹ *Barnes* 570 F.3d at 1108.

⁹² See *Terms of Use*, CRAIGSLIST, <http://www.craigslist.org/about/terms-of-use> (last visited Jan. 18, 2010). Craigslist users agree, as a condition of using its services, to indemnify and hold Craigslist harmless for any content submitted. *Id.* ¶ 17.

⁹³ See Press Release, State of Connecticut Attorney General's Office, CT Attorney General, 39 Other States Announce Agreement With Craigslist, NCMEC to Crack Down on Erotic Services Ad Content (Nov. 6, 2008), available at <http://www.ct.gov/ag/cwp/view.asp?A=2795&Q=427448> (last visited February 12, 2011).

⁹⁴ Press Release, Office of Attorney General Henry McMaster, Craigslist Told to Remove Illegal Content in Ten Days of Face Possible Prosecution (May 5, 2009), http://www.scattorneygeneral.org/newsroom/pdf/2009/craigslist_release.pdf (last visited February 12, 2011).

⁹⁵ Craigslist, Inc., Joint Statement (Nov. 6, 2008), <http://www.tn.gov/attorneygeneral/cases/craigslist/craigsliststatement.pdf> (last visited February 12, 2011).

that could serve as an offer, or that otherwise might be sufficient to give rise to a traditional contract supported by consideration."⁹⁶ Additionally, to be enforceable, it would need to be clear from the parties' manifestations that they intended the agreement to be enforceable.⁹⁷ Although potentially a question of fact, it seems unlikely this announcement could be used as a basis for a promissory claim in light of the parties' countervailing manifestations and the absence of the requisite clarity.⁹⁸ Furthermore, it appears Craigslist did actually perform all measures included therein.⁹⁹

C. Craigslist is unlikely to be held guilty of any criminal offense

1. Aiding and Abetting

Websites have no duty to monitor third party content whatsoever.¹⁰⁰ Thus, it is unlikely Craigslist could be found

⁹⁶ *Barnes*, 570 F.3d at 1108.

⁹⁷ *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1200-01.

⁹⁸ Craigslist maintains this announcement was voluntary and further Craigslist does not even refer to this scenario as an agreement or a promise but rather as a 'joint public statement'. See Plaintiff Craigslist's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, at *13, *Craiglist, Inc. v. McMaster*, No. 2:2009cv01308 (D. S.C. Aug. 31, 2009). Furthermore, the announcement is based in the past tense as in actions Craigslist has already undertaken as opposed to conduct it will undertake in the future. See Joint Statement, *supra* note 95. Further limiting this rather weak theory's scope of potential liability, "a third party is not an intended beneficiary of an agreement unless the promisee intends the agreement to benefit the third party." *Goddard*, 640 F. Supp. 2d at 1201 (citing *Souza v. Westlands Water Dist.*, 135 Cal. App. 4th 879, 893, (Cal. Ct. App. 2006)). Therefore, even if the Attorney Generals' agreement or 'joint statement' created an enforceable promise, however unlikely, enforcing that promise would be limited to those 43 state attorney generals rather than plaintiffs at large.

⁹⁹ Compare Joint Statement, *supra* note 95; with e.g., Brad Stone, *Craigslist Agrees to Curb Sex Ads*, N.Y. TIMES, Nov. 6, 2008, <http://www.nytimes.com/2008/11/07/technology/internet/07craigslist/html>; Craigslist, *inter alia*, modified their content hosting practices by requiring that erotic services advertisers provide a phone number as well as credit card information to confirm users' identities. See also *Flags and Community Moderation*, CRAIGSLIST http://www.craigslist.org/about/help/flags_and_community_moderation (last visited Jan. 12, 2010); *Craiglist, Inc. v. Mesiaab*, 2010 WL 5300883 (N.D. Cal. Nov. 15, 2010) (example of actions taken against parties providing services to circumnavigate Craigslist's Terms of Service).

¹⁰⁰ *Stoner v. Ebay, Inc.*, No. 305666, 2000 Extra LEXIS 156 (Extra 2000).

guilty of aiding and abetting the crime that occurs through it.¹⁰¹ In *Doe v. GTE*, wherein the plaintiff unsuccessfully alleged GTE was liable for aiding and abetting a website featuring illegally obtained hidden camera footage it hosted,¹⁰² the court noted that while “[GTE] does profit from the sale of server space and width . . . these are lawful commodities whose uses overwhelmingly are socially productive.”¹⁰³ Given the large amount of legitimate commerce and exchange of ideas that occurs on Craigslist, this point is particularly relevant.¹⁰⁴ Case law applied to Craigslist is consistent. Building on the precedent set in *GTE*, the court in *Dart v. Craigslist* stated that “[i]ntermediaries [like Craigslist] are not culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts.”¹⁰⁵

Yet, despite this precedent, commentator John E. D. Larkin¹⁰⁶ asserts that Craigslist's new policy of collecting a nomi-

¹⁰¹ See Larkin, *supra* note 11, at 97.

¹⁰² *Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003).

¹⁰³ *Id.* at 659.

¹⁰⁴ See Ziniti, *supra* note 4, at 590. See also Jeff McDonald, *The Oldest Profession Finds A New Medium: Craigslist and the Sex Industry*, 15 PUB. INT. L. REP. 42, 43 (2009) (noting that Craigslist is perhaps the largest classified ad resource in the world). *But cf.* Larkin, *supra* note 11, at 89 (citing 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>). Sheriff Dart alleged that Craigslist's 'erotic services' category gets twice as many individual visitors as the next ranking category.

¹⁰⁵ *Dart v. Craigslist, Inc.*, 665 F. Supp. at 967 (N.D. Ill. 2009) (citing *GTE Corp.*, 347 F.3d at 659). Although case law in regards to third party content has dealt with aid and abetting in a civil context, the GTE court cited the criminal standard in noting GTE's provision of services did “not satisfy the ordinary understanding of culpable assistance to a wrongdoer, which requires a desire to promote the wrongful venture's success. *GTE Corp.*, 347 F.3d at 659 (citing *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.1989) (en banc)).

¹⁰⁶ It may reasonably be alleged that Larkin's positions in relation to Craigslist are at least slightly tainted by personal bias. Larkin graduated from Villanova Law School the same year its long time Dean, Mark A. Sargent, abruptly resigned citing personal and medical issues although allegedly amidst a prostitution scandal involving Sargent and Craigslist. See Larkin, *supra* note 11, at n.1; Kathleen Brady Shea, *Ex-dean Helped Police, Report Says*, PHILADELPHIA INQUIRER, June 2, 2009; <http://www.save-ardmore-coalition.org/node/3321/villanova-laws-mark-sargent-caught-compromising-position>. Further, at the time of the allegations, Sargent was supposedly rep-

nal fee for its Adult Services section posts might expose Craigslist to criminal liability as a corporation under certain state promotion of prostitution laws, “if even a single advertisement for prostitution slips by Craigslist censors [in its Adult Services section].”¹⁰⁷ The basis of this allegation may reasonably be called into question on a number of different grounds. As an initial matter, the basis for forming liability suggested by Larkin is now a moot point since Larkin's publication, Craigslist permanently removed its U.S. and international adult and erotic services sections.¹⁰⁸ Next, this position assumes Craigslist could be held criminally responsible for content posted by third parties under state law because the CDA has no effect in certain criminal situations. While it is true the CDA does not cover all causes of action,¹⁰⁹ namely federal criminal law, it does preempt all inconsistent state laws.¹¹⁰ What is often confused (see *supra* Note 45) is that in order to be consistent with the CDA, any imposition of state criminal laws against a website like Craigslist could only attempt to base guilt upon Craigslist having actually acted as the creator of the content in question and not based on any reference to the content created by a third party.¹¹¹ Pleading around this impedi-

resented by now County Commissioner Bruce Castor, who prior to taking that position was the District Attorney of Montgomery County in suburban Philadelphia, Larkin's current employer.

¹⁰⁷ Larkin, *supra* note 11, at 100.

¹⁰⁸ Cecilia Kang, *Craigslist Says It Has Permanently Taken Down U.S. Adult Services Ads*, THE WASHINGTON POST, Sept. 15, 2010, <http://www.washingtonpost.com/wp-dyn/content/story/2010/09/16/ST2010091600370.html>; Stephanie Reitz, *Craigslist Removes Global Adult Services Listings*, YAHOO! NEWS, Dec. 21, 2010, http://news.yahoo.com/s/ap/20101221/ap_on_bi_ge/us_craigslist_adult_services.

¹⁰⁹ For instance, when Yahoo fraudulently manufactured false subscriber profiles for its on-line dating service, it became an ICP removing its CDA immunity. See *Anthony v. Yahoo, Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal., 2006).

