Brooklyn Law Review

Volume 77 | Issue 2 Article 9

2012

Policing the Virtual Red Light District: A Legislative Solution to the Problems of Internet Prostitution and Sex Trafficking

Abby R. Perer

Policing the Virtual Red Light District

A LEGISLATIVE SOLUTION TO THE PROBLEMS OF INTERNET PROSTITUTION AND SEX TRAFFICKING

INTRODUCTION

"IM [sic] READY TO SATISFY ALL YOUR SINFULL [sic] NEEDS . . . 150 HHR, 200 1HR, 350 2HRS, 500 3HRS."[1] A quick search through the adult services section of an average classified-ads website reveals hundreds of advertisements like this. This advertisement from the "Erotic Services" section of Classifiedads.com—among hundreds of others on the same website and other classified-ads websites—is the reason why some refer to the Internet as the "virtual red-light district."[2] In fact, Craigslist, the online classified-ads giant, recently came under the microscope of local and national law enforcement agencies and prosecutors because it hosted ads like this. Known as the "Wal-Mart"[3] of online sex trafficking, Craigslist, as well as those in charge of the site, began to face intense scrutiny from the public in 2010 because some believed that the website's operators knowingly allowed users to offer sex for money in the site's "Adult Services" section.[4]

Despite this belief, the legal options for deterring websites from hosting such content were—and continue to be—limited. Under the Communications Decency Act of 1996

---

[1] Destiny, *Sexy Mixed Bombshell Ready for You*, CLASSIFIEDADS.COM, http://adult.classifiedads.com/erotic_services-ad4516424.htm (last updated May 22, 2011) (on file with author).

[2] David Wright et al., *'Craigslist: Site for Sex Slaves' Story Save's Girl's Life*, ABC NEWS (Sept. 6, 2010), http://abcnews.go.com/WN/popular-website-craigslist-outlet-sex-trafficking-child-exploitation/story?id=11367581.

[3] Steve Turnam & Amber Lyon, *Sold on Craigslist: Critics Say Sex Ad Crackdown Inadequate*, CNN (Aug. 3, 2010), http://articles.cnn.com/2010-08-03/justice/craigslist.sex.ads_1_adult-ads-services-ads-craigslist?_s=PM:CRIME (quoting Andrea Powell of FAIR).

[4] In early August 2010, CNN reporter Amber Lyon approached Craigslist's founder, Craig Newmark, outside of a university where he was giving an unrelated talk. Lyon showed Newmark several ads that she had found on the "Adult Services" section of Craigslist in which it is clear that women are selling themselves for money. Amber Lyon, *Craigslist and the Sex Trade*, CNN (Aug. 25, 2010, 6:31 PM), http://ac360.blogs.cnn.com/2010/08/25/video-craigslist-and-the-sex-trade-2/?iref=allsearch.

(CDA), websites essentially have immunity from liability—civil and criminal[5]—for unlawful postings by third parties.[6] This immunity comes from section 230 of the CDA, entitled "Protection for private blocking and screening of offensive material."[7] Under this section, websites that merely provide an interactive computer service[8] "shall [not] be treated as the publisher or speaker" of any information posted by third-party users, where the third-party users are considered the "information content providers."[9]

Courts agree that they cannot make websites that act as mere hosts of information, not creators, answer to plaintiffs "under state law" for offensive or illegal information posted by third-party users.[10] Specifically, section 230 protects interactive computer services, including websites, from liability as publishers or speakers of information created by third parties.[11] Therefore, classified-ads websites remain immune from

---

[5] It should be noted that section 230 provides an explicit carve-out for federal criminal liability. 47 U.S.C. § 230(e)(1) (2006). Prostitution, however, is generally regulated by the states, and, as far as criminal liability goes, classifieds websites like Craigslist have, thus far, "escap[ed] criminal prosecution." John E.D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, a Case Study*, 15 J. TECH. L. & POL'Y 85, 87 (2010). It is true that prosecutors could bring criminal charges against classifieds websites for violations of federal anti-prostitution laws, but it is highly unlikely that those prosecutors could meet the burden of showing that classifieds websites have "the requisite knowledge and *mens rea* to be prosecuted." *Id.* at 93.

[6] 47 U.S.C. § 230. Although there is a statutory carve-out for federal crimes, *id.* § 230(e)(1), criminal prosecution would be a stretch here, especially on the elements of intent or *mens rea*. *See* Larkin, *supra* note 5, at 91-100 (discussing the shortcomings of potential criminal prosecution strategies for Craigslist's "Adult Services" section).

[7] 47 U.S.C. § 230.

[8] "The definition of an 'interactive computer service' (ICS) is very broad under the CDA, including: 'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.'" Lori E. Lesser, *Social Network and Blogs*, 1001 PLI/Pat 101, 117 (2010); 47 U.S.C. § 230(f)(2). Courts have interpreted interactive computer services to include websites as well. Lesser, *supra*, at 117 (citing Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007)). "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

[9] 47 U.S.C. § 230(c)(1).

[10] Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 294 (D.N.H. 2008). "[O]ther courts that have addressed these issues have generally interpreted Section 230 immunity broadly, so as to effectuate Congress's 'policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" *Lycos, Inc.*, 478 F.3d at 418 (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir.1997)).

[11] *See* 47 U.S.C. § 230(c). For the definition of an "interactive computer service," see *supra* note 8.

liability for hosting content created entirely by third parties, which includes sex-sales advertisements.[12]

As a society that condemns, and has outlawed, sex trafficking and prostitution (collectively, "sex sales"), we should not have to rely on societal pressures—from open letters to media reports[13]—to hold classified-ads websites accountable for the rampant criminal activity facilitated through the sites' adult-services sections. Although many have tried, plaintiffs have had little luck getting around section 230.[14] Despite the development of creative litigation strategies, including (1) the Estoppel Approach,[15] (2) the *Grokster* Approach,[16] (3) the *Roommates.com* Approach,[17] and (4) the Default-Injunction Approach,[18] each strategy has its own weaknesses, and thus, none of them will effectively combat the problem of online sex sales. Therefore, Congress should amend section 230 in order to obtain a more effective, long-term solution to these problems. The Commercial Sex Distribution Amendment (CSDA) would preserve traditional distributor liability for classified-ads websites. Under such an amendment, classified-ads websites would be liable for unlawful sex postings by third parties if the websites were notified about the postings but took no steps to remove the postings, because they would then become distributors that knowingly distribute illegal content. As a "distributor," the website would lose the shield of section 230 "publisher" immunity.[19]

This note is divided into five parts. Part I contains a brief history of prostitution and sex trafficking, including their Internet evolution. Part II discusses the policy reasons for, and the purpose of, section 230. Part III explores the four litigation

---

[12] *See, e.g.*, Dart v. Craigslist, Inc., 665 F. Supp. 2d 961 (N.D. Ill. 2009) (where the court found Craigslist immune from civil liability for third-party sex-sales advertisements under CDA section 230).

[13] *See infra* notes 44-51 and accompanying text.

[14] *See, e.g.*, Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008); *Zeran*, 129 F.3d at 328; *Dart*, 665 F. Supp. 2d at 966.

[15] *See infra* Part III.A.

[16] *See infra* Part III.B.

[17] *See infra* Part III.C.

[18] *See infra* Part III.D.

[19] As the law stands now, courts have held that interactive computer services that conduct no filtering are, at most, distributors. Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991). More importantly, courts have also decided that section 230 eliminates traditional distributor liability for websites, despite the fact that the statute only mentions publisher liability. *Zeran*, 129 F.3d at 332; *see infra* notes 148-64 and accompanying text.

strategies mentioned above and explains why each strategy ultimately fails to provide plaintiffs with relief on the merits. Part IV presents a legislative solution to online-prostitution and sex-trafficking problems. This solution, the CSDA, finds its foundation in common-law principles of distributor liability for the distribution of tortious materials.[20] Finally, Part V addresses the potential problems with the CSDA and explains how those problems can be overcome.

I. PUTTING PROSTITUTION AND SEX TRAFFICKING IN CONTEXT

Prostitution, perhaps the "'oldest profession' in the world,"[21] is defined as "[t]he act or practice of engaging in sexual activity for money or its equivalent."[22] In contrast, sex trafficking is defined as using force, fraud, or coercion to cause a person to "engage in a commercial sex act"—or in the case of a person under eighteen years of age, simply causing that person to engage in a commercial sex act.[23] In other words, sex trafficking is forced prostitution, or alternatively, facilitating prostitution with a minor.

Although it is often hard to distinguish between voluntary prostitution and involuntary sex trafficking, the two have coexisted in the United States since the eighteenth century.[24]

---

[20] Under tort law, a distributor "who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication." RESTATEMENT (SECOND) OF TORTS § 577(2) (1977). As one author notes, these kinds of defamation cases "typically involve a defendant who, though not the author of the defamatory statement in question, has implicitly ratified that statement by his failure to remove it from a place of prominence on his property." Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863, 877 (2010).

[21] *See, e.g.*, Rebecca L. Wharton, Note, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 759 (2010) (citing NILS JOHAN RINGDAL, LOVE FOR SALE: A WORLD HISTORY OF PROSTITUTION 4 (Richard Daly trans., Grove Press 1st ed. 2004) (1997)); R. BARRI FLOWERS, THE PROSTITUTION OF WOMEN AND GIRLS 5 (1998).

