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Subverting the Communications Decency Act: J.S. v. Village Voice Media Holdings

Cynthia Lee*

INTRODUCTION

The Internet as we know it today runs on advertisements. From your favorite video platforms to social media channels, advertisements generate the revenue these companies need to exist.1 A 1996 law called the Communications Decency Act (CDA) plays a large part in making this lucrative industry possible. Enacted by Congress to encourage the “continued development of the Internet,”2 section 230 of the CDA provides a unique safe harbor exception to interactive computer services,3 exempting them from liability over harmful or offensive content so long as the interactive computer service, a term used interchangeably with Internet service provider (ISPs) in this Comment, have no hand in the

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3. “The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specially a service or system that provides access to the Internet . . . “ Id. § 230(f)(2). An Internet site meets this definition. See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (“Today, the most common interactive computer services are websites.”). The phrase is sometimes used interchangeably with Internet service provider (ISP)—a practice adopted in this Comment for brevity. See Johnson v. Arden, 614 F.3d 785, 788 (8th Cir. 2010).
content's development.\textsuperscript{4} Examples of such third-party content include the ads conceived and created by brands that are then posted on the Googles and Facebooks of the Internet.\textsuperscript{5} Surprising to some, section 230 has survived numerous lawsuits and challenges since its enactment.\textsuperscript{6} Furthermore, it has been interpreted as providing strong grounds for summary judgment dismissal of claims,\textsuperscript{7} effectively shielding ISPs from unnecessary discovery and litigation.\textsuperscript{8} However, a recent ruling from the Supreme Court of Washington in \textit{J.S. v. Village Voice Media Holdings} threatens this record.

This Comment argues that \textit{J.S.} deviates from precedent while illustrating how the ruling subverts the policy rationales behind section 230. Contrary to prominent precedents set by several circuit courts, \textit{J.S.} defines content creation too broadly, making it substantially easier to characterize an ISP as a potentially liable content creator.\textsuperscript{9} In doing so, the \textit{J.S.} court sets a low standard for overcoming summary judgment challenges and moving into the discovery phase of litigation, thereby imposing administrative and financial burdens on defendant ISPs. Barring another challenge in the Washington State Supreme Court or the United States Supreme Court, \textit{J.S.} marks the opening of the metaphorical litigation floodgates, impeding policy goals such as technological innovation, user control, and choice in the free market.

Part I of this Comment discusses the factual and procedural history of the case. Part II considers \textit{J.S.}'s disconnect from legal precedents and legislative policy.

\section{BACKGROUND}

In \textit{J.S.}, three minor plaintiffs sued the parent company of Backpage—a website characterizing itself as the “classified ads” section of the Internet.\textsuperscript{10} Sex trade advertisement has been particularly popular on Backpage, and the website is considered the leading destination for such ads.\textsuperscript{11} In one month alone, “[Backpage] published more than 1.4 million ads in its adult services section in

\begin{flushleft}
\textsuperscript{5} Id.
\textsuperscript{8} CENTER ON LAW AND INFORMATION POLICY, \textit{SECTION 230 OF THE COMMUNICATIONS DECENCY ACT: A SURVEY OF THE LEGAL LITERATURE AND REFORM PROPOSALS} 29 (2012).
\textsuperscript{9} This is different from characterizing an ISP as a liability-immune content host.
\end{flushleft}
the United States.” 12 As a result, Backpage and its parent company, Village Voice Media Holdings, have been the targets of lawsuits and legislative action.13

The plaintiffs, collectively known as J.S.,14 were minor females who “ran away from home and became controlled by professional adult pimps.”15 Beginning in 2010, the adult pimps posted advertisements on Backpage in exchange for a fee.16 Featuring photos of the plaintiffs in lingerie and using sexually suggestive language, the advertisements generated hundreds of responses and led to repeated rapes.17 In their suit against Backpage, the plaintiffs alleged harms including the “violations of Washington’s laws against trafficking, commercial sexual abuse, and prostitution.”18

The litigation began in a Washington state superior court, where J.S. survived a motion to dismiss the action.19 Backpage then moved for a discretionary review, at which point “[t]he Court of Appeals granted review and certified the case to [the Supreme Court] for direct review.” 20 As it has done in previous, unrelated litigation over prostitution ads on its website,21 Backpage invoked a section 230 defense, arguing that the CDA prohibited Washington state laws from imposing liability.22 Section 230 seeks to protect interactive service providers in ways traditional content providers like newspapers and magazines are not shielded.23 While the latter mediums “may be held liable for publishing ads that harm third parties,”24 section 230 explicitly prohibits holding ISPs liable if the content is developed by a third party.25 The scope of CDA immunity was a matter of first impression for the court.