¹¹⁰ 47 U.S.C. § 230 (2006).

¹¹¹ See *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 464-465 & n.25 (Wash. Ct. App. 2001). See also *Voicenet Communications, Inc. v. Corbett*, 2006 WL 2506318 (E.D. Penn. Aug. 30, 2006). The defendants argue that the CDA allows for the operation of state criminal laws by relying on the first sentence of subsection (e)(3), which provides that a state may enforce “any State law that is consistent with [the CDA].” This argument is inapposite because the plaintiffs' claim is that the enforcement of Pennsylvania's child pornography law against them is not consistent with the CDA, as they did not provide such pornography themselves.

ment would be fruitless¹¹² because under case law Craigslist is not a creator of the content it hosts.¹¹³ Secondly, Larkin apparently fails to realize that Craigslist's policy of collecting a nominal fee was part of the joint statement made with 43 state Attorney Generals.¹¹⁴ It would be unjust to base liability off actions taken in tandem and with reliance on so many of the nation's state attorneys general.¹¹⁵ Secondly, case law demonstrates that profiting from a provision of a service later misused by the consumer is not relevant for purposes of determining whether a website may be considered a principal or creator of a third party's posts.¹¹⁶ At any rate, Craigslist gives all revenue collected from the nominal fee to charity.¹¹⁷ Thus, it is questionable whether there is any real basis for alleging Craigslist receives money or something of value as would be required to prove the crime of promoting prostitution.¹¹⁸ Additionally, case law also demonstrates that where a statute "is

¹¹² Artful pleading strategies have failed. *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 U.S. Dist. LEXIS 53246, at *1 (S.D.N.Y. June 15, 2009); *Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007) (plaintiff was unable to hold the social networking website Myspace negligent for failing to keep young children of its site and thereby allow sexual abuse). See also Ziniti, *supra* note 4, at 612 (citing *Universal Comm'n Sys., Inc. v. Lycos*, 478 F.3d 413 (1st Cir. 2007)(allegation that website enabled posters to spread false information more credibly characterized by plaintiff as culpable assistance was held insufficient to circumvent CDA immunity. "The First Circuit called the strategy 'artful pleading' that failed to avoid the fact that the plaintiffs attempted to hold Lycos liable for content created by another."

¹¹³ *Gibson*, 2009 U.S. Dist. LEXIS 53246, at *7-8.

¹¹⁴ See Joint Statement, *supra* note 95, § III.

¹¹⁵ The Model Penal Code provides for a limited defense based on official reliance, and this defense is widely accepted. See SANFORD H. KADISH, STEPHEN J. SCHUHOFFER & CAROL S. STEIKER CRIMINAL LAW AND ITS PROCESSES 280 (8th ed., 2007) (citing Model Penal Code § 2.04(3) (1962)).

¹¹⁶ *Doe v. GTE Corp.*, 347 F.3d 665, 658 (7th Cir. 2003). See also Ziniti, *supra* note 4, at 613 (citing *Doe v. Bates*, 2006 U.S. Dist. LEXIS 93348, *9-12 (E.D. Tex. Dec. 27, 2006) (although Yahoo! profited significantly from advertising revenue, they were still granted immunity under the CDA even where the third party posts contained obviously illegal content)). *But cf.* *Goddard v. Google*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) (citing *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1167-68).

¹¹⁷ Erotic Services FAQ, CRAIGSLIST, http://www.craigslist.org/about/erotic_services_FAQ (last visited Dec. 24, 2009).

¹¹⁸ See Larkin, *supra* note 11, 111 nn.94 -115, for list and categorization of state promotion of prostitution statutes requiring that defendant receive money or something of value.

precise about who, other than the primary [violator], can be liable, [such a statute] should not be read to create a penumbra of additional but unspecified liability.”¹¹⁹

Next, Larkin's phrasing of the hypothetical concedes a necessary element for any criminal prosecution short of strict liability. An illegal advertisement that “slips by” a censor would indicate the censor lacked the requisite mens rea to convict under state promotion of prostitution laws.¹²⁰ Indeed, the standards for criminal culpability require more than Larkin's hypothetical presents. In describing the criminal liability standards for a website, case law dictates the prosecution would need to prove actual and not constructive knowledge of illegal activities and some affirmative action by the ISP, beyond providing its normal services, designed to accomplish or further the illegal activity.¹²¹ Craigslist denies knowingly carrying ads for prostitution.¹²² Given the volume of posts and the number of employees at Craigslist, a fair argument could be made that such a censor did have specific knowledge of a given post's illegality, a defense supported by the CDA's legislative history.¹²³

Larkin instead claims that Craigslist's new policy of taking more manual efforts to look for indications of unlawful activities or violations of Craigslist's Terms of Service violations and employing search tools with keyword filtering to block certain inappropriate words makes the mens rea easily provable.¹²⁴ Larkin goes so far as to suggest that by employing censors to manually review each post, Craigslist can no longer claim to be

¹¹⁹ *GTE Corp.*, 347 F.3d at 659.

¹²⁰ See Larkin, *supra* note 11, at 100.

¹²¹ *Stoner v. Ebay Inc.*, No. 305666, 2000 Extra LEXIS 156, at •14 (Ca. Super. Ct. Nov. 7, 2000) (citing *People v. Lauria*, 251 Cal. App. 2D 471 (1967)).

¹²² Page Ivey, *Judge Calls Craigslist Lawsuit Premature*, THE SUN NEWS, Aug. 7, 2010, <http://www.thesunnews.com/2010/08/07/1624737/judge-calls-craigslist-lawsuit.html#storylink=mirelated>

¹²³ Ziniti, *supra* note 4, at 584-85 (“Legislators recognized the unfairness of the Stratton Oakmont result- i.e., that the huge volume of web content distinguishes it from traditional media and makes application of traditional liability schemes unfair.”).

¹²⁴ See Larkin, *supra* note 11, at 97. Larkin goes so far as to suggest that mens rea will be all but a non-issue. This suggestion implicitly imposes corporate strict liability on the basis of it employing a censor. The Supreme Court has invalidated a similar attempt to impose strict liability on 1st Amendment grounds. See *Smith v. California*, 361 U.S. 147 (1959).

ignorant of the content of each post.¹²⁵ First of all, it has been held that “[a] web host, like a delivery service or phone company, is an intermediary and normally is indifferent to the content of what it transmits. Even entities that know the information's content do not become liable for the sponsor's deeds.”¹²⁶ Secondly, by employing censors for the purposes of screening out offensive content, Craigslist is engaging in the archetypal Good Samaritan efforts to restrict access to obscene content that Congress sought to protect in passing the CDA.¹²⁷

2. Distribution of obscenity

A successful prosecution of Craigslist for distribution of obscenity is unlikely. Yet, despite recent attempts to impose federal obscenity statutes against websites on the basis of insufficiently monitoring content which have been held unconstitutional,¹²⁸ Larkin contends the strongest avenue for criminal prosecution against Craigslist in Federal court is for distribution of obscenity pursuant to 18 U.S.C. § 1465.¹²⁹ Under this statute, however, the prosecution again bears the burden of proving that the defendant acted knowingly with the in-

¹²⁵ Larkin, *supra* note 11, at 94. Consistent with Larkin's statement here, it is conceivable that internet technologies like semantic analysis, concept-mapping, and natural language search may advance to the point where a website may be said to always be aware of the nature of the content it hosts. Ziniti, *supra* note 4, at 602. Larkin, largely ignores the implications of imposing liability on this basis. For one thing, no one would ever employ censors if it meant that by their mere employment, the corporation could be held criminally knowledgeable for every posting a censor reviewed. Ziniti, on the other hand, goes so far as to suggest, among other negative effects, that such liability would destroy the functionality of search engines. *Id.*

¹²⁶ *GTE Corp.*, 347 F.3d at 659. *See also* Ziniti, *supra* note 4, at 610 (quoting *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630-31 (D. Del. 2007). “§ 230 'bars lawsuits seeking to hold a service provider liable for . . . deciding whether to publish, withdraw, postpone, or alter content.’”

¹²⁷ Ziniti, *supra* note 4, at 597 (noting that all critics of the CDA concede it was the intent of Congress to encourage “voluntary self-policing like that which Stratton Oakmont effectively penalized.”).

¹²⁸ *Reno v. ACLU* 521 U.S. 844 (1997) (holding 47 U.S.C. § 223 unconstitutional under the 1st Amendment because it created criminal penalties for transmissions of obscene or indecent communications); *ACLU v. Mukasey*, 534 F.3d 181, 185 (3d Cir. 2008) (holding 47 U.S.C. § 231, unconstitutional under the 1st Amendment for similar reasons).