[22] BLACK'S LAW DICTIONARY 576 (3d Pocket ed. 2006). Additionally, prostitution exists in several forms, such as street prostitution, escort services, and brothels. Ronald Weitzer, *The Politics of Prostitution in America*, *in* SEX FOR SALE 159, 163-65 (Ronald Weitzer ed., 2000).

[23] Trafficking Victims Protection Act, 18 U.S.C.A § 1591 (West 2000 & Supp. 2011).

[24] *Prostitution and the Trafficking of Women*, IOWA STATE UNIV., http://www.public.iastate.edu/~womenstu/ws201student/prostitution/homepage.html (last visited Oct. 13, 2011).

During its earliest days, "the incidence of prostitution was low"[25] in America, partly because adultery was extremely common and partly because men could often have sex with slaves or indentured servants rather than prostitutes.[26] In the early nineteenth century, as cities and industry expanded, so too did the business of prostitution.[27] Until the end of World War I, prostitution existed in plain view in many American cities.[28]

But prostitution did not thrive for long. During World War II, law enforcement and the general public began to see prostitutes as a dangerous threat to soldiers and laborers, and reformers made efforts to decrease the open business of prostitution.[29] After that, in the 1950s and 1960s, police arrested prostitutes more frequently, men did not hire prostitutes as often, organized crime found more lucrative sources of revenue, and the entire business was largely forced underground.[30]

Over the past fifty years, however, the sexual culture in America has changed dramatically—and so has prostitution. In the 1960s, a "sexual revolution" began, and pornography became available for mass consumption for the first time.[31] As pornography became more pervasive in American society, so too did prostitution, because, as one author writes, "prostitution is the *enacted* version of pornography."[32] As a result, by the 1990s, prostitution was essentially "normalized" in our society.[33] The prevalence of sex in the media, combined with the increasingly regular entrance of women in the labor force led to an increase in prostitution because "sex industries" could offer women "higher wages than the labor force."[34] Rather than being a woman's only work option, prostitution arguably became a choice for some women;[35] and not only a choice for women in lower socio-economic classes, but a choice for educated, upper middle class women as well.[36] Accordingly,

---

[25] T. C. Esselstyn, *Prostitution in the United States*, 376 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 126 (1968).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 127.

[31] KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 56 (1995).

[32] *Id.* at 57.

[33] *Id.* at 58-59.

[34] *Id.* at 123.

[35] Valerie Jenness, *From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem*, 37 SOC. PROBLEMS 403, 405-06 (1990).

[36] Consider Ashley Dupré, a prostitute from an upper middle class suburb in New Jersey, who arguably chose the profession of her own free will. *See* Kimberly

"[s]ince 1970, the most dramatic changes in prostitution have been its industrialization, normalization, and widespread global diffusion."[37]

However, the rise in prostitution during the last thirty years of the twentieth century pales in comparison to the rise in prostitution over the last decade alone. Today, "[s]exual freedom is now regarded by many as a basic liberty, and the freedoms to buy and sell sexual services are arguably included in sexual freedom."[38] As one author correctly predicted in 1998, "the number of girls and women entering the profession will likely swell in the coming years as we enter the new century."[39]

A major reason for the swell in prostitution and sex trafficking over the past decade is the advancement of the Internet.[40] The Internet has made access to commercial sex essentially effortless.[41] From the privacy of their own homes, Internet users can sell and purchase sex instantly. The "anonymity and community aspect to the Internet makes it a powerful tool for traffickers, buyers, and facilitators."[42]

Although sex between consenting adults can be harmless, the problem in the online sex-sales context lies in that not all the sex-sales postings on classified-ads websites are voluntary, and, based on the content of the postings alone, it is nearly impossible to identify who is offering sex willingly (voluntary prostitutes) and who is being forced to sell her body against her will (victims of sex trafficking). Additionally, even if many of the ads are posted by willing adult participants and do not constitute sex trafficking, the sale of sex for money is illegal in all fifty states.[43]

An open letter to Craig Newmark—the founder of Craigslist—sent by two victims of online sex trafficking shed

---

Launier & Katie Escherich, *Ashley Dupré Exclusive: My Side of the Story*, ABCNEWS 20/20 (Nov. 19, 2008), http://abcnews.go.com/2020/story?id=6280407&page=1.

[37] BARRY, *supra* note 31, at 122.

[38] PETER DE MARNEFFE, LIBERALISM AND PROSTITUTION 108 (2010).

[39] FLOWERS, *supra* note 21, at 15.

[40] LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN 19 (2009), *available at* http://www.sharedhope.org/Portals/0/Documents/SHI_National_Report_on_DMST_2009.pdf.

[41] *Id*.

[42] *Id*.

[43] *See, e.g.*, N.Y. PENAL LAW § 230.00 (McKinney 2008). Prostitution is legal only in some counties in Nevada in which state-regulated brothels exist. Weitzer, *supra* note 22, at 159; NEV. REV. STAT. ANN. § 244.345 (LexisNexis 2005).

light on the problems of involuntary prostitution.[44] In that letter, the two teenage girls describe some of the horrors they suffered while they were being sold for sex through the "Adult Services" section of Craigslist. One of the girls explains that she was "sold for sex by the hour at truck stops and cheap motels" and that she was threatened, abused, and repeatedly raped.[45] Meanwhile, the man who trafficked one of the girls online made an easy $30,000 each month.[46] Undoubtedly other children and teenagers have suffered the same fate. Thus, online classified-ads websites facilitate violence and criminal activity that involves unwilling children and teens by continually allowing third-party users to advertise the sale of sex for money.[47] Moreover, even if those third-party users are willing adults, the underlying conduct is still unlawful, and often dangerous.

Seventeen attorneys general in 2010 recognized the problems inherent in online sex sales, with the tension between law enforcement and the classified-ads websites finally reaching its breaking point on August 24, 2010. On that date, the seventeen attorneys general sent a letter to Craig Newmark and Jim Buckmaster, the founder and general counsel of Craigslist, respectively, and requested the immediate removal of the "Adult Services" section of Craigslist.[48] In a move that surprised many, on September 4, 2010, Craigslist voluntarily replaced its "Adult Services" section with a black text box that read "censored."[49] Even more surprisingly, several days later, the section was removed entirely.[50] Although many people acknowledge the removal of the adult-services section on Craigslist as a victory in the fight against online prostitution and sex trafficking, others do not

---

[44] Open letter from AK and MC to Craig Newmark, founder of Craigslist, *available at* http://www.rebeccaproject.org/dearcraig/Dear_Craig.pdf (hereinafter "Craigslist Open Letter").

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] Letter from Attorneys General to Craig Newmark (Aug. 24, 2010), *available at* http://www.ohioattorneygeneral.gov/CraigslistLetter. The attorneys general from Arkansas, Connecticut, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Mississippi, Missouri, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, and Virginia, cited concern for "innocent women and children," as well as Craigslist's unique position as the "only player in the sex industry who is in a position to stop these ads before they are published," as reasons for their request for removal. *Id*.

[49] *Adult Services Censored on Craigslist*, CNN (Sept. 4, 2010), http://articles.cnn.com/2010-09-04/justice/craigslist.censored_1_prostitution-ads-craigslist-ceo-jim-buckmaster-founder-craig-newmark?_s=PM:CRIME.

[50] Michael A. Lindenberger, *Craigslist Comes Clean: No More 'Adult Services,' Ever*, TIME (Sept. 16, 2010), http://www.time.com/time/nation/article/0,8599,2019499,00.html.

understand the problems surrounding such solicitation.[51] Craigslist removed its "Adult Services" section voluntarily, but it is important to note that, under the CDA and relevant case law, Craigslist was not legally required to do so.[52]

Acknowledgment of Craigslist's voluntary compliance as a complete victory fails to adequately appreciate the problems that surround sex solicitation in the first place. Additionally, for victims of sex trafficking and law enforcement alike, the voluntary removal of the Craigslist section does little to solve the problem of online sex sales. Sex-sales postings are still available on Craigslist—simply under other sections like "Casual Encounters"[53]—and they are widely available on other classified-ads websites that continue to host "Adult" or "Erotic" services sections, such as Classifiedads.com, Webcosmo.com, Backpage.com, and more.[54] As one commentator recognized, when Craigslist removed its "Adult Services" section, other classified-ads websites began "actively soliciting traffic from the former "Adult Services" section of Craigslist."[55]

II. HISTORY AND PURPOSE OF SECTION 230

In 1996, with the enactment of the CDA, Congress made its first attempt to substantially regulate Internet activity.[56] In response to the ever-increasing presence of online sex sales, as

---

[51] Some people argue that adult or erotic services sections on classifieds sites actually make it easier to combat online sex crimes because the listings are all consolidated in one place, making them easily identifiable for law enforcement agencies. *See* danah boyd, *How Censoring Craigslist Helps Pimps, Child Traffickers and Other Abusive Scumbags*, HUFFINGTON POST (Sept. 6, 2010), http://www.huffingtonpost.com/danah-boyd/how-censoring-craigslist-_b_706789.html.

[52] 47 U.S.C. § 230(c)(1) (2006); *see, e.g.*, Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 967-69 (N.D. Ill. 2009) (holding that Craigslist was immune from civil liability for commercial sex postings created by third parties); Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008) (holding that Craigslist was immune from liability under section 230 for discriminatory housing postings created by third parties); Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (holding that plaintiff barred by section 230 from bringing suit against defendant for third-party defamatory postings).