12. Id.
14. The three minors are J.S., S.L., and L.C. All chose to identify only by their initials due to the nature of the harms alleged. Amended Complaint at 2, No. 3:12-cv-06031 (W.D. Wash. Dec. 5, 2012).
15. Id.
16. Id. at 16–17.
17. Id. at 2–4, 17, 19, 21.
19. Id. at 99.
20. Id. Through the direct review process, the Washington Supreme Court possesses the authority to hear appeals directly when certified by the lower courts. WASH. REV. CODE ANN. § 2.06.030 (West).
22. J.S., 184 Wash. 2d at 99.
24. Id.
25. 47 U.S.C. § 230(c)(1). The law additionally prohibits imposing liability for “action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, . . . or otherwise objectionable.” Id. § 230(c)(2).
The court held that the case did not merit a Washington Court Rule 12(b)(6) dismissal for “failure to state a claim upon which relief can be granted,” finding that J.S. could conceivably overcome the section 230 defense. The section 230 defense can be overcome in cases where the ISP makes a material contribution to content development. The court provides little discussion of what material contribution means here and how Backpage could possibly meet that standard. However, the court appears to be content that at least one of J.S.’s six allegations, if true, would invalidate Backpage’s immunity. Together, the allegations state that Backpage’s website development and policies sufficiently move the company out of the protected host role into that of a content developer. Yet the allegations are threadbare, unable to do more than simply state that “Backpage has a ‘substantial role in creating the content and context of the advertisements on its website.’” The case has been remanded to the trial level for further proceedings.

II
DISCUSSION OF THE CASE

A. There is poor fit between J.S. and leading precedents.

J.S. does not fit in with past holdings either in the Ninth Circuit or other courts of appeals. In approving the sufficiency of J.S.’s threadbare claims of content development, the court suggests that very little is required to move an ISP from the “host” category to the “developer” category. Yet in *Fair Housing Council v. Roommates.com*, the Ninth Circuit cautioned against such broad conceptions of a developer. The court noted that “to read the term [developer] so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides.”
In *Roommates*, the defendant operated a popular website pairing roommates together, receiving roughly one million page views per day.\(^{38}\) To successfully list a posting on the website, users were required to describe preferences in three categories: gender, sexual orientation, and familial status.\(^{39}\) The Fair Housing Councils of San Fernando Valley and San Diego contested this practice as discriminatory and in breach of the Fair Housing Act (FHA).\(^{40}\) The court evaluated Roommates’s section 230 immunity without ruling on the FHA claim\(^{41}\) and concluded that there was no such safe harbor for the information published on individual profile pages or for its search system.\(^{42}\) The court further noted that “[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommates [became] much more than a passive transmitter of information provided by others; it [became] the developer, at least in part, of that information.”\(^{43}\) Here, the court made a distinction between simply requiring neutral information, such as the title of an ad, and requiring specific content, namely sexual orientation and familial status preferences.

By allowing websites to require neutral information and yet remain immune from liability, the *Roommates* decision itself closely tracks earlier Ninth Circuit decisions. In *Carafano v. Metrosplash.com, Inc.* the court held that where a website “classifies user characteristics into discrete categories and collects responses to specific essay questions,” such actions do “not transform [the website] into a ‘developer’ of the ‘underlying misinformation.’”\(^{44}\) The website merely provides space for users to add in content and leaves the choice to post proper or improper content to the user.\(^{45}\) Drawing parallels to another decision, *Batzel v. Smith*,\(^{46}\) the Ninth Circuit acknowledged its adoption of “the consensus developing across other courts of appeals [notably the Fourth and Tenth Circuits] that [section] 230(c) provides broad immunity for publishing content provided primarily by third parties.”\(^{47}\)

Under the Ninth Circuit’s understanding then, J.S. would have to prove something that does not exist in order to defeat section 230 immunity: editorial development. Backpage has never required information beyond basics such as title and service description. In fact, nowhere on its ads submissions page is a