¹²⁹ Larkin, *supra* note 11, at 95.

tent to further the sale or distribution of obscene or lewd materials.¹³⁰ To convict Craigslist under this statute, nothing short of evidence that a Craigslist censor knowingly allowed a poster to traffic obscenity and acted affirmatively to facilitate that crime would be sufficient to convict quite a rogue censor.¹³¹

3. Corporate Criminal Liability

Arguendo, even if the impossible burden of proving both the mens rea and actus reus were met, the censor's actions under these circumstances might very well be considered outside the scope of employment, meaning Craigslist could not be held criminally liable as a corporation.¹³² Furthermore, in order to be attributed to Craigslist, there would need to be a showing that the censor acted with the intent to benefit the corporation.¹³³ Given the persistent criticism of Craigslist as a haven for crime,¹³⁴ it cannot reasonably be said that Craigslist would benefit or that the censor would think intentionally furthering an illegal post would benefit the corporation.

Larkin concedes there is but only slim precedent for imposing corporate criminal liability on a website under the statute he proposes is the strongest avenue for criminal liability

¹³⁰ See 18 U.S.C. § 1465 (2006).

¹³¹ This is because if a censor mistakenly authorized an illegal post by merely failing to notice its illegal character, such could not be attributed to Craigslist as the burden of knowingly acting with intent would be left unfulfilled.

¹³² JAMES A. HENDERSON, JR., *THE TORTS PROCESS* 142 (7th ed., 2007). Acts outside the scope of employment may not be attributed to a corporation under the commonly applied standards for corporate criminal liability, as liability is attached when the conduct was "...within the scope of his office or employment." Model Penal Code Section 2.07(1)(c) (1962). This is particularly the case where the act in question is an intentional wrongdoing, illegal and not associated with benefiting the master. See *Maria D. v. Westec Residential Sec., Inc.*, 102 Cal. Rptr. 2d 326 (Ct. App. 2000). Furthermore, the case relied upon by Larkin, *supra* note 4 at 94, *United States v. Hilton*, is easily distinguishable. 467 F.2d 100 (9th Cir. 1972). The *Hilton* case dealt with a commercial offense, described as a likely consequences of the pressure to maximize profits, specifically violations of the Sherman Act. Collecting a nominal fee which is later given to charity is hardly of a similar kind and quality to a hotel employee conditioning purchases upon payment of a contribution to a local association by the supplier. *Id.* at 1003, 1006.

¹³³ *Standard Oil Co. v. United States*, 307 F.2d 120, 128-29 (5th Cir. 1962); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1227, 1247-51 (1979).

¹³⁴ See *supra* note 71.

against Craigslist in Federal Court. Yet, of the two cases actually cited in support of this proposition, neither provides support for the argument against Craigslist alleged by Larkin. First, Larkin cites *United States v. Extreme Associates, Inc.*,¹³⁵ for the proposition that the First Amendment does not necessarily protect against corporate criminal convictions for distribution of obscenity. There, the website in question was accused of distributing hardcore sadomasochistic videos to paying customers.

Craigslist though is clearly distinguishable from *Extreme Associates* as the content in question in that case was produced and sold by Extreme Associates.¹³⁶ Larkin concedes this difference acknowledging Craigslist might defend charges brought under this basis by contending they lacked knowledge of the content of any individual post.¹³⁷ However, Larkin then goes on to claim that this defense would be unavailable to Craigslist because it has been undercut by the court's decision in *United States v. Hair*. To prove his point, Larkin analogizes that "if Yahoo can be sufficiently guilty of transmitting child pornography to support an aiding and abetting conviction for using their email service, then Craigslist almost certainly can be held accountable for transmission of obscenity."¹³⁸ This analogy and its basis for suggesting Craigslist would have more difficulty claiming they lacked knowledge of the content of any individual post completely misreads the case. Larkin misstates Yahoo's disposition in the matter as 'sufficiently guilty'. In *Hair*, Yahoo! was not found, charged, or even suspected of knowingly transmitting child pornography. Instead, it was alleged that the defendant Hair caused Yahoo! to violate § 2252A(a)(1) without the knowledge of the company and on that basis alone the defendant was found to have aided and abetted Yahoo! in the transmission of pornography. Contrary to Larkin's interpretation, Yahoo's status in this case as an innocent principal is plainly clear from the court's discussion of and citation to 18

¹³⁵ *United States v. Extreme Associates, Inc.*, 431 F.3d 150 (3d Cir. 2005).

¹³⁶ *Id.* at 151. Craigslist does not produce content or charge its users to view ads like Extreme Associates did.

¹³⁷ See Larkin, *supra* note 11, at 96.

¹³⁸ *Id.*

U.S.C. § 2, which allows an individual to be charged as an aider and abettor of an offense even though such person did not commit all the acts constituting the elements of the substantive crime aided.¹³⁹ The *Hair* court noted 18 U.S.C. § 2 was created for a defendant evidencing “the requisite intent to commit a crime [but who] gets someone else to act in a way necessary to bring about the crime, even if that other person is innocent,” which was the case in *Hair* and is also the case with Craigslist.¹⁴⁰

4. Wire Fraud and the First Amendment

Finally, Larkin suggests that “creative prosecutors might attempt to make out a charge against Craigslist for aiding and abetting wire fraud on the basis of posts containing common disguises like ‘roses’ or ‘diamonds’ instead of dollars for purposes of concealing a scheme to fraudulently obtain money.”¹⁴¹ Beyond reiterating the unlikelihood of convicting Craigslist under aid and abetting statutes, see *supra* III.a.1, imposing liability on the basis of ambiguous uses of language would also raise First Amendment prior restraint issues. It has been asserted by Craigslist that the imposition of any liability based on a failure to monitor would necessarily mean they would have to shut the website down entirely, which would restrict other entirely lawful speech.¹⁴² Additionally, Craigslist has contended such prior restraints would not be narrowly tailored to further any compelling governmental interest.¹⁴³

Despite this concern, Larkin contends the First Amendment would be no bar to prosecuting Craigslist criminally as a corporation.¹⁴⁴ Larkin's basis for this statement is that posts on Craigslist's Erotic Services section are commercial speech meriting less protection under the tests presented in *Central Hud-*

¹³⁹ United States v. Hair, 178 Fed. App'x. 879, 885 (11th Cir. 2006).

¹⁴⁰ *Id.* (citing United States v. Hornaday, 392 F.3d 1306, 1313 (11th Cir. 2004)).

¹⁴¹ Larkin, *supra* note 11, at 97. *But see* Ziniti, *supra* note 4, at 601-03 (noting extreme commercial consequences if courts were to allow this type of knowledge to be sufficient).

¹⁴² Craigslist, Inc. v. McMaster, Pl.'s Mem. P. & A. in Opp'n to Def.'s Mot. Dismiss, No. 2:2009cv01308, 2009 WL 2899580, at *34-35 (D. S.C. 2009).

¹⁴³ *Id.* at 38.

¹⁴⁴ Larkin, *supra* note 11, at 91.

son Gas & Electric v. Public Services Commission.¹⁴⁵ Larkin, quoting the court in *Central Hudson*, writes that expression is “commercial speech where it is ‘related solely to the economic interests of the speaker and its audience.’”¹⁴⁶ Yet, where content is posted by a third party, such content relates solely to the economic interests of that third party, not Craigslist’s economic interests. It would be unreasonable to contend Craigslist acts with the intent to further a third parties’ economic interests outside of providing its initial service.¹⁴⁷ Although depending on the nature of the content, such third party content may very well be considered commercial speech. Attributing the third party commercial speech to Craigslist, however, would be to treat them as a publisher of that content, something courts are unlikely to do.¹⁴⁸

C. *The future of Craigslist liability*

Indications from the White House suggest no action is likely to be taken by the executive branch against Craigslist.¹⁴⁹ And despite what might be said publicly, actions against Craigslist by state legal officials are also unlikely. The background for this contention concerns Craigslist’s pending at-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ While indeed Craigslist was collecting a nominal fee, this fee was for the express purposes of verifying poster’s identities and was installed at the behest of state Attorney Generals. See Joint Statement, *supra* note 95. Thus, when taken in tandem with the fact Craigslist donates this money to charity, collecting this nominal fee does not relate solely to furthering Craigslist’s economic interests either such that it might make Craigslist’s posts economic speech as to Craigslist. *Erotic Services FAQ*, CRAIGSLIST, *supra* note 117.

¹⁴⁸ Jurisdictions interpreting the plain language of the CDA indicate an aversion to holding ISPs liable as publishers when the content in question comes from third parties. See, e.g., 230(c)(1); *Zeran*, 129 F.3d at 330; *Ben Ezra, Weinstein & Co. v. AOL, Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000).