[53] *Casual Encounters*, CRAIGSLIST.ORG, http://newyork.craigslist.org/cas/ (last visited Oct. 13, 2011).

[54] *Erotic Services*, CLASSIFIEDADS.COM, http://www.classifiedads.com/erotic_services-99.html (last visited Oct. 13, 2011); *Erotic Services*, WEBCOSMO, http://www.webcosmo.com/listing/search.aspx?countryId=1&gId=5&dId=95 (last visited Oct. 19, 2011); *Adult Jobs*, BACKPAGE.COM, http://newyork.backpage.com/AdultJobs/ (last visited Oct. 19, 2011).

[55] Laura Sydell, *Beyond Craigslist, Many Markets for Sex Traffickers*, NPR (Sept. 14, 2010), http://www.npr.org/templates/story/story.php?storyId=129863089.

[56] The CDA was added as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

well as other unlawful activity, Congress enacted section 223[57] and section 230 of the CDA.[58] Specifically, Congress enacted section 223 to protect minors from indecent and obscene materials found on the Internet.[59] Under subsections (a) and (d) of section 223, it became a crime for someone to knowingly transmit "obscene, indecent, or patently offensive material to minors below the age of eighteen."[60] The American Civil Liberties Union (ACLU) found these provisions at odds with the First Amendment's guarantee of free speech and brought suit to challenge the constitutionality of the statute.[61] In a 1997 decision, the Supreme Court sided with the ACLU and declared subsections (a) and (d) of section 223 unconstitutional.[62] The Court cited concerns about the "vague contours" of the statute, including the fact that Congress did not define the terms "indecent" or "patently offensive" and held that the indecency and obscenity provisions of the CDA placed an overly broad content-based restriction on free speech in violation of the First Amendment.[63] As a result of this decision, the only enforceable provision of the CDA that remains is section 230.

Congress originally enacted section 230 to limit liability of interactive computer services for defamatory postings created by third parties. More specifically, section 230 is "often cast as a legislative response to the *Stratton Oakmont, Inc.* [New York State Supreme Court] case."[64] In that case, the court held that a website and its operators were liable for libelous statements made by third parties on a bulletin-board portion of the site. Since the website's administrators screened—and either approved or rejected—all potential posts, the court found that the website had acted as the publisher of the statements

---

[57] 47 U.S.C. § 223 (1996).

[58] *See* 47 U.S.C. § 230 (2006); *see also* AARON SCHWABACH, INTERNET AND THE LAW: TECHNOLOGY, SOCIETY, AND COMPROMISES 45 (2006) ("The Communications Decency Act of 1996 (CDA) was the first law passed by Congress attempting to address the availability of pornography and obscene materials to minors over the Internet.").

[59] Vasiliki Pagidas, Case Note, *First Amendment—Freedom of Speech—Provisions of the Communications Decency Act of 1996 Intended to Protect Minors from Exposure to Indecent and Patently Offensive Material on the Internet Violate the First Amendment*—Reno v. ACLU*, 117 S. Ct. 2329 (1997)*, 8 SETON HALL CONST. L.J. 975, 980 (1998).

[60] Pagidas, *supra* note 59, at 980-81.

[61] ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996).

[62] Reno v. ACLU, 521 U.S. 844, 849 (1997).

[63] *Id.* at 870-79. The Court further notes that the interest in protecting children from harmful materials on the Internet "does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875.

[64] Brian J. McBrearty, *Who's Responsible? Website Immunity Under the Communications Decency Act and the Partial Creation or Development of Online Content*, 82 TEMP. L. REV. 827, 831 (2009).

at issue.[65] Under this line of reasoning, a website's liability increased the more it monitored posts by third parties because such monitoring effectively made a website a publisher, rather than a distributor, of information created and submitted by third parties. Therefore, Congress enacted section 230 to "remove the disincentives to selfregulation [sic] created by the *Stratton Oakmont* decision"[66] and to shield websites from traditional publisher liability. Recall that the pertinent parts of section 230 immunize interactive computer services, which include classified-ads websites, from being "treated as the publisher or speaker of any information provided by another information content provider."[67]

Unfortunately, many courts have read section 230 so broadly that they have granted immunity even to those interactive computer services that do next to nothing to monitor offensive or unlawful third-party content.[68] As the Ninth Circuit Court of Appeals opined in 2003, "[S]o long as a third party willingly provides the essential published content, the interactive service provider [or website] receives full immunity regardless of the specific editing or selection process."[69] The justification for such a broad reading of section 230 stems from the fact that "billions of users continually transmit enormous quantities of information" through the Internet, and although some of the information transmitted may be illegal, "[t]here is no way for the [interactive service providers] to police all of the content stored on and passing through their systems."[70] Therefore, in the commercial sex context, so long as third-party users create the sex-sales listings on classified-ads websites, the websites—as interactive computer services, and not information content providers—have immunity from civil and criminal liability, whether they monitor the ads posted or not.

The 2009 case *Dart v. Craigslist, Inc.*,[71] illustrates this immunity. In *Dart*, a county sheriff filed suit against Craigslist

---

[65] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

[66] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

[67] 47 U.S.C. § 230(c) (2006).

[68] *See, e.g.*, *Zeran*, 129 F.3d at 328 (holding that interactive service providers are immune from tort liability for information created by third parties); Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 712-16 (Ct. App. 2002); *see also* McBrearty, *supra* note 64, at 834-36.

[69] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

[70] SCHWABACH, *supra* note 58, at 190-91.

[71] 665 F. Supp. 2d 961 (N.D. Ill. 2009).

and claimed that the "Adult Services" section of the site constituted a public nuisance because the content contained in the section violated federal, state, and local prostitution laws.[72] The court dismissed the suit on the ground that the complaint plainly treated "Craigslist as the publisher or speaker of the information created by its users," and that under section 230(c), the provider of an interactive computer service, such as Craigslist, had immunity and could not be treated as the developer of information created by third parties.[73] Although the *Dart* Court noted that the majority of courts take this broad view of immunity for websites,[74] not all courts subscribe to such a view, especially when faced with more innovative strategies employed by plaintiffs.

III. LITIGATION STRATEGIES FOR CIRCUMVENTING SECTION 230

Admittedly, plaintiffs have developed creative litigation strategies in attempts to circumvent section 230. The following four approaches—Estoppel, *Grokster*, *Roommates.com*, and Default-Injunction—all have significant weaknesses inherent in relevant case law that impede their effectiveness in combating online sex sales.

A. The Estoppel Approach

After severing ties with her boyfriend in 2004, Cecilia Barnes began receiving phone calls, e-mails, and personal visits from male strangers who wanted sex.[75] Unbeknownst to Barnes, her ex-boyfriend was posting false profiles in her name through Yahoo!, in which he listed all of Barnes's contact information, nude photographs of Barnes, and an open invitation for sex.[76] Once Barnes figured out what was happening, she contacted Yahoo! Inc. and requested removal of the false profiles.[77] Barnes contacted Yahoo four separate times before anyone from the company got back to her.[78] When Yahoo's director of communications finally contacted Barnes,

---

[72] *Id.* at 963.
[73] *Id.* at 969.
[74] *Id.* at 965.
[75] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009).
[76] *Id.*
[77] *Id.*
[78] *Id.*

the director told Barnes that the profiles would be removed.[79] The profiles remained online for two months after that conversation, and, as a result, Barnes brought suit against Yahoo. Barnes claimed that she relied on Yahoo's promise to remove the profiles to her detriment, which constituted a promissory estoppel claim under Oregon law.[80]

The court held that section 230 did not bar Barnes's promissory estoppel claim because the duty allegedly violated by Yahoo did not derive from its "status or conduct as a publisher or speaker," but rather "the duty [Yahoo] allegedly violated [sprung] from a contract—an enforceable promise."[81] The court continued, "Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication."[82] Although Barnes asked Yahoo to edit information, a role that traditionally belongs to publishers, this editorial function had no effect on the website's liability, because the underlying claim was one based in contract law, not publisher liability and tort law.[83]

Although this approach worked for Barnes, the promissory estoppel approach does not easily transfer to the online classifieds context. A classified-ads website would only face liability under the estoppel approach if a person, such as a law enforcement official or an individual featured in one of the ads without her consent, contacted the website to request removal of a particular commercial-sex ad and the website agreed to do so but then failed to follow through with the removal. Websites could avoid exposure to contractual liability by ignoring removal requests and thereby avoid forming a contract with anyone who requests removal. As the *Barnes* Court articulated, a website can avoid contract liability by simply "disclaim[ing] any intention to be bound."[84] Alternatively, websites could simply refuse to remove any ads

---

[79] *Id.* at 1099.

[80] *Id.* Promissory estoppel is a contract law principle under which "a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment." BLACK'S LAW DICTIONARY, *supra* note 22, at 253; RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[81] *Barnes*, 570 F.3d at 1107.

[82] *Id.*

[83] *Id.* at 1107-09.

[84] *Id.* at 1108. The court points out that a "general monitoring policy," or "attempt to help a particular person, on the part of an interactive computer service" does not give rise to contract liability under a promissory estoppel approach. *Id.*

that do not contain clearly illegal content, and the First Amendment will protect the websites.[85] Therefore, the promissory estoppel approach actually creates an incentive for websites to refuse to cooperate with removal requests.