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38. *Id.* at 1161.
39. *Id.*
40. *Id.* at 1162.
41. *Id.* at 1182.
42. *Id.* at 1166.
43. *Id.* at 1167.
44. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).
45. *Id.*
46. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).
47. *Carafano*, 339 F.3d at 1123. Appellate decisions the *Carafano* court references include *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000); and *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).
prepopulated field like the one found on Roommates.com.\textsuperscript{48} Nor do its general advertising policies require the submission of specific information; in fact, the only policies promulgated by the website are those prohibiting naked imagery and prostitution services.\textsuperscript{49} In allowing an unsupported claim of this nature to survive summary judgment, the \textit{J.S.} court effectively abolishes Washington Court Rule 12(b)(6) in section 230 cases. The logical result of such action is the metaphorical opening of the litigation floodgates, allowing frivolous lawsuits and pointless discovery to continue.\textsuperscript{50}

Proponents of the \textit{J.S.} ruling may argue that its impact is far narrower. Admittedly, the facts of the cases are highly specific. Sex trafficking, particularly when minors are involved, is a serious and sensitive public policy issue in Washington.\textsuperscript{51} Furthermore, despite broad public support, legislative efforts to curb the advertisement of such illegal services failed in 2012 when a district court ruled Senate Bill 6251 unconstitutional.\textsuperscript{52} Senate Bill 6251 “makes it a felony to knowingly publish, disseminate, or display [an advertisement] . . . if it contains a ‘depiction of a minor’ and any ‘explicit or implicit offer’ of sex for ‘something of value.’”\textsuperscript{53} Within this context, a proponent of the \textit{J.S.} ruling might suggest the relaxing of 12(b)(6) is most appropriate in section 230 cases involving serious public policy issues that the other branches of government have failed to effectively address. Yet nowhere in the opinion does the court set forth such a limiting principle.\textsuperscript{54} Even if the case were interpreted to include one, judicial discretion would determine whether an issue met the threshold of pressing public policy importance and whether past legislative or executive action had been sufficient. Not only is such discretion unwelcome in a judicial system that emphasizes the predictability of legal outcomes, it is highly detrimental to ISPs, which seek clear precedents for their business decisions.\textsuperscript{55}

\textbf{B. The ruling is at odds with the policy rationales of section 230.}

The \textit{J.S.} ruling subverts not only leading circuit decisions but also the major policy rationales of the CDA, one of which is “to promote the continued development of the Internet.”\textsuperscript{56} Overly lenient pleading requirements such as the ones in \textit{J.S.} lead to unnecessary, continued litigation, diverting company

\begin{itemize}
  \item \textsuperscript{48} Post an Ad, BACKPAGE, http://posting.pullman.backpage.com/online/classifieds/PostAdPPI.html/puw/pullman.backpage.com/.
  \item \textsuperscript{49} \textit{J.S. v. Vill. Voice Media Holdings, LLC}, 184 Wash. 2d 95, 99 (2015).
  \item \textsuperscript{50} \textit{Kent D. Stuckey, Internet and Online Law}, §2.03[3] (2000).
  \item \textsuperscript{51} A 2008 report estimates that there are between “three hundred to five hundred children being exploited for sex in the Seattle area alone each year.” 2012 Wash. Sess. Laws 6251.
  \item \textsuperscript{52} Backpage.com, LLC v. McKenna, 2012 WL 4120262, at 1296 (W.D. Wash. Sept. 18, 2012).
  \item \textsuperscript{53} \textit{Id}.
  \item \textsuperscript{54} See \textit{J.S.}, 184 Wash. 2d 95, 95-147 (2015).
  \item \textsuperscript{55} See \textit{Edwin S. Fruehwald, Choice of Law for American Courts: A Multilateralism Method} (2001) (emphasizing the desirability of predictability in legal regime, particularly for businesses).
  \item \textsuperscript{56} 47 U.S.C. § 230(b)(1) (2012).
\end{itemize}
resources to discovery and deposition preparation. Professor Eric Goldman, a leading voice in technology and marketing law, worries this may have even been the court’s intent: “the majority emphasizes the case’s discovery implications (the court says the plaintiffs ‘brought this suit in part to bring light to some of those shadows: to show how children are bought and sold for sexual services online on Backpage.com’).”

Extensive and unnecessary discovery is particularly problematic when resources are being diverted away from creating technological and operational processes to remove offensive, obscene, and illegal content. Many Internet advertising platforms recruit engineering, policy, and operations teams. These teams work interdependently in managing the twin faces of online advertising: open, liberal platforms that uphold the values of the First Amendment and complex content moderation processes—both automatic and human—to remove expressions that overstep the companies’ guidelines and online community standards. Operations and policy teams will identify problem areas for the engineers who in turn develop tools targeting problematic content. Those tools are then tweaked and improved based on the recommendations of the operation and policy teams. To the extent that personnel are diverted off these three teams to assist with compiling discovery documents and to prepare testimonies, the pro-development intentions of the CDA fall by the wayside.