¹⁴⁹ “Powell noted in his testimony that in a White House meeting earlier in the summer, Obama administration officials said they considered Craigslist to be a model compared with “the countless other venues that currently host unmoderated adult content, do not assist law enforcement and do not engage in best practices,” Cecilia Kang, *Craigslist Says It Has Permanently Taken Down U.S. adult Services Ads*, THE WASHINGTON POST, Sept. 15, 2010, <http://www.washingtonpost.com/wp-dyn/content/story/2010/09/16/ST2010091-600370.html>

tempt to get a federal judge to reconsider Craigslist's previous attempt to enjoin South Carolina Attorney General McMaster from threatening Craigslist with criminal and civil actions. Craigslist claims continuing public threats of prosecution made by McMaster's office are in violation of Federal law, namely the CDA and 42 U.S.C. § 1983, and the U.S. Constitution, specifically the First and Fourteenth Amendments and the Commerce Clause.¹⁵⁰

McMaster responded to these claims initially by filing a 12(b)(6) motion to dismiss, arguing that the court should refrain from interceding in this matter under the *Younger* doctrine;¹⁵¹ that the CDA does not give immunity from prosecution for aiding and abetting prostitution in violation of South Carolina law.¹⁵² Additionally, the motion attests the complaint fails

¹⁵⁰ Complaint, *Craigslist, Inc. v. McMaster*, No. 2:2009cv01308 (D. S.C. 2009) (Craigslist alleges "that the threatened prosecution violates the Commerce Clause because it would regulate activities that take place outside of South Carolina and place burdens on interstate commerce that are excessive in relation to any local benefits," mostly because even if Craigslist South Carolina were taken down, it would not stop citizens of South Carolina from using other similar websites or using Craigslist websites pertaining to another state or region. *Id.* Craigslist may have some basis under the commerce clause for seeking a defense. Cases have held that "the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether. Thus, the Commerce Clause ordains that only Congress can legislate in this area, subject, or course, to whatever limitations other provisions of the Constitutions (such as the First Amendment) may require." *Am. Library Ass'n v. Patake*, 969 F. Supp. 160 (S.D.N.Y. 1997). Such a statement has relevance to Craigslist and the possibility of imposing South Carolina law against it).

¹⁵¹ *Younger v. Harris*, 401 U.S. 37 (1971) (bars federal courts from hearing claims brought by a person being prosecuted for a matter arising from that claim). Defendant's Reply to Plaintiff's Memorandum in Opposition to Motion to Dismiss at *7, *Craigslist, Inc. v. McMaster*, No. 2:2009cv01308 (D. S.C. 2009) (citing *North v. Walsh*, 656 F. Supp. 414, 418-19 (D.D.C. 1987) ("Courts have almost never found that an ongoing criminal investigation imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment")). Craigslist challenges this conclusion stating there need be something more than a threat of a criminal proceeding for the *Younger* doctrine to apply as a threat may amount to nothing more than that, which would cause an unduly chilling effect. Plaintiff Craigslist's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, at *11-15, *Craigslist, Inc. v. McMaster*, No. 2:2009cv01308 (D. S.C. 2009).

¹⁵² Motion to Dismiss ¶¶ 1-4, *Craigslist, Inc. v. McMaster*, No. 2:2009cv01308 (D. S.C. 2009). *See generally, supra* note 45, for reasons why this assertion is erroneous.

to state violations of the First and Fourteenth Amendments, 42 U.S.C. § 1983, or the Commerce Clause.¹⁵³

Judge C. Weston Houck granted the motion dismissing the case against the Attorney General on the grounds that it was premature to determine whether Craigslist has an actionable claim because no one at Craigslist has been charged with a crime.¹⁵⁴ Judge Houck characterized Craigslist's suit as a request for "an advisory opinion based on a hypothetical injury."¹⁵⁵ The dismissal carries with it though a discrete implication: should a state attorney general actually press action against Craigslist, there may very well be consequences if Craigslist then brought a § 1983 claim based on a violation of their right to immunity under the CDA as they have in this instance. In a previous case acknowledging such a right for a website under the CDA, the government officials in question received qualified immunity from money damages as the court held the ISP's rights under the CDA were not clearly established at the time of the alleged violation.¹⁵⁶

Arguably, Craigslist's rights under the CDA are now sufficiently established.¹⁵⁷ Even so, McMaster's office has since stated it will continue its investigations of Craigslist.¹⁵⁸ Unsurprisingly, Craigslist has used these statements as grounds for why the Judge should reconsider Craigslist's attempt to enjoin McMaster.¹⁵⁹ The Judge will hear Craigslist's request for

¹⁵³ Motion to Dismiss ¶¶ 1-4, *Craigslist, Inc. v. McMaster*, No. 2:2009cv01308 (D. S.C. 2009).

¹⁵⁴ *Ivey*, *supra* note 122.

¹⁵⁵ *Id.*

¹⁵⁶ *Voicenet Commc'n., Inc. v. Corbett*, No. 04-1318, 2006 WL 2506318, at *5 (E.D. Pa. 2006) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")).

¹⁵⁷ *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("Official action is protected by qualified immunity unless the unlawfulness of the action is apparent in the light of pre-existing law.")).

¹⁵⁸ *Ivey*, *supra* note 122.

¹⁵⁹ Meg Kinnard, *Craigslist: SC Prosecutor Still Threatening Company With Prosecution Despite Lawsuit Dismissal*, DAILY REPORTER, Dec. 30, 2010, available at <http://www.greenfieldreporter.com/view/story/395b3e43138e450cae443e2e49931efb/SC--Craigslist-Prostitution/> (quoting Attorneys for

reconsideration sometime during the spring of 2011.¹⁶⁰ Critics question whether these actions by McMaster serve a political goal rather than the control of crime.¹⁶¹

V. APPROACHES ABROAD

A. *European Approaches*

The United Kingdom's approach to ISP liability for third party content began with *Godfrey v. Demon Internet Limited*.¹⁶² In this case, the plaintiff, an academic lecturer, sued a major English ISP alleging defamation as a result of an obscene posting purporting to be from the plaintiff.¹⁶³ Upon informing the ISP of the fraudulent nature of the posting, the posting was not removed as requested.¹⁶⁴ This case analyzed the American approach from *Cubby* to *Zeran* and sought to distinguish them from English law citing the impact of the First Amendment as the cause for the divergence.¹⁶⁵ The defendant ISP attempted to invoke Section 1 of the Defamation Act of 1996 to substantiate its innocent disseminator defense.¹⁶⁶ Denied the defense, the ISP was ultimately held liable for defamation for the periods after they knew or had notice of the defamatory content.¹⁶⁷ Whereas under the less plaintiff-friendly American approach,¹⁶⁸ an ISP will be immune even after receiving notice of objectionable content and failing to remove it.¹⁶⁹ Under the U.K. approach, following notification of objectionable content,

Craigslis, "Defendant McMaster's official public announcement, even before the ink on the Order was dry, that craigslist is still the subject of an active State criminal investigation . . . confirms that craigslist's apprehension of prosecution for its ongoing activities is far from imaginary or speculative.")

¹⁶⁰ A McMaster spokesman has since trivialized Craigslis's request for rehearing claiming. *See id.* (quoting Gene McCaskill, "It's fairly common for the losing party to request a rehearing after a dismissal.")

¹⁶¹ McDonald, *supra* note 104, at 48 (citing an interview with Thomas Bucaro, Oct. 9, 2009).

¹⁶² *Godfrey v. Demon Internet Ltd.*, [1999] EWHC (QB) 244, [¶ 1] 149 NLJ 609 (Eng.).

¹⁶³ *Id.* ¶¶ 3, 12.

¹⁶⁴ *Id.* ¶¶ 13-14.

¹⁶⁵ *Id.* ¶¶ 1, 36-52.

¹⁶⁶ *Id.* ¶ 2.

¹⁶⁷ *Id.* ¶ 50.

¹⁶⁸ *See Sterling*, *supra* note 10, at 340.