Finally, even if a plaintiff can establish contractual liability against a classifieds website, the remedy will be limited to a reliance interest, or to what "justice requires,"[86] and thus it is not a sufficient deterrent in the long run for classified-ads websites that host sex-sales advertisements. Classified-ads websites generate millions of dollars in revenue from their adult-services sections,[87] and the payment of limited contract damages would have little impact on those earnings. Thus, the promissory estoppel approach does little to solve the problem of website liability for online sex sales, and in fact may create perverse incentives for websites to make no promises regarding the monitoring or removal of postings.

B. The Grokster *Approach*

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, the Supreme Court held Grokster, a software manufacturer, liable for the illegal acts of third-party users of its software because the Court found that Grokster had induced the users to commit the unlawful acts in question.[88] Grokster developed and distributed digital file-sharing software. The software allowed users to share digital files, such as music and movies, directly between end-user computers without going through a central server.[89] The Grokster software allowed users to share many kinds of files with one another, but the majority of files being shared were copyrighted music and video files that users were sharing without authorization.[90] As a result of this activity, various music companies, motion picture studios, and publishers who owned the relevant copyrights brought suit against Grokster and alleged that Grokster "knowingly and intentionally distributed [its] software to enable users to reproduce and distribute the

---

[85] For a discussion of relevant First Amendment issues see *infra* Part V.

[86] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[87] Before Craigslist shutdown its "Adult Services" section, it was estimated that they would make more than $36 million from that section alone due to fees they charged users to post in that section. Brad Stone, *Sex Ads Seen Adding Revenue to Craigslist*, N.Y. TIMES, Apr. 25, 2010, at B1, *available at* http://www.nytimes.com/2010/04/26/technology/26craigslist.html.

[88] 545 U.S. 913, 919 (2005).

[89] *Id.*

[90] *Id.* at 920.

copyrighted works in violation" of federal copyright law.[91] The copyright holders wanted to hold Grokster liable simply for manufacturing and distributing its software.[92]

Grokster relied on the Supreme Court's 1984 decision in *Sony Corp. of America v. Universal*[93] for the proposition that Grokster's software was capable of noninfringing uses, and therefore Grokster should escape liability.[94] In *Sony*, the Court held that a VCR manufacturer and distributor was not liable for secondary copyright infringement where the third-party users of the VCR recorded copyrighted materials without authorization because the VCR was developed and distributed primarily for "commercially significant noninfringing uses."[95] The *Grokster* Court, however, refused to extend *Sony*-like immunity to Grokster on the ground that, unlike the uses of the VCR, Grokster's software had the primary and intentional purpose to share copyrighted works without permission.[96] The Court ultimately held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[97] Therefore, the Court held Grokster was secondarily liable for copyright infringement committed by third-party users.[98]

By applying the *Grokster* approach to online sex sales, courts could hold interactive computer services, such as Classifiedads.com and Webcosmo.com, secondarily liable for third-party postings if those websites "actually [did] something

---

[91] *Id.* at 920-21.

[92] This kind of liability is known as secondary liability. *See generally* Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963). There are two kinds of secondary liability: contributory and vicarious. A person may be liable for contributory infringement where he has knowledge of direct infringement, and induces, causes, or otherwise aids in that activity. Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). A person may be liable for vicarious infringement where he has the ability to control infringing activity, but does not do so, and gains a direct financial benefit from the infringing activity. *Shapiro*, 316 F.2d at 307-08.

[93] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[94] *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003).

[95] *Sony Corp.*, 464 U.S. at 442, 456.

[96] *Grokster*, 545 U.S. at 941.

[97] *Id.* at 936-37.

[98] "Although Grokster and StreamCast do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches." *Id.* at 922. Regardless of their knowledge, or lack thereof, of the infringement being committed by its users, Grokster was held liable on a vicarious liability theory, which is defined as "[a] person's liability for an infringing act of someone else, even though the person has not directly committed an act of infringement." BLACK'S LAW DICTIONARY, *supra* note 22, at 427.

to encourage the illegal speech"[99] (i.e., induced third parties to post ads for commercial sex). Classified-ads websites that create specific forums for commercial sex ads under sections titled "Adult Services" or "Erotic Services"—and then largely turn a blind eye to the content of those sections—allow online sex sales to thrive, and thus their operators have induced users to violate the law.[100] Many classified-ads websites generate significant revenue from their adult services sections,[101] and third-party posters know that they have a place where they can post ads for commercial sex without fear of repercussions.

However, plaintiffs in the online sex-sales context have a heavy burden when it comes to presenting evidence to show that a classified-ads website actually took steps to induce third parties to create illegal postings on the site.[102] Most classified-ads websites simply set up a forum for third parties to post information created entirely by the third-party users.[103] As one author argues, a website that "simply allows anyone and everyone to post content on its service, but does not solicit or purposely benefit from any illegal third-party content . . . passes the *Grokster* test, whether the [site] knew about the illegal material or not."[104] Therefore, unless classified-ads websites solicit illegal sex sales postings, and then benefit from those postings, they fall outside of *Grokster*.[105] Moreover, the Court held Grokster secondarily liable for acts of third parties in large part because Grokster's software had the primary purpose of unlawfully sharing copyrighted works.[106] In contrast, most classified-ads websites are created for the primary purpose of providing a virtual marketplace where people can buy and sell *legal* goods and services—not sex.

---

[99] 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, 155-56 (2008).

[100] Inducement is defined as the "process of enticing or persuading another person to take a certain course of action." BLACK'S LAW DICTIONARY, *supra* note 22, at 355.

[101] *See supra* note 87.

[102] *See infra* notes 111-14 and accompanying text.

[103] *See, e.g.*, *Create Your Free Ad*, CLASSIFIEDADS.COM, http://www.classifiedads.com/post.php (last visited Oct. 5, 2011); *Post Ads Free*, WEBCOSMO, https://www.webcosmo.com/Post/Post.aspx (last visited Oct. 5, 2011).

[104] Locke, *supra* note 99, at 170.

[105] Some classified-ads websites do in fact generate revenue from their erotic services sections by making users pay a fee to create listings in those sections, which constitutes a benefit to the site. Most classified-ads websites will pass the *Grokster* test anyway because they arguably do not solicit or encourage the creation of commercial-sex advertisements. *See supra* notes 88-100 and accompanying text; *see also infra* notes 111-14 and accompanying text.

[106] *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 932 (2005).

Rare exceptions do exist, however, with websites such as AdultSearch.com.[107] Unlike more general classified-ads websites, Adultsearch.com is a forum primarily for sex sales. Users of Adultsearch.com have access to thousands of commercial sex listings under categories such as "Erotic Services," "Sex Tourism," "Erotic Massage," and more.[108] Under the *Grokster* test, classified-ads websites established primarily for commercial sex postings could face liability for third-party sex sales postings because the websites' creators have the intent to encourage online sex sales. However, a judgment against such websites would likely have little or no impact in the fight against online sex sales because most classified-ads sites devoted purely to adult services are established to allow users to find lawful casual sexual encounters, that is, sexual encounters that are consensual and noncommercial, such as listings for strip clubs.[109] Therefore, only a small number of websites could arguably be held liable under a *Grokster* approach.

Because most classified-ads websites are created for the primary purpose of buying and selling goods and services that are legal, and because section 230 provides broad immunity to such interactive computer services, the *Grokster* approach will likely fail in allowing plaintiffs to circumvent section 230, just as it did in one 2007 defamation lawsuit in Massachusetts.[110]

In *Universal Communications Systems, Inc. v. Lycos, Inc.*, plaintiffs sued an interactive computer service for defamatory postings created and posted by third parties on the defendant's website.[111] Plaintiffs specifically argued that section 230 did not shield the defendant-website from liability because "it actively induce[d] its subscribers to post unlawful content," and, under a *Grokster* analogy, the website should be held liable for that inducement.[112] The court ruled in favor of the defendant-website and noted, "It is not at all clear that there is a culpable assistance exception to Section 230 immunity," and even if "active inducement could negate Section 230 immunity, it is clear that

---

[107] ADULTSEARCH, http://www.adultsearch.com (last visited Oct. 13, 2011).

[108] *Id.*

[109] Even websites like Adultsearch.com include some lawful advertisements for adult services such as strip clubs, adult stores, and noncommercial sexual encounters. *Id.*

[110] *See* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 414-15 (1st Cir. 2007).

[111] *Id.* at 415.

[112] *Id.* at 421 (quoting Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005)).

[Universal] has not alleged any acts by [the defendant-website] that come even close to constituting . . . active inducement."[113]

The *Universal* Court rejected the *Grokster* approach in the defamation context, and it is likely that plaintiffs in the online sex sales context would face similar difficulties in trying to show that classified-ads websites took affirmative steps to induce third parties to post unlawful commercial sex ads. Classified-ads websites function largely as blank forums for third-party content, and even with websites such as Adultsearch.com, plaintiffs will likely fall short of satisfying the *Grokster* standard. A website that is founded purely for adult services does not necessarily indicate that the interactive computer service actively induces users to post ads for *unlawful* adult services. In fact, even websites like LocalEscortPages.com have policies against users posting such content.[114]

Of course, an argument can be made that the mere existence of adult services websites, coupled with the websites' allowance of anonymous postings, encourages third parties to create commercial sex advertisements when they may not have done so prior to the existence of such forums. However, it is unlikely that these facts rise to the level of active inducement as laid out in the *Grokster* and *Universal* cases. Plaintiffs would have a nearly impossible time showing that classified-ads websites have actual intent to encourage users to create unlawful adult services advertisements—the websites could simply defend themselves by pointing to their "Terms of Use" agreements in which they explicitly discourage the creation of such ads. Therefore, the *Grokster* approach is unsatisfactory.