Such developments would be discouraging, particularly given that the CDA and strong judicial protection of its safe harbor provision have, in fact, produced robust content moderation regimes within the major Internet companies. For instance, Google, Yahoo, Twitter, and Facebook all have clear and thorough policies on content standards for advertisements and user-generated posts. Similar companies have also developed proprietary algorithms to instantaneously flag and remove such content and are even collaborating

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57. Goldman, supra note 29.
58. See, e.g., The Twitter Rules, TWITTER, https://support.twitter.com/articles/18311. Today, the human review component of content moderation alone is a massive economy. An independent online safety consultant estimated “the number of content moderators scrubbing the world’s social media sites, mobile apps, and cloud storage services runs to ‘well over 100,000’. . . .” Adrian Chen, The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed, WIRED (Oct. 23, 2014), http://www.wired.com/2014/10/content-moderation/; see also Brad Stone, Policing the Web’s Lurid Precincts, N.Y. TIMES (July 18, 2010), http://www.nytimes.com/2010/07/19/technology/19screen.html.
59. In 2012, for example, Twitter developed a “point of contact” program in which “every product manager has a point of contact in Trust & Safety who they can get in touch with, so if they’re proposing something new there’s somebody from our team following it.” Charles Arthur, Twitter’s Del Harvey Talks PhotoDNA, Spam and Prism, GUARDIAN (July 25, 2013), https://www.theguardian.com/technology/2013/jul/25/twitter-del-harvey-photodna-spam-prism. The program led to the development of a feature, which provides notice to users that a tweet may contain sensitive material. Id.
60. See, e.g., Twitter Ads Policies, TWITTER, https://support.twitter.com/articles/20169693; AdWords Policies, GOOGLE, https://support.google.com/adwordspolicy/answer/6008942?hl=en; see also S. Braman & S. Lynch, Advantage ISP: Terms of Service as Media Law, 5 NEW MEDIA & SOC’Y 249, 263 (2003) (noting that even in the early 2000s, ISPs were developing content standards).
amongst themselves to develop more rigorous tools. An example of this kind of collaboration is a project with the Internet Watch Foundation (IWF) to incorporate the IWF’s hash list—digital fingerprints of child pornography images—into the content moderation technologies of companies like Google and Facebook.\(^\text{62}\) The end product will be technologies that can almost instantaneously detect and remove third-party content that carries child pornography.\(^\text{63}\)

Another policy laid out in the CDA is “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”\(^\text{64}\) A weakening of section 230 immunity works against this policy. Section 230 “protects against the ‘heckler’s veto’ that would chill free speech.”\(^\text{65}\) Without it, any “heckler” who opposed a third party-provided post or ad “could pressure service providers to remove it simply by threatening litigation.”\(^\text{66}\) Applied to today’s Internet landscape, the results of this would simply be untenable. Twitter, for instance, saw 500 million tweets a day as of 2013.\(^\text{67}\) Since CDA analysis does not differ for paid and unpaid content, takedown requests could span the entire range of daily tweets, not just paid advertisements. Faced with the possibility of liability for all such content, ISPs may turn to overregulation of users’ speech.\(^\text{68,69}\) Other ISPs may simply close their doors. A founder of a prominent website network, when interviewed by the Electronic Frontier Foundation, confirmed this reality, stating that the weakening of section 230 defense would lead to shutdowns: “there’s no way we would survive even a month. We get so many legal threats.”\(^\text{70}\) Such consequences

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62. Id.


69. See also Holland, supra note 7, at 127 (noting that traditional liability rules lead to “overly broad restrictions on expression and behavior”).

reduce users’ options and dampen free market activity and are thus antithetical to the original goals of the CDA.

CONCLUSION

To date, the CDA has proven to be an exceptionally powerful tool, not just in incentivizing self-policing, but also in prioritizing free speech. The *J.S.* decision is problematic in that it jeopardizes both developments, setting concerning precedent for the state of Washington. Barring another challenge in the Washington State Supreme Court or the United States Supreme Court, *J.S.* will remain good law despite growing consensus among the circuits to the contrary, 71 including the First Circuit, which recently upheld section 230 immunity in a case involving the same defendants, three runaway Jane Does, and pimps armed with prepaid credit cards and with the speed, anonymity, and mass audiences new technologies today enable.72

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