¹⁶⁹ *Goddard*, 640 F. Supp. 2d at 1197 (citing *Zeran*, 129 F.3d at 333).

the ISP is under an obligation to remove it, an approach criticized as too harsh on ISPs.¹⁷⁰

Nowadays the U.K. takes the approach adopted by the European Union under the Electronic Commerce Regulation of 2002 (“EC Directive”).¹⁷¹ Article 12(1) of the EC Directive provides that where an ISP acts as a mere conduit for the information transmitted, the ISP shall not be held liable, unless the ISP initiated the transmission, selected the receiver of the transmission, or selected or modified the information contained therein.¹⁷² Even still, there is some influence for domestic law through Article 12(3) in regards to ISP actions over infringement.¹⁷³ If Article 12 does not apply by reason of one of the exceptions being met and Article 13, referring to the temporary, inadvertent storage of content, also does not apply, then Article 14 applies. Article 14 dictates that ISP's shall not be liable for content hosted as long as the ISP does not have notice of the illegal nature of that content, and that once informed acted promptly to remove the content.¹⁷⁴ According to Art. 14(3) further obligations can be imposed by court or authority orders of member states.¹⁷⁵ This has allowed E.U. member states' courts to base their decisions on domestic, as opposed to EU law.¹⁷⁶ Such further obligations may be illustrated by a German decision wherein attempts to force Ebay to prevent future trademark infringement of Rolex upon receiving categorical notice of such could be imposed if it was not an unreasonable burden on

¹⁷⁰ Anne S.Y. Cheung, *A Study of Cyber-Violence and Internet Service Providers' Liability: Lessons From China*, 18 PAC. RIM L. & POL'Y J. 323, 341 (2009) (citing Diane Rowland, *Free Expression and Defamation, in HUMAN RIGHTS IN THE DIGITAL AGE* 66 (Mathias Klang & Andrew Murray eds., 2005).

¹⁷¹ Cheung, *Id.*, at 341-42 (citing The Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20022013.htm> (implementing 2000 O.J. (L 178) 2000/31).

¹⁷² The Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, art. 17, ¶ 1 (U.K.).

¹⁷³ See Kleinschmidt, *supra* note 22, at 337.

¹⁷⁴ See Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 2000/31) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>.

¹⁷⁵ Kleinschmidt, *supra* note 22, at 346 (citing EC Directive at (45)).

¹⁷⁶ *Id.* at 347.

Ebay to examine.¹⁷⁷

Following the EC Directive, in *Bunt v. Tilley*, the U.K. court went on to distinguish itself from *Godfrey*.¹⁷⁸ The *Tilley* court determined that in order for an ISP to be found liable for the postings of a third party, the ISP must have engaged in something more than a passive role in facilitating the postings, and that there must be knowing participation in publishing the objectionable content.¹⁷⁹ The European approach, like the American approach, imposes no general obligation upon ISPs to monitor content posted for illegal activities, the exception of which is potentially Italy.¹⁸⁰

B. Recent changes in Italy

Italy recently took an unexpected approach to third party postings. An Italian court in Milan convicted three Google executives *in absentia* for content posted by third parties.¹⁸¹ The content in question pertains to a video posted on Google videos documenting insults of a boy with autism.¹⁸² Although Google did remove the video two hours after being contacted by the police, the charges were essentially *Zeran* type claims asserting negligence against the executives for failing to remove content within an appropriate amount of time.¹⁸³ According to the Italian court, this negligence violated Italian privacy laws prohibiting the use of personal data with the intent to cause harm or profit.¹⁸⁴ It was argued “because Google handled user data – and used content to generate advertising revenue – it was a content provider, not a service provider, and therefore broke

¹⁷⁷ *Id.* at 347 (citing Maximilian Herberger, *BGH 11.03.2004, I ZR 304/01*, JURPC, <http://www.jurpc.de/rechtspr/20040265.htm> (last visited Mar. 6, 2011)).

¹⁷⁸ *Bunt v. Tilley*, (2006) EWHC 407 (QB) ¶ 41, available at <http://www.bailii.org/ew/cases/EWHC/QB/2006/407.html>.

¹⁷⁹ Cheung, *supra* note 170, at 342 (citing *id.* at ¶. 23.).

¹⁸⁰ See 2000 O.J. (L 178) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>.

¹⁸¹ John Hooper, *Google Executives Convicted in Italy over Abuse Video*, GUARDIAN (U.K.), Feb. 24, 2010, available at <http://www.guardian.co.uk/technology/2010/feb/24/google-video-italy-privacy-convictions> (They were given a six month suspended sentence.)

¹⁸² *Id.*

¹⁸³ Rachel Donadio, *Italy Convicts 3 Google Officials in Privacy Case*, N.Y. TIMES, Feb. 25, 2010, at A1.

¹⁸⁴ *Id.*

Italian privacy law.”¹⁸⁵ The executives are liable because Italian law makes corporate executives responsible for the acts of their company.¹⁸⁶ Google meanwhile contends they are protected by the EC Directive and have stated an intention to appeal the decision.¹⁸⁷

This case illustrates an apparent necessity of rapid responsiveness by ISPs where notice and take down policies are enforced criminally. It also illustrates present inconsistencies in application of law within Europe despite the EC Directive, which critics allege here imposes a Chinese-like duty for ISPs to monitor content.¹⁸⁸ The nature of Google's actions here may represent a new concern for other websites allowing third party posts, including even Craigslist.¹⁸⁹

C. Australian approach

Australia follows a form of the notice and takedown approach. In *Urbanich v. Drummoyne Municipal Council*, the court held that where an entity has notice of defamatory content and fails to remove that content thereafter, the entity is then seen as a publisher of the content whether they created or had anything to do with its initial publication.¹⁹⁰ The ISP may still have a defense though.¹⁹¹ Clause 91(1) of Schedule 5 to the Broadcasting Services Act of 1992 provides that where an ISP is unaware of the defamatory nature of the content in question, the ISP has a statutory defense as an innocent disseminator as was demonstrated in the Australian High Court case of *Thompson v. Australian Capital Television Pty Ltd.*¹⁹²

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Anna Masera, *Italy has Taken a Step Closer to China*, GUARDIAN (U.K.), Feb, 25, 2010, available at <http://www.guardian.co.uk/commentis-free/libertycentral/2010/feb/25/google-italy-internet-censorship>.

¹⁸⁹ Donadio, *supra* note 183.

¹⁹⁰ *Urbanich v. Drummoyne Municipal Council* (1988) 1988 N.S.W. LEXIS 8802 (N.S.W. Austl.).

¹⁹¹ See Electronic Frontiers Australia, Defamation Laws and the Internet, <http://www.efa.org.au/Issues/Censor/defamation.html> (last visited Jan. 25, 2010).

¹⁹² *Thompson v. Australian Capital Television Pty. Ltd* [1996] HCA 38,

The Australian approach differs somewhat from the English and European approach. Australia is commonly thought to have “the most restrictive Internet policies of any Western nation.”¹⁹³ For instance, there are no American-style First Amendment protections for speech not related to political candidates within the Australian Constitution.¹⁹⁴ Additionally, Australia requires ISPs to reasonably filter out websites determined to carry offensive content by the Australian Communications and Media Authority,¹⁹⁵ which does not reveal its decisions pertaining to blacklisted websites.¹⁹⁶ However, an ISP may opt-out of the mandatory provisions if it agrees to follow certain self-regulatory industry codes,¹⁹⁷ which is described as a system of co-regulation, combining both self-governance and law.¹⁹⁸ The current system is contested and possible changes include compulsory internet filtering of foreign websites containing obscene content,¹⁹⁹ or ditching website filters altogether.²⁰⁰

D. Website Blocking Elsewhere

In Germany, website blocking is an emerging trend. A legally binding agreement was reached between the German government and 75% of the ISP market to block access to websites determined to be child pornographic by the Federal Crime

(1996) 186 CLR 574 (Austl.).

¹⁹³ Evan Croen, *Australia and New Zealand*, OPENNET INITIATIVE, <http://www.opennet.net/research/australia-and-new-zealand> (last visited Jan. 30, 2010).

¹⁹⁴ *Id.* (citing Roy Jordan, *Free Speech and the Constitution*, Parliamentary Library, June 4, 2002, available at <http://www.aph.gov.au/LIBRARY/Pubs/RN/2001-02/02rn42.htm>.)

¹⁹⁵ Kleinschmidt, *supra* note 22, at 343 (citing sec. 40 (2) of the 1999 amendment of the Broadcasting Services Act 1992 (BSA)).

¹⁹⁶ *Id.* at 344.

¹⁹⁷ *Id.* (noting the self regulatory alternatives are too ineffective to combat child pornography because they do not prevent general accessibility).

¹⁹⁸ *Id.* at 343.

¹⁹⁹ *Green Light for Internet Filter Plans*, ABC NEWS <http://www.abc.net.au/news/stories/2009/12/15/2772467.htm> (last visited Dec. 14, 2010).

²⁰⁰ Some liken the Australian filters to the Chinese Great Firewall. *Australia Announces Arguable Internet Filter*, SCITECHBOX, SCIENCE AND TECHNOLOGY NEWS BOX, Dec. 15, 2009, <http://scitechbox.com/news/australia-announces-arguable-internet-filter>; ABC News, *Internet Filter Plan 'Wasting Time, Money,'* ABC NEWS <http://www.abc.net.au/news/stories/2009/09/02/2673749.htm> (last visited Feb. 1, 2010).