C. The Roommates.com *Approach*

By moving away from an inducement-liability theory, and employing an information-creation argument, plaintiffs saw some success in a 2008 suit against Roommates.com.[115] In that case, the Fair Housing Councils of San Fernando Valley and San Diego (Councils) successfully brought suit against

---

[113] *Id.* Active inducement liability is "predicated on [a defendant] actively encouraging (or inducing) infringement through specific acts." *Grokster*, 545 U.S. at 942.

[114] LocalEscortPages.com's "Terms of Use" explicitly says that users are "entirely responsible" for the content they create, and that users may not post illegal content. *Terms of Use*, LOCALESCORTPAGES.COM, http://www.localescortpages.com/page/terms/0/ (last visited Oct. 5, 2011).

[115] *See generally* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

Roommates.com—a roommate matchmaking website—for violations of the federal Fair Housing Act (FHA).[116] On the Roommates.com website, users created personal profiles by answering a series of required questions. In answering these questions, users were required to disclose information about—among other things—their "sex, family status and sexual orientation."[117] Answers to the required questions had to be selected from a prepopulated menu of various options, known as a drop-down menu, created by Roommates.com.[118] These questions had to be answered in order to gain access to the available roommate listings on the website.[119] Roommates.com also provided a comments section for users to add preferences not adequately detailed by the pre-selected menus for the required questions. From the information disclosed through a user's answers to the required questions, as well as the user's additional comments, Roommates.com would then "steer users" to one another as potential roommates based on "the preferences and personal characteristics that [the website] itself force[d] subscribers to disclose."[120]

The Councils claimed that Roommates.com matched roommates based on discriminatory criteria and functioned as a "housing broker doing online what it may not lawfully do off-line" by asking discriminatory questions with respect to housing sales or rentals, and then using that information to run discriminatory roommate searches, in violation of the FHA.[121] The Councils argued that section 230 immunity did not apply to Roommates.com and alleged that the website qualified as an information content provider, not just an interactive computer service, because it required users to answer discriminatory questions, provided a pre-set list of answers to those questions, and then used the discriminatory preferences gathered from those answers to direct users to like-minded, potential roommates.[122] The court agreed with the Councils, and held that section 230 immunity did not apply to the discriminatory questions posed by Roommates.com because the website served as "more than a passive transmitter of information provided by others; it [was] the developer, at least in part, of that

---

[116] *Id.* at 1164.
[117] *Id.*
[118] *Id.* at 1165.
[119] *Id.* at 1166.
[120] *Id.* at 1167.
[121] *Id.* at 1162.
[122] *Id.* at 1164-65.

information."[123] However, the court limited its holding to the questions actually created by Roommates.com. With respect to the additional comments section, the site was immune under section 230 "because [Roommates.com] published the comments as written, [and it] did not provide guidance or urge subscribers to input discriminatory preferences."[124]

Local or national law enforcement agencies could apply a similar approach to the online sex-sales context and bring suit against classified-ads websites that host commercial sex postings in violation of state and federal laws by arguing that section 230 does not apply to such websites because the sites are partial content creators—not just interactive computer services—of the postings. However, this argument is weak when applied to classified-ads websites because plaintiffs would have an incredibly difficult task in showing that classified-ads websites, which are mostly blank forums for information created entirely by third parties, qualify as developers of sex-sales advertisements in even the broadest sense of the word.[125] Classified-ads websites are designed and function more like the additional comments section of Roommates.com, rather than the required-questions section, because classified-ads websites merely publish advertisements created freely by third parties, and do not aid in the creation of the posts.

The weakness of the *Roommates.com* approach has been exposed in several recent cases in which plaintiffs have tried to argue that various websites were partial creators or developers of the information posted by third parties on the sites, and thus not immune from liability under section 230.[126] In response to these

---

[123] *Id.* at 1166 (noting that "section 230 provides immunity only if the interactive computer service does not 'creat[e] or develop[]' the information 'in whole or in part'" (citation omitted)).

[124] Doe II v. Myspace Inc., 96 Cal. Rptr. 3d 148, 158 (Ct. App. 2009) (discussing *Roommates.com*, 521 F.3d at 1174).

[125] While plaintiffs in *Chicago Lawyers*' did not make a *Roommates.com* argument when they sued Craigslist for discriminatory housing postings on the site, the Seventh Circuit Court of Appeals made it clear that Craigslist did not cause unlawful postings on its site, and thus Craigslist was not a developer or partial developer of the information, but rather just the publisher, and immune under section 230. *See generally* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008). Therefore, classified-ads websites designed and operated like Craigslist, i.e., as largely blank forums for content created by third parties, likely won't be found to be developers, and the *Roommates.com* approach will fail.

[126] *See, e.g.*, Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009) (holding that a consumer review website could not be considered an information content provider because the site was designed in a neutral way, and simply "enable[d] [the] content to be posted online," unlike Roommates.com); *Doe II*, 96 Cal. Rptr. 3d at 158-59 (holding that social-networking site Myspace.com could not be

arguments, the courts simply distinguish the websites sued from Roommates.com, noting that "Roommate's website [was] designed to force subscribers to divulge . . . discriminatory preferences," while the websites at issue simply provide "neutral tools" that enable users to independently create postings of their choosing.[127] Therefore, in order to defeat the *Roommates.com* approach, defendants need only distinguish classified-ads websites from the questions section of Roommates.com and analogize the sites to the additional comments section of Roommates.com.

Further, plaintiffs would not likely have any more success under a *Roommates.com* approach by arguing that classified-ads websites are partial creators of commercial sex postings on the ground that the classifieds sites create sections titled "Adult Services" or "Erotic Services." In fact, the Illinois sheriff in *Dart v. Craigslist, Inc.* employed this argument when he brought the public nuisance claim against Craigslist.[128] The sheriff argued that Craigslist caused or induced its users to post unlawful commercial sex 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 [the users'] preferences."[129] The court disagreed and noted that Craigslist did not cause the creation of unlawful postings on its site but rather took steps to warn users against posting such ads in the site's "Terms of Use" agreement.[130] The court further stated that "[t]he phrase 'adult,' even in conjunction with 'services,' is not unlawful in itself nor does it necessarily call for unlawful content" and reasoned that one might post an advertisement for erotic dancing, which is a lawful adult service.[131]

Accordingly, courts have viewed the *Roommates.com* decision as fact-specific and only applicable to websites that assist in the creation of unlawful content on the site. As long as

---

considered an information content provider for purposes of civil liability because, unlike Roommates.com, Myspace.com employed "neutral tools" and lawful questions in its profile-creation process for users).

[127] *Doe II*, 96 Cal. Rptr. 3d at 158.

[128] *See* Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009).

[129] *Id.* (internal quotation marks omitted).

[130] *Id.* at 962. Other classified-ads websites that continue to host adult services sections similarly include prohibitions against unlawful commercial sex postings in their terms of use. For example, Backpage.com includes a "User Conduct" section in its terms of use, and subsection four of the User Conduct policy explicitly prohibits the posting of illegal conduct, including "[p]osting any solicitation directly or in 'coded' fashion for any illegal service exchanging sexual favors for money or other valuable consideration." *Terms of Use*, BACKPAGE.COM, http://newyork.backpage.com/online/classifieds/Terms (last visited Oct. 5, 2011).

[131] *Dart*, 665 F. Supp. 2d at 968.

a classified-ads website does not use pre-populated content to the same extent as Roommates.com, where users were forced to create illegal content, section 230 applies, and those sites will be immune under a *Roommates.com* theory of liability. In order to succeed on a *Roommates.com* approach, a classifieds site would have to qualify as a partial developer of the unlawful sex-sales advertisements by hosting adult services sections that force users to choose whether they are seeking a woman or a man, a specific kind of sexual encounter, and a price range for those services. Because most sites do exactly the opposite of this and actually warn users against posting such ads, the *Roommates.com* approach will not aid plaintiffs in circumventing section 230.

D. The Default-Injunction Approach

The First Amendment to the United States Constitution protects anonymous speech.[132] For this reason, Internet users may post content on websites anonymously. However, such a protection creates a problem when it comes to illegal speech. For example, when an anonymous user posts defamatory remarks about another person or entity on a website operated by an independent interactive computer service, the target of the defamatory speech will want to have the content removed from the site. Unfortunately, it is difficult, and sometimes even impossible to uncover the identity of the anonymous user who posted the remarks at issue.[133] Moreover, even if the user's identity is known, he or she will rarely show up to court. Therefore, victims of defamatory Internet posts have a difficult time getting the content removed, especially if a website refuses to do so voluntarily,[134] because the content creators cannot be located, and section 230 shields websites from liability.

In response to the difficulties presented in removing defamatory postings from websites, targets of such postings

---

[132] *See* Talley v. California, 362 U.S. 60, 64 (1960) (holding that "an identification requirement [for distributing pamphlets] would tend to restrict freedom to distribute information and thereby freedom of expression").