Office.²⁰¹ This agreement was accompanied by a bill which passed German Parliament but was later placed on a one year moratorium.²⁰² The law became effective as of February 23, 2010, and has since provoked discussion of a constitutional challenge.²⁰³ In the U.K., website blocking is also active, but it is done on a voluntary, yet organized basis. In contrast to Germany, which relies on the government to determine which websites are to be banned, in the U.K., a registered charity called the Internet Watch Foundation makes the decisions and the ISP decides whether it will comply.²⁰⁴ By comparison, in the U.S., attempts by a state to require ISPs to block website access have been held unconstitutional on First Amendment grounds because they over-blocked websites.²⁰⁵ Canada takes a similar approach against blocking by statute,²⁰⁶ and expressly excludes ISPs from liability.²⁰⁷

D. *The Chinese approach*

The Chinese differ substantially from approaches elsewhere. “In China . . . the right to free speech has not been so culturally engrained or legally protected.”²⁰⁸ Nevertheless, the

²⁰¹ Kleinschmidt, *supra* note 22, at 339 (citing Major German Online Companies Agree to Block Child Porn Websites, DW WORLD, Apr. 17, 2009, available at <http://www.dw-world.de/dw/article/0,,4185666,00.html>).

²⁰² *Id.* (citing Deutscher Bundestag Plenarprotokoll 16/227, 25165, available at <http://www.ethikzentrum.de/downloads/bundestag-2009-06-18-plenarsitzung.pdf>; No internet censorship in Germany for the next year, AK ZENSUR, Oct. 18, 2009, available at <http://ak-zensur.de/2009/10/access-blocking-germany.html>).

²⁰³ Thomas Stadler, Netzsperrn: Warum das Zugangerschwerungsgesetz verfassungswidrig ist [Network Lock: Why the Aggravation Access Law is Unconstitutional], Apr. 11, 2010, <http://www.internet-law.de/2010/11/netz-sperren-warum-das-zugangerschwerungsgesetz-verfassungswidrig-ist.html>.

²⁰⁴ Kleinschmidt, *supra* note 22, at 340; IWF Facilitation of the Blocking Initiative, INTERNET WATCH FOUNDATION, <http://www.iwf.org.uk/services/blocking> [last visited February 16, 2011].

²⁰⁵ *Id.* at 341 (citing Order, Ctr. for Democracy and Tech. v. Pappert, No. 03-5051 (E.D. P.A. 2004), available at <http://www.cdt.org/speech/pennweb-block/20040910order.pdf>).

²⁰⁶ *Id.* at 342 (citing The Canadian Telecommunications Act 1993 (TA)).

²⁰⁷ *Id.* (citing Canadian Human Rights Act, R.S.C. 1985, c.H-6, §13 (3) available at <http://laws.justice.gc.ca/PDF/Statute/H/H-6.pdf>).

²⁰⁸ Nicole Hostettler, *Tongue-In-Cheek: How Internet Defamation Laws of*

Chinese Constitution does still specifically protect freedom of speech.²⁰⁹ However, “the right to free speech cannot be so strong that it destroys other rights in its path.²¹⁰ Judicially, “[t]he Internet is treated in a similar manner to traditional media under the Chinese defamation legal regime.”²¹¹ What differs substantially from the policies in Europe and America is that in China “ISPs are considered on notice of all the content they provide.”²¹² Thus, ISPs have a duty to monitor all content hosted, which directly conflicts with the American CDA and Article 15 of the EC Directive.²¹³

The drawbacks of this approach are poignantly clear. “Merely quoting the defamatory statements of another is enough to give rise to liability for an ISP. As a result, many ISPs will shut down chat groups that exchange potentially defamatory content as a preventative measure, rather than risk liability and damages.”²¹⁴ This self-censorship chills the free movement of ideas. Worse still, the Chinese system lacks certainty for ISPs as “[t]he ICPs are not given lists directly by the MII [the responsible government agency], so they must identify and maintain catalogs of potentially incendiary items on their own.”²¹⁵ To maintain the government's control, ISPs are required to have operating licenses as a condition of providing services in China, and because “companies do not want to risk losing their Chinese operating licenses, most ICPs admit to 'over-blocking' -that is censoring items that do not specifically

the United States & China Are Shaping Global Internet Speech, 9 J. HIGH TECH. L. 66, 67 (2009) (citing Rana Mitter, *A Short History of Free Speech in China*, THE NEW INTERNATIONALIST, Oct. 7, 2008, archived at <http://www.webcitation.org/5edo26f62>).

²⁰⁹ *Id.* at 72 (citing Peter Lin, *Between Theory and Practice: The Possibility of a Right to Free Speech in the People's Republic of China*, 4 J. CHINESE L. 257, 258 (1990)).

²¹⁰ *Id.*

²¹¹ *Id.* at 76 (citing Timothy L. Fort & Lui Junhai, *Chinese Business and the Internet: the Infrastructure for Trust*, 35 VAND. J. TRANSNAT'L L. 1545, 1588 (2002)).

²¹² *Id.* at 77.

²¹³ See 2000 O.J. (L 178) 2000/31 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>.

²¹⁴ Hostettler, *supra* note 208, at 77 (citing S. David Cooper, *The Dot.Com(munist) Revolution: Will the Internet Bring Democracy to China?*, 18 UCLA PAC. BASIN L.J. 98, 103 (2000)).

²¹⁵ Nellie L. Viner, Comment, *The Global Online Freedom Act: Can U.S. Internet Companies Scale the Great Chinese Firewall at the Gates of the Chinese Century?*, 93 IOWA L. REV. 361, 375 (2007).

violate any law or regulation.”²¹⁶ The consequences for what may be unspecified violations can be serious, subjecting the ISP to possible reprimands by the MII and license revocation.²¹⁷ For ISPs like Google, the decision has been phrased as a choice between self-censorship or leaving the country.²¹⁸

VI. ANALYSIS AND RECOMMENDATIONS

A. Challenges affecting policy

The absence of consistent international internet standards and the universal nature of the internet make enforcement of a state's own internet policies difficult.²¹⁹ To illustrate, because a person in America could post an ad on a Craigslist page dedicated for a location abroad, an ad in one country may affect individuals in another. Furthermore, providers of content can typically find alternative ways to bring the content back when website filters are employed.²²⁰

Foreign countries find it difficult to impose their laws on domestic ISPs. Unlike ISPs like Yahoo or Microsoft that conduct business in places like China, and are thus susceptible to judicial intervention, Craigslist could create sites dedicated to countries that do not desire its presence because it does not conduct business or operate servers outside of the U.S.²²¹ A

²¹⁶ *Id.* Indeed, other commentators note that the task of screening out a website necessarily requires blocking the whole domain name, which may very well also contain significant quantities of unobjectionable content. See Kleinschmidt, *supra* note 22, at 335.

²¹⁷ Viner, *supra* note 215, at 375.

²¹⁸ John D. Sutter, *Google 'Optimistic' It Won't Pull Out of China*, CNN, Feb. 12, 2010, <http://www.cnn.com/2010/TECH/02/12/brin.google.china/index.html?iref=allsearch> [last visited February 20, 2011].

²¹⁹ The European Directive also takes notices of a resulting less attractive market for informational services when countries are hampered by legal uncertainty derived from divergent legislation. 2000 O.J. (L 178) 2000/31, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>. Despite this aim for harmonization, one commentator alleges that by allowing Member States to fall back on their domestic law under 14(3), the EU Directive has failed its main goal. See Kleinschmidt, *supra* note 22, at 348.

²²⁰ Kleinschmidt, *supra* note 22, at 338.

²²¹ Craigslist currently operates websites targeting 13 of China's largest cities. See Craigslist > China, <http://geo.craigslist.org/iso/cn> (last visited Feb.

country desiring to remove Craigslist could do little other than contact the U.S. State Department to complain, render criminal verdicts against executives of the ISP in abstentia as occurred recently in Italy against Google, or seek to block their citizens from access by use of filters. However, arguably, the use of internet filters is contrary to established human rights norms.²²² Furthermore, the effectiveness of these filters is constantly challenged.²²³

The difficulty of successful individual state enforcement of internet policy poses a unique challenge for governments. One commentator notes the key weakness for the notice and takedown approach is that it has to be applied globally in order to be effective as obscene content merely migrates to countries that grant hosts more immunity.²²⁴ Some commentators contend a global internet structure is necessary.²²⁵ Although still in negotiation, the Anti-Counterfeiting Trade Agreement is one such step towards reaching international agreement pertaining to the internet.²²⁶

3, 2010).

²²² The European Directive takes notice of Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (noting that “the supply of information society services must ensure that this activity may be engaged in freely”) ¶ 9, 2000 O.J. (L 178) 2000/31 *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L00-31:EN:HTML>.

Additionally, Article 19 of the Universal Declaration of Human Rights states, “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights, G.A. Res. 2200 A(XXI), ¶ 19, U.N. Doc. A/217 (Dec. 10, 1948).

²²³ Viner, *supra* note 215, at 372 (“...for although China sustains the most intricately censored Internet regime in the world, Chinese users are still able to access dissident opinions through online bulletin boards and blogs.”). Another commentator notes that DNS-blocking and other methods of blocking websites are easily circumnavigated by modifying common browsers. Kleinschmidt, *supra* note 22, at 336-37. This Commentator also suggests that filters are so ineffective that it is reasonable to speculate their implementation is politically motivated. *Id.* at 353.

²²⁴ Kleinschmidt, *supra* note 22, at 355.

²²⁵ Hostettler, *supra* note 208, at 80 (citing Xue Hong, Online Dispute Resolution for E-commerce in China: Present Practices and Future Developments, 34 HONG KONG L.J. 377, 387 (2004). “As the Internet continues to expand to new users, Eastern and Western ideals must meet.”)

²²⁶ See *Anti-Counterfeiting Trade Agreement*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/issues/acta> (last visited Feb. 13, 2010) (Premised as a new intellectual property enforcement treaty, it is suggested that

B. Redrafting considerations

The answer to the question of whether there is any way to fashion a remedy for harm caused by third party content without chilling free speech or excessively burdening future internet development may very well be no. This result may have been anticipated by Congress.²²⁷ Others are optimistic of the remedial possibilities:

The American CDA, for instance, is ripe for redrafting. The internet of today was not in Congress' wildest dreams or darkest nightmares when the CDA was originally drafted in 1996. Perhaps America can take a cue from China and expose ISPs to a greater level of liability for their content. Some measure of ISP liability is not as impossible to implement as it was once believed and may not have the complete 'chilling effect' Congress once feared.²²⁸

Yet, despite this optimism, when one actually attempts to conceive of some type of CDA redrafting, optimism fades, even more so when international consistency and/or co-operative global internet governance aims are considered. Further, what this argument fails to consider is that, as one commentator puts it, what was once a passive activity has turned into one where users are creating more of the content out there through services such as Facebook, among others, indicating a 'chilling effect' is more likely now.²²⁹

this agreement will actually be broader in scope. Given the negotiations are held privately, it is difficult to say what this will mean for ISPs worldwide regarding their obligations in general as well as in regards to content posted by third parties. *Id.* From this agreement it is evident that the primary drive for global internet governance derives from states seeking to protect their commercial interests, which might suggest a more timid response could be expected from countries should there be a push to spread global internet governance across the board).

²²⁷ Ziniti, *supra* note 4, at 597 (noting that "Congress chose to allocate risk in favor of preserving the system and away from protecting individual participants").

²²⁸ Hostettler, *supra* note 208, at 86 (citing Ternisha Miles, *Barrett v. Rosenthal: Oh, What a Tangled Web We Weave-No Liability for Web Defamation*, 29 N.C. CENT. L.J. 267 (2007)).

²²⁹ Ziniti, *supra* note 4, at 613. Ziniti notes that "internet services will increasingly provide targeted advertising based on the user-generated content of particular pages ..., the web's most successful business model. Thus, a system that threatened it would almost certainly harm the web's growth." Ziniti

Several commentators suggest that given recent cases defending websites with CDA immunity concerning child pornography that the CDA should be modified solely to reflect changes concerning it.²³⁰ It is contended that by limiting an exception solely to child pornography, there will be a reduced risk of stifling communication and free speech.²³¹ Other commentators suggest that the CDA needs to be reevaluated to include an exception for Fair Housing laws in the CDA in light of the results reached in the *Roommates.com* and *Chicago Lawyers' Comm. for Civil Rights Under Law Inc.* decisions.²³² However, what these commentators suggest is an exception to the exclusion of so many other laws that are regularly immunized by the CDA. Undoubtedly, some laws are of greater social importance than others. Nevertheless, by adding more and more exceptions, the resulting increased duties on ISPs from increased legal uncertainty will slow innovative development of the internet. The CDA is a general immunity, and if it is to be reformed, for it to be effective in the long-term, it needs to remain a more generalized statute rather than one cut up with small, specific exceptions.

Other commentators advocate an inducement test to determine whether the ISP induced the third-party to post illegal content, which follows the logic from the *Roommates.com* case and more directly in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*²³³ Benefits of this test are said to create liability only where an ISP acts with the requisite scienter as to the content of the third-party post, and would only place liability on the worst offenders.²³⁴ However, taking this approach too liberally by expanding the definition of ICP carries with it un-

then explains just how dramatic that harm might be through "long tail" economic theory where that the value of a network to a given customer depends on the numbers of users of it" *Id.* at 592. This theory is directly applicable to Craigslist.

²³⁰ Katy Noeth, *The Never-Ending Limits of Section 230: Extending ISP Immunity to the Sexual Exploitation of Children*, 61 FED. COMM. L.J. 765, 778 (2009).

²³¹ *Id.* at 779.

²³² J. Andrew Crosssett, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195, 211 (2008).

²³³ Locke, *supra* note 23, at 168 (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005)).

²³⁴ Ziniti, *supra* note 4, at 608.

desirable technological consequences,²³⁵ and would add further difficulty to the determination of what kinds of actions specifically would make an ISP an ICP, indirectly chilling speech.²³⁶ Furthermore, the constitutionality of applying this approach to Craigslist, which is used under the DMCA would be subject to challenge.²³⁷ While such an approach requires no duty to monitor content and instead merely requires content be removed after notification,²³⁸ applying this approach beyond the DMCA would be problematic in practice.²³⁹ Zac Locke contends:

With the myriad of service providers, websites, chat rooms, bulletin boards, listservers, blogs and other ICS that exist today, a [notice and take down approach] applied to all content on the internet would lead to millions of takedown requests per year. ISPs such as AOL and search engines such as Google would have to employ an army of notice-and-takedown screeners in order to process the thousands of requests that would come across their

²³⁵ *Id.* at 612. Zinigi points to *Prickett v. infoUSA, Inc.* No. 4:05-CV-10, 2006 U.S. Dist. LEXIS 21867 (E.D. Tex. Mar. 30, 2006), where the CDA protected an online directory listing from being considered an ICP for the content of the listing despite its licensing, categorization, tagging, and distribution of it to third parties. *Id.* Zinigi notes that had the decision gone the other way, it would have forced “a reversion to the ‘walled garden’ - style internet services of the late 1990’s in which portal sites like AOL strived to keep users within their world and keep other’s content out.” *Id.* at 613. Zinigi also notes that a different result would have meant the end to CDA protection for services like Google AdSense, YouTube, and Flickr. *Id.*

²³⁶ Zinigi also correctly notes that because online communities want more traffic to add value to their networks that “[i]f the dispositive question becomes not whether a provider created a piece of content but whether it intended for content to go up, the answer would almost invariably be yes....” *Id.* at 608-09. Zinigi poses hypothetically: “if a spam filter ‘learns’ from human input, has the content that the filter assesses been human-edited?” *Id.* at 600. Zinigi notes ironically that “human programmers write the algorithms that do the editing anyway, so such a distinction seems contrived anyway.” *Id.*

²³⁷ *Id.* at 606 (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 581 (1994) (noting that “in the copyright setting, the Supreme Court has warned that, where decisions to remove or forbid challenged content implicate free speech, they require very careful ‘case by case analysis’”)).

²³⁸ *Io Grp. Inc. v. Veoh Networks*, 586 F.Supp.2d 1132 (N.D. Cal., 2008).

²³⁹ Zinigi, *supra* note 4, at 605 (noting that under the DMCA, a takedown notice is easily prepared and requires little judgment whereas if expanded to the CDA context would required analysis of hundreds of torts under hundreds of state and federal laws with slight variations among them, so the notices would be harder to prepare and interpret).

desks everyday.²⁴⁰

Zac Locke further contends that this approach would cost millions as well as be unfeasible in practicality and would necessarily have a 'chilling effect' on speech as content providers would likely prefer to avoid hosting risky information at all rather than risk liability, substantially curtailing legal speech at the cost of regulating small portions of illegal speech.²⁴¹ Additionally, another commentator notes that such an approach "would create an extreme version of the impermissible 'heckler's veto.'"²⁴² In light of these concerns, the notice and take down approach can have but only limited effectiveness and its costs seem to outweigh its potential benefits.