[133] Courts have adopted various standards for granting motions to obtain identifying information of anonymous posters in defamation cases. The most common approach is outlined in *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009). According to the *Brodie* Court, plaintiffs must first try to notify the anonymous posters about the lawsuit directly. *Id.* at 457. Next, if the anonymous defendants do not respond, the plaintiffs must set out the exact statements at issue, as well as a prima facie defamation claim. *Id.* The court will then conduct a balancing test between the anonymous poster's First Amendment rights against the necessity of disclosure for purposes of the defamation claim. *Id.*

[134] *See supra* notes 75-80 and accompanying text.

have recently begun to use a litigation tactic that may be called the Default-Injunction approach.[135] Under this approach, victims of defamatory posts bring suit against the third-party posters for defamation instead of wasting time by bringing a claim directly against the website hosting the defamatory content.[136] If plaintiffs cannot ascertain the identities of the defendant-posters, plaintiffs simply list defendants as "Does." Predictably, defendants in these suits do not show up to defend against the claims, and the court then enters a default against them. Next, if proper under applicable law, the court will enter a permanent injunction against the defaulting defendants, which "requir[es] [the defendants] to . . . remove their defamatory postings from the websites."[137] Because the defendants can be difficult to find, plaintiffs approach the "third party providers of the websites to enlist their help in deleting the postings."[138] The plaintiffs will show the websites the default injunction, and, generally, the websites will voluntarily comply.[139] As Internet law scholar Eric Goldman notes, in order to avoid the litigation costs associated with challenging such action, most websites "would speedily comply with a default injunction, no questions asked—especially if the user is not around to protest the takedown."[140]

Under this approach, law enforcement officials could bring suit against anonymous or identifiable users who post unlawful sex ads on classified-ads websites in violation of state or federal laws. It is unlikely that the defendants will appear in

---

[135] *See, e.g.*, Blockowicz v. Williams, 675 F. Supp. 2d 912, 913 (N.D. Ill. 2009). *See generally* Bobolas v. Does, No. CV-10-2056-PHX-DGC, 2010 WL 3923880 (D. Ariz. Oct. 1, 2010).

[136] Websites, as service providers, not content creators, are immune from liability for the presence of defamatory postings on their sites. *See* 47 U.S.C. § 230(c) (2006); *see, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997). This immunity under 47 U.S.C. § 230 gives websites little incentive to remove posts. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009).

[137] *Blockowicz*, 675 F. Supp. 2d at 913. As one commentator notes, "[w]ithout any defendant there to argue otherwise, the courts seem willing to grant virtually any relief requested by the plaintiff." Eric Goldman, *A New Way to Bypass 47 USC 230? Default Injunctions and FRCP 65*, TECH. & MARKETING L. BLOG (Nov. 10, 2009, 11:50 AM), http://blog.ericgoldman.org/archives/2009/11/a_new_way_to_by.htm.

[138] *Blockowicz*, 675 F. Supp. 2d at 913.

[139] Plaintiffs can serve an injunction on a non-party to a suit if the non-party acted in "active concert or participation" with defendant. FED. R. CIV. P. 65(d)(2)(C). The major problem here would be proving that websites acted in concert or participation with third-party posters. Despite this problem, most websites would rather remove the contested material than incur the cost of litigation. *See Blockowicz*, 675 F. Supp. 2d at 913 (two of three websites approached by plaintiff removed the contested third-party posts).

[140] Goldman, *supra* note 137.

court to defend against the claims, and the court will enter default injunctions against them. From there, law enforcement officials could approach the classified-ads websites with default injunctions in hand. The sites would then be more likely to remove the ads than to expend resources to contest compliance.

The problem with the Default-Injunction approach, however, arises when a website refuses to remove postings when approached. This happened in 2009 when a consumer-review website, RipoffReport.com, refused to take down allegedly defamatory content on its site when contacted by the target of the content who had obtained a default injunction against a third-party poster.[141] Under the shield of section 230, RipoffReport.com has a strict "no-takedown policy—even if the user requests the takedown, and even in the face of a court order against the user."[142] In an attempt to force compliance with the takedown injunction over RipoffReport.com's no-takedown policy, the plaintiffs turned to the court and moved for third-party enforcement of the injunction against RipoffReport.com.[143] In its defense, RipoffReport.com argued that section 230 "protects its publication decisions" with respect to third-party content, and it need not comply with the injunction, because it was not a party to the underlying defamation suit and did not act in concert with the poster.[144] The court agreed with RipoffReport.com and found that the site[145] had too "tenuous" a connection to the third-party users to compel "compliance with the court's permanent injunction."[146] Despite its holding, the court sympathized with plaintiffs who "find themselves the subject of defamatory attacks on the [I]nternet yet seemingly have no recourse to have those statements removed from the public view."[147]

---

[141] Eric Goldman, *Ripoff Report Not Bound by Takedown Injunction Against User*—Blockowicz v. Williams, TECH. & MARKETING L. BLOG (Dec. 22, 2009, 6:44 PM), http://blog.ericgoldman.org/archives/2009/12/ripoff_report_n.htm.

[142] *Id.*

[143] *See Blockowicz*, 675 F. Supp. 2d at 913.

[144] Goldman, *supra* note 141. "To enforce the injunction against a non-party under Federal Rule of Civil Procedure 65(d), that party must be acting in concert or legally identified (i.e. acting in the capacity of an agent, employee, officer, etc.) with the enjoined party." *Blockowicz*, 675 F. Supp. 2d at 915 (citing Sec. Exch. Comm'n. v. Homa, 514 F.3d 661, 674 (7th Cir. 2008)).

[145] Technically, the issue was with Xcentric, the operator of RipoffReport.com. *See Blockowicz*, 675 F. Supp. 2d at 913.

[146] *Id.* at 916. It is important to note that the "judge's ruling turned solely on a statutory interpretation of FRCP 65," and not on section 230. Goldman, *supra* note 141.

[147] *Blockowicz*, 675 F. Supp. 2d at 916.

The decision by the court in the RipoffReport.com case substantially weakened the Default-Injunction approach. Under the holding of the district court, classified-ads websites need not remove unlawful sex-sales ads created by third parties, even if law enforcement obtains a takedown injunction against the third-party posters. Law enforcement officials are essentially left with no recourse to remove illegal commercial sex ads from sites because the websites have immunity from direct liability under section 230, and need not comply with indirect, Rule-65 injunctions under emerging case law.

IV. A LEGISLATIVE SOLUTION: THE COMMERCIAL SEX DISTRIBUTION AMENDMENT

Thus far, courts have not provided adequate relief for plaintiffs who seek removal of objectionable or unlawful content from various websites.[148] Although some courts have expressed concern about the overly broad reach of section 230,[149] courts generally continue to rule for defendant-websites, because section 230 leaves courts' hands tied. Even when plaintiffs have employed litigation strategies such as the Estoppel, *Grokster*, *Roommates.com*, and Default-Injunction approaches, courts have consistently ruled in favor of the defendant-websites as interactive computer services and publishers, rather than content creators.[150] Given the current dead-ends for plaintiffs, and the serious social harm that online prostitution and sex-trafficking present,[151] the legislature

---

[148] Since its enactment, section 230 has barred two-thirds of all claims against websites "who facilitated the publication or distribution of content they believed had caused harm." David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 492 (2010).

[149] *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 51-52 (D.D.C. 1998) ("If it were writing on a clean slate, this Court would agree with plaintiffs. . . . But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.").

[150] *See supra* Part III.

[151] On one hand, the social harms associated with sex-trafficking are fairly obvious, as the practice quite literally constitutes a form of child slavery. SMITH ET AL., *supra* note 40, at 4. With sex-trafficking, children are commercially exploited for sex, and, in the process, they are physically, psychologically, and sexually abused. *See id*. Congress recognized the social harms created by sex-trafficking, and enacted the Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7112 (2006), "to prevent victimization, protect victims, and prosecute perpetrators of human trafficking." *Id*.

On the other hand, the social harms associated with prostitution are much less obvious, because, by definition, prostitutes are individuals who have reached the age of majority and can consent to sex in exchange for money or other goods. Feminist

should take action to amend section 230 in the form of the Commercial Sex Distribution Amendment (CSDA) in order to better aid law enforcement officials in the fight against online prostitution and sex-trafficking.

The CSDA would carve out a narrow exception to section 230 only in the online sex-sales context. Under the CSDA, an interactive computer service, such as a classified-ads website, would become a distributor once local or national law enforcement officials alerted the provider to the presence of illegal sex-sales ads[152]—those ads that advance prostitution or sex trafficking[153]—on the relevant website. Once an interactive computer service has actual knowledge of such content and thereby becomes a distributor, common-law tort principles of distributor liability would apply.[154] Under such principles, distributors such as booksellers, libraries, and newsstands would face liability for the dissemination of tortious materials "if they either know or have reason to know of the [tortious] nature of their publications,"[155] yet continue to distribute those

---

groups, however, argue that even if prostitution is sometimes consensual, the practice nevertheless "represents women's subordination and degradation in patriarchal society." DEBORAH ROSE BROCK, MAKING WORK, MAKING TROUBLE: PROSTITUTION AS A SOCIAL PROBLEM 4 (1998). Further, traditional religious groups argue that prostitution "flies in the face of the ideals of monogamy, fidelity, and chastity." *Id.* More tangibly, social research suggests that there is widespread drug use among prostitutes, a high risk of sexually transmitted diseases, malnourishment, and other health problems that often go untreated. *See* Judith Porter & Louis Bonilla, *Drug Use, HIV, and the Ecology of Street Prostitution*, *in* SEX FOR SALE, *supra* note 22, at 103.

[152] The burden of reporting the presence of sex-sales advertisements would thus fall on a party with great interest in eliminating such content—law enforcement agencies. This strategy is analogous to the takedown requirements under the Digital Millennium Copyright Act (DMCA). 17 U.S.C.A. § 512 (West 2005 & Supp. 2011). Under applicable copyright law, the burden lies with copyright owners to police the Internet for instances of infringement, and then, under section 512(c) of the DMCA, the copyright owner can report those instances to the relevant websites in order to obtain a takedown of the allegedly infringing content. *See id.*

[153] The New York Penal Law defines "advances prostitution" as follows:

> A person "advances prostitution" when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

N.Y. PENAL LAW § 230.15 (McKinney's 2008).

[154] *See* RESTATEMENT (SECOND) TORTS § 581 (1977).

[155] Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 590 (2001) (citing RESTATEMENT (SECOND) TORTS § 581 (1977)). Note that distributor liability typically arises in the context of defamation, but it can also be extended to the distribution of obscene materials. *See, e.g.*, Smith v. California, 361 U.S. 147 (1959) (holding that local ordinance must contain a knowledge requirement in local ordinance

publications anyway. Therefore, a classified-ads website would only be liable for commercial sex ads created by third parties if they had actual knowledge[156] of such ads and took no steps to remove the ads. As some commentators have suggested, Congress "intended for section 230(c) to override only publisher, not distributor, liability."[157]

Without the CSDA, websites may never have to take responsibility for third-party commercial sex ads, and countless women and children will continue to be exploited through a medium that is both cheap and fast. As section 230 case law has developed, courts have decided not to apply common-law distributor liability principles to the Internet.[158] Every court that has had an opportunity to distinguish between publisher liability and distributor liability under section 230 has declined to do so and instead has immunized websites from both publisher liability *and* distributor liability, despite the fact that section 230 uses only the word "publisher" and not "distributor."[159] For example, in *Zeran v. America Online, Inc.*,[160] plaintiff Kenneth Zeran sued America Online ("AOL") for defamation and argued that "[section] 230 immunity eliminates only publisher liability, leaving distributor liability intact."[161] The plaintiff claimed that because he gave AOL notice of the defamatory postings, AOL had actual knowledge and was therefore subject to distributor liability when it did not remove the posts.[162] The court disagreed with the plaintiff, holding that AOL was immune from both publisher liability and distributor liability under section 230 because distributors are a "type of

---

that held booksellers liable for the distribution of obscene materials). In the online sex-sales context, the ads are either unlawful on their face, or, if written more subtly, constitute tortious content in the form of a public nuisance. *See* Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 962-63 (N.D. Ill. 2009).

[156] Actual knowledge is defined as "[d]irect and clear knowledge, as distinguished from constructive knowledge." BLACK'S LAW DICTIONARY, *supra* note 22, at 403.

[157] Batzel v. Smith, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003) (citations omitted).

[158] Ardia, *supra* note 148, at 411 (citing Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 258 (2006)).

[159] *Batzel*, 333 F.3d at 1027 n.10 (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 331-34 (4th Cir. 1997); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Doe v. Am. Online, Inc., 783 So. 2d 1010, 1013-17 (Fla. 2001)). It is important to note, however, that courts have immunized websites from distributor liability in defamation suits only, not online prostitution and/or sex-trafficking. Under the CSDA, traditional publisher liability would be left intact in the online sex-sales context only, and the relevant defamation suits would be unaffected.

[160] *Zeran*, 129 F.3d 327.

[161] *Id.* at 331.

[162] *Id.*

publisher for purposes of defamation law."[163] The court went on to note that, "once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher," and therefore immune from liability.[164] Perhaps the *Zeran* Court rightfully declined to recognize a distinction between publisher liability and distributor liability in the defamatory-speech context,[165] but such a denial makes little sense in the world of online sex sales, and ought not to apply there. This move has left law enforcement without recourse against websites that have knowledge of their role as hosts of unlawful sex-sales ads, and yet do nothing to remove those ads.[166]

If forced to apply the *Zeran* theory to the online sex-sales context, websites would be immune from liability, even if they knowingly hosted commercial sex ads after law enforcement officials notified the websites of the existence of such unlawful content. Therefore, if faced with a case in which law enforcement agents could show that they had notified a website of the presence of commercial sex ads on the site, and further, that the website had failed to remove the content, then the website could be liable as a distributor under the CSDA. Pursuant to liability as a distributor, classified-ads websites that violate the CSDA would be subject to substantial monetary penalties, which would serve as incentive to comply with takedown requests by law enforcement.

The CSDA would preserve the underlying policy goals of section 230[167] because it would still not treat interactive computer services, such as classified-ads websites, as

---

[163] *Id.* at 332.

[164] *Id.*

[165] It can be argued that Congress intended to preclude distributor liability with section 230, even though not explicitly mentioned in the statute, because such preclusion would be consistent with the underlying policy goals of the statute, including those mentioned in note 167, *infra*. At the same time, Congress recognizes the importance of combating prostitution and sex trafficking, as evidenced through their enactment of federal laws like the Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7112 (2006). Therefore, while Congress may have intended to preclude distributor liability in the defamatory-speech context, it is unlikely that Congress intended to limit liability for websites that knowingly disseminate or distribute commercial sex ads.

[166] Essentially, law enforcement has no way to combat online sex sales. Going after individual facilitators is nearly impossible for the reasons discussed above. *See supra* note 133 and accompanying text.

[167] Policy goals of section 230 include—among other things—preserving the "vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," and encouraging the "development of technologies which maximize user control over what information is received." 47 U.S.C. § 230(b)(2), (3) (2006).

publishers of content created by third parties, but law enforcement would have an effective tool for combating online sex sales where websites have knowledge of the unlawful content. By creating a distinction between publishers and distributors in the online sex-sales context, it is possible to impose liability on classified-ads websites that allow online sex sales to thrive without undermining the policy goals[168] and textual construction of section 230,[169] or imposing unreasonable restrictions on Internet speech.[170] Not only is distributor liability much more limited than publisher liability,[171] but the CSDA would limit interactive computer service liability even further by restricting its application to the online sex-sales context only. Therefore, classified-ads websites could still host a free-flow of third-party information without fear that they need to monitor every detail of every ad that is posted—a task that is likely impossible on the Internet. Instead, law enforcement officials, who have the relevant knowledge and expertise about unlawful sexual activities, as well as proper resources to better assess the possible presence of commercial sex ads, would conduct monitoring and investigations.

If law enforcement officials could meet a preponderance of the evidence standard to show that certain ads were more likely than not illegal commercial sex ads, then the classified-ads website would have to remove the ads. In other words, law enforcement would need to present the websites with a reasonable amount of evidence to support a takedown order. Moreover, if the officials could show that illegal sex ads had a substantial and pervasive presence within an adult services section of a classified-ads website, the website would have to remove the section entirely, which would solve the systemic problem at its root.[172]

---

[168] *Id.*

[169] *Id.* § 230.

[170] For a discussion of First Amendment issues see *infra* Part V.

[171] *Immunity for Online Publishers Under the Communications Decency Act*, CITIZEN MEDIA L. PROJECT (Apr. 30, 2009), http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act ("Distributor liability is much more limited [than publisher liability]. . . . The concern is that it would be impossible for distributors to read every publication before they sell or distribute it, and that as a result, distributors would engage in excessive self-censorship.").

[172] In order to make a showing of the substantial and pervasive presence of unlawful commercial sex advertisements on classified-ads websites, law enforcement officials would indeed be required to conduct more in-depth investigations, including contacting the creators of suspicious listings, conducting sting operations, and more. If the evidence gathered from an investigation could support the proposition that a majority of the online advertisements at the time of the investigation were advocating

Further, the CSDA would be a cost-effective way to control online prostitution and sex trafficking for classified-ads websites. The amendment would not require websites to screen third-party content because law enforcement would be responsible for that task. By putting the burden of the cost of screening on law enforcement, the CSDA would allow websites to continue to operate and host information created by third parties without fear of being held liable for information that the sites do not create.

Finally, in order to protect the free-flow of information on the Internet by shielding websites from costly litigation and by respecting the constitutional rights of third-party users, the CSDA could contain a procedural takedown provision akin to the takedown provision of the Digital Millennium Copyright Act.[173]

This provision would require interactive computer services to designate a takedown agent to whom parties could direct all takedown requests of illegal sex-sales advertisements. Further, the provision would outline the substantive requirements for the takedown requests created by law enforcement officials and mandate that the officials clearly identify the content at issue, the content's precise location on the website, and a statement of good faith belief in the illegality of the content. Law enforcement officials who ordered takedowns in bad faith could face fines. Additionally, the officials would be required to attempt to notify the author of the post about the takedown request. Upon receipt of a takedown notification, absent voluntary removal by the author, the website would then be required to remove the material at issue after ten business days but before fourteen business days. This would give the content creator time to object. Content creators may object to any takedown notification with a counter-notification containing a statement of good faith in the legality of the content. Upon receipt of a counter-notification, the website would be required to restore the content within ten days. At that point, law enforcement would have to file suit against the content creator directly in order to get the content removed.

The notification provision of the CSDA would give law enforcement officials and content creators a clear procedural framework for remedies under the statute. If a user's lawful advertisement were accidentally removed, the user would have a

---

prostitution and/or sex trafficking, then the classified-ads website would have to remove the section.