C. *Reflections on Craigslist*

Under the American approach, some plaintiffs injured through content provided on Craigslist are largely left without a remedy. This is because postings especially when related to crime, are often anonymous. This leaves a plaintiff with few remedial options. While the CDA does not protect the third parties that actually post the content, tracking these individuals down can be difficult, if not impossible. Yet, some, including Craigslist, contend otherwise claiming that keeping crime on the surface makes enforcement of criminal laws more effective. President of the nonprofit Center for Democracy and Technology, Leslie A. Harris, stated "Craigslist is a very open site, and [users] leave digital footprints. It makes it easier for the police."²⁴³ Despite whatever digital footprints are left, there is still IP spoofing, a form of online camouflage creating anonymity,²⁴⁴ and the use of public internet forums and internet cafes,

²⁴⁰ Locke, *supra* note 23, at 162.

²⁴¹ *Id.* Ziniti further recognizes that the "empirical evidence indicates that more than a quarter of DMCA takedown notices are either on shaky legal grounds or address cases in which no copyrights are violated." Ziniti, *supra* note 4, at 607. Thus, considering the far greater scope of laws under CDA protection, the chilling effect cannot be understated.

²⁴² Ziniti, *supra* note 4, at 606 (noting that it such would "giv[e] anyone with the desire the ability to silence another's speech and engage in mass censorship").

²⁴³ Bruce Lambert, *As Prostitutes Turn to Craigslist, Law Takes Notice*, N.Y. TIMES, Sept. 5, 2007, at A1, available at <http://www.nytimes.com/2007/09/05/nyregion/05craigslist.html?pagewanted=2&r=1>.

²⁴⁴ Matthew Tanase, *IP Spoofing: An Introduction*, SECURITYFOCUS, Mar.

which leaves the intelligent criminal that much more anonymous and thus largely immune from the law.

However, certainly not every criminal goes through precautions like IP spoofing. Arguably more could be done to reduce certain repeat Craigslist abusers by tracking their IP addresses and prohibiting these users from continuing to post content. Under Craigslist's Terms of Use and Privacy Policy, Craigslist collects information ranging from email addresses, phone numbers, IP addresses, and time stamps as well as personal information posted on its forums.²⁴⁵ Thus, from the information Craigslist already collects, it is not beyond their capabilities to do more. However, if the government demands this information as opposed to continuing to engage in a relationship of cooperation with Craigslist, there may be some Constitutional First Amendment issues²⁴⁶ and similar problems under the EC Directive.²⁴⁷ Even without First Amendment issues, plaintiffs and authorities would still need to go to court to compel disclosure of the third party identities.²⁴⁸

While Craigslist does not disclose its actual profits, it is suspected that the website currently pulls in over \$100 million

11, 2003 <http://www.securityfocus.com/infocus/1674> (last visited Feb. 6, 2010).

²⁴⁵ See Privacy Policy, CRAIGSLIST, http://www.craigslist.org/about/privacy_policy (last visited Feb. 2, 2010).

²⁴⁶ Ziniti, *supra* note 4, at 609 (noting a system that prevented anonymous postings by "requiring online providers to maintain records of every posting online would not only be a massive undertaking unreasonable to impose" but would also impinge on a right recognized under the First Amendment). See, e.g., *Doe v. 2themart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (D. Wash. 2001); *ACLU v. Miller*, 977 F. Supp. 1228, 1230-32 (N.D. Ga. 1997); but see Ballon, *supra* note 84. Ian C. Ballon, *The Good Samaritan Exemption and The CDA, Excepted From Chapter 37 (Defamation and Torts) of E-Commerce and Internet Law*, 978 PLI/Pat 515 (2009) ("privacy laws generally do not proscribe disclosure of the contact information provided by pseudonymous subscribers, users or posters in cyberspace unless a site or service has adopted a privacy policy that purports to prevent such disclosures or otherwise creates a reasonable expectation of privacy in this information").

²⁴⁷ The Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20022013.htm> (implementing the Council Directive on Electronic Commerce, 2000/31/EC, para. 14, 2000 O.J. (L 178/1)(EC), noting "[the] Directive cannot prevent the anonymous use of open networks such as the Internet.").

²⁴⁸ See Ballon, *supra* note 84, at 529.

from fees collected from help-wanted ads pertaining to a few cities such as New York, San Francisco, and Los Angeles, and for rental property agencies in New York said to be worth \$5 billion.²⁴⁹ It is suspected by analysts that revenues could be at least tripled if more cities were included, or even more so if banner or pop-up ads were employed.²⁵⁰ Craigslist currently employs about 30 individuals compared to Ebay, which employs close to 15,000.²⁵¹ Arguably, Craigslist could probably afford to hire more employees to monitor ads. However, Craigslist cannot reasonably monitor everything that gets posted no matter how many employees they hire. Users post more than 50 million ads on the site per month in the U.S. alone.²⁵²

Arguments are made that CDA could use an overhaul allowing tort liability to encourage ISPs to do their part.²⁵³ However, overhauling the CDA is submersed with strong policy concerns.²⁵⁴ Arguments may be made that when legislators enacted the CDA, it is unlikely they could have anticipated the growth of the internet and its corresponding crime. This raises the question of whether it has come to the point where certain unlawful acts have become so egregious and yet commonplace that greater legal protections need to be implemented for socie-

²⁴⁹ *Study: Craigslist Revenue to Climb 23 Percent to US\$100 Million*, WATERLOO REGION RECORD, June 10, 2009, at section 6, available at 2009 WLNR 11161741; Christopher Goodwin, *Shucks, We Just Can't Help Making Billions; Interview; Craig Newmark and Jim Buckmaster*, SUNDAY TIMES (U.K.), Sept. 7, 2008, available at 2008 WLNR 16969808; Dominic Rushe, *Falling for Super-geek*, SUNDAY TIMES (UK), May 7, 2006, available at 2006 WLNR 8170156.

²⁵⁰ Christopher Goodwin, *Craigslist: A Triumph of Nerd Values*, THE SUNDAY TIMES (Sept. 7, 2008), http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article4681804.ece.

²⁵¹ *Id.*; Craigslist, *supra* note 8.

²⁵² Craigslist, *supra* note 8.

²⁵³ Ziniti, *supra* note 4, at 597.

²⁵⁴ *Id.* at 598 (arguing that a tort approach is not justified in terms of its effect on free speech stating “[t]he efficiency rationale that justifies spreading the costs of injuries from a product or service to everyone who uses it, by holding its providers liable, ignores the value of free speech and fails to appreciate the social utility of the Internet and its growth.”). *But cf* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992). “It ought to be troubling,” Schauer argues, “whenever the cost of a general societal benefit must be born exclusively or disproportionately by a small subset of the beneficiaries. ... If free speech benefits us all, then ideally we all ought to pay for it.” *Id.* at 1322.

ty's protection. Modifying the CDA could do much to curb crime from organized theft to child prostitution, but at what cost? The values at stake are not easily quantified.

VII. CONCLUSION

CDA immunity is robust at this point, robust enough to protect Craigslist. Courts acknowledge that the long line of CDA precedent leaves courts incapable of imposing anything resembling a duty to monitor.²⁵⁵ Ultimately, Congress should not modify the CDA, but if it does, it must balance the social desire of providing plaintiffs with rights without hampering further socially desirable growth of the internet and free expression.²⁵⁶ Governments must be mindful that inducing websites to do more carries with it a reciprocal risk of stifling the free exchange of information and technological development. By contrast, the *Zeran* approach encourages internet growth by furthering developers certainty in their ability to rely on advertising revenues.²⁵⁷ The crime commonly associated with Craigslist is not to be trivialized, and new methods of combating it should be sought. However, it would be imprudent to impede the advancement of so useful of a tool through imposing liability merely because that tool may also be misused.

²⁵⁵ *Stoner v. Ebay*, 56 U.S.P.Q.2D (BNA) 1852 (2000). 2000 Extra LEXIS 156 (Extra 2000) *13 (stating that if a duty to monitor third party content is to be imposed on websites, Congress will have to be the one imposing it).

²⁵⁶ Mary Kay Finn, Karen Lahey & David Redle, *Policies Underlying Congressional Approval of Criminal and Civil Immunity for Interactive Computer Service Providers Under Provisions of the Communications Decency Act of 1996 – Should E-Buyers Beware?*, 31 U. TOL. REV. 347 (2000) (noting that “[w]hile deference to industry growth and minimization of government involvement in business has a nice ring, it may in the long term be more destructive. In the alternative, ordered growth at the outset may be a better route. Balancing of risks and allocation of loss now may assure reasonable growth and expansion with optimum protection of all involved.”).

²⁵⁷ *Ziniti*, *supra* note 4, at 613.