[173] *See* 17 U.S.C.A. § 512(c) (West 2005 & Supp. 2011).

forum in which he could challenge the takedown.[174] More importantly, with this system, the classified-ads websites would not be hampered with having to police their pages, nor liable for good-faith removal of certain sex-sales advertisements. Additionally, law enforcement agencies would have incentive to do their due diligence before issuing takedown orders, or else risk facing fines.

V. POTENTIAL PROBLEMS WITH THE CSDA

Of course, some potential problems exist with the practical application of the CSDA. First, this solution remains costly for law enforcement entities. As the Illinois sheriff in *Dart* attested, his local law enforcement unit expended approximately 3120 man-hours and $105,081 during an eleven-month span in which they conducted "prostitution stings using information culled from advertisements in Craigslist's erotic-services category," and made 156 arrests from those operations.[175] As a remedy, the sheriff not only sought to enjoin Craigslist from continuing to host commercial sex ads, but he also wanted "to recoup the money his department ha[d] spent policing Craigslist-related prostitution, compensatory damages, and punitive damages."[176]

Law enforcement officials like the plaintiff in *Dart* may object to the CSDA on the ground that it still requires their agencies to expend considerable time and resources to fight online sex sales. Given this burden, law enforcement agencies might question whether it even makes sense to approach the classified-ads websites. After all, if the agencies confirm the existence of unlawful commercial sex ads through exhaustive investigation, they could just go after the third-party creators of the ads directly (they may have to do so as part of their investigation in the first place).[177] It is at precisely this point, however, that the CSDA would benefit law enforcement. Under the amendment, law enforcement agencies need only satisfy a preponderance of the evidence standard—more likely than not—

---

[174] Such a user could also make out a case under 42 U.S.C. § 1983 for deprivation of his First Amendment rights.

[175] Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 962-63 (N.D. Ill. 2009).

[176] *Id.* at 963.

[177] "[R]eflecting the problem of ambiguous posts, Sheriff Dart allege[d] that in a typical sting[,] an arrest is made only after the person identified in the ad offers an undercover officer sex for money." *Id.* at 962 & n.3. In other words, law enforcement has to go through the effort of setting up an undercover sting operation to confirm the illegality of commercial sex advertisements on classified-ads websites in the first place.

when they challenge the legality of sex-based classified advertisements. Such a standard does not require sting operations or other evidence needed to meet the level of a reasonable-doubt standard, but rather it only requires factual information that tends to show that a given advertisement is one for sex in exchange for money, not just a therapeutic massage.

For example, an advertisement such as the one quoted at the beginning of this note[178] likely needs no further evidence than the text of the ad itself. Admittedly, not all ads are quite so obvious, and some may require more evidentiary support. For instance, the sheriff in *Dart*, through investigation of and expertise in online adult services advertisements, explained that third-party users often post commercial sex ads using code language, such as substituting the word "roses" for the word "dollars."[179] In that instance, a law enforcement official would only need to attach an affidavit to a copy of the advertisement in which he or she explains the use of code words that online facilitators commonly use to advertise sex sales. Additionally, many advertisements contain phone numbers, names or nicknames, and photographs, and can be traced to a specific IP address. Where law enforcement has evidence of an advertisement for sex sales, and the officials gather information associated with that ad, they could raise red flags where the same information is subsequently listed in new ads that appear to advertise commercial sex.

Obviously, many advertisements are so ambiguous that the evidentiary task would prove more difficult. More importantly, third-party users could just get more creative with their use of code words or protective language. One such user on Classifiedads.com went so far as to post the following disclaimer:

> Donation exchanged for legal adult personal services such as modeling, escorting or massages are simply for time, companionship, and related stated service. Anything else that may or may not occur is a matter of personal preference between two or more consenting adults of legal age and is not contracted for nor is it requested for in any matter. This is NOT an offer of or for prostitution. Fees charged are for time spent only. I do reserve the right to decline appointments and individuals as I deem necessary. By contacting me either through phone or email you agree to this contract and these terms and hereby

---

[178] *See supra* note 1 and accompanying text.

[179] *Dart*, 665 F. Supp. 2d at 962 (referring to plaintiff's complaint).

> acknowledge that you are not a part of any law enforcement agency using this advertisement for entrapment or arrest.[180]

Despite the fact that this user lists a price and includes nearly nude photographs in her advertisement,[181] the possibility exists that the ad is truly for a lawful escort service. This precise problem makes the fight against online sex sales so difficult. If the woman in the disclaimer-laden advertisement is advertising a lawful service, then the First Amendment protects her post.[182]

Unfortunately, some constitutionally protected speech will inevitably be swallowed up by the CSDA, especially in cases like that of Craigslist in which entire adult services sections are removed from classified-ads websites. However, "there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting" the government "from enforcing the statute against conduct that is admittedly within its power to proscribe."[183] If it is indeed true that, before removing its "Adult Services" section, Craigslist was "the single largest source for prostitution, including child exploitation, in the country,"[184] then takedowns of entire adult services sections on classified-ads websites will dramatically reduce the incidence of online prostitution and sex trafficking. Such regulation would send a message that classified-ads websites will no longer be free-for-all forums in which illegal activity will be tolerated.

Finally, the CSDA faces a free-speech challenge from the First Amendment of the United States Constitution. The First Amendment dictates that Congress "shall make no law . . . abridging the freedom of speech."[185] The freedom implicated by this amendment is one of the most important for citizens of the United States.[186] The right of free speech, as Justice Brandeis once said, is "fundamental."[187] Statutes that attempt to limit such fundamental rights are therefore subject

---

[180] *Post by PaRiiS*, CLASSIFIEDADS.COM, http://adult.classifiedads.com/erotic_services-ad4136067.htm (last visited Oct. 11, 2011).

[181] *Id.*

[182] *See infra* notes 185-92 and accompanying text.

[183] People v. Foley, 731 N.E.2d 123, 128 (N.Y. 2000).

[184] *Dart*, 665 F. Supp. at 962.

[185] U.S. CONST. amend. I

[186] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.").

[187] Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (citations omitted).

to the highest standard of judicial scrutiny.[188] More specifically, "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society."[189] As discussed above, section 223 of the CDA was struck down in *Reno* for not meeting this standard.[190] Although the Court in *Reno* conceded that the government had a compelling goal of "protecting minors from potentially harmful materials" on the Internet, it ultimately held that section 223 was not "carefully tailored" to that goal because it was too vague, and its effect was to ultimately suppress "a large amount of speech that adults have a constitutional right to send and receive."[191] Statutes that attempt to limit free-speech rights may not be overly broad.

Here, the CSDA has a potentially harmful effect on free speech. Just as critics of section 223 of the CDA pointed out, the statute would presumably affect legally acceptable speech in some instances, and by extension, would "chill discourse unacceptably."[192] Similarly, it can be argued that the CSDA would inevitably lead to the removal not just of illegal sex advertisements, but also constitutionally-protected, adult services advertisements. As a limit on speech, courts would subject the CSDA to a high level of scrutiny. In order for the CSDA to stand, Congress must specifically tailor its means to a compelling end.

The reduction of instances of online sex sales that lead to exploitation, and sometimes violence, is a compelling justification for the CSDA.[193] Adult prostitutes post advertisements, and third

---

[188] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.").

[189] Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

[190] *See supra* notes 56-63 and accompanying text; *see also* Reno v. ACLU, 521 U.S. 844 (1997). In *Reno v. ACLU*, the Supreme Court declined to articulate the exact standard that should apply to the Internet, with Justice Stevens remarking, "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* at 870. The Court did, however, discuss whether the CDA was "carefully tailored" to its "goal," which suggests a level of scrutiny akin to strict scrutiny. *Id*. at 871.

[191] *Reno*, 521 U.S. at 846, 871.

[192] HAL ABELSON, KEN LEDEEN, & HARRY LEWIS, BLOWN TO BITS: YOUR LIFE, LIBERTY, AND HAPPINESS AFTER THE DIGITAL EXPLOSION 241 (2008).

[193] The adult services sections of classified-ads websites are thorns "in the side of law enforcement agencies across the United States." Larkin, *supra* note 5, at 111. Most importantly, online commercial sex advertisements "have recently spawned a string of robberies, sexual assaults, and murders." *Id*. The adult services sections of

parties who seek to exploit minors through sex-trafficking arrangements also post advertisements.[194] Both types of advertisements are illegal, and arguably unsafe. The CSDA would aid in reducing the instances of prostitution, and in protecting minors from this kind of abuse, because the posters or facilitators would no longer reach such a wide, readily available audience.[195] Further, the CSDA is narrowly tailored to its ultimate objective of combating online prostitution and sex trafficking because law enforcement would employ their expertise in screening adult or erotic services ads on classified-ads websites and would only encourage removal of ads that appear unlawful. The CSDA would not force website operators to become conservative screeners who would sacrifice "wide swaths of First Amendment-protected speech"[196] simply to avoid liability; the burden would be on law enforcement agencies to properly investigate and screen potential commercial sex ads. The CSDA does not target so-called obscene materials on the Internet—an ambiguous category[197]—but rather is aimed specifically at online sex sales ads, which are illegal even for adults.[198] In this way, the CSDA "describes a category of material[,] the production and distribution of which is not entitled to First Amendment protection,"[199] and so the amendment is not overly broad.

Additionally, even if the CSDA had a negative effect on some constitutionally protected speech, and could not stand up to the highest level of judicial scrutiny, the Supreme Court, in its First Amendment cases, draws "vital distinctions between

---

classified-ads websites further this violence, thereby endangering the safety of countless women and men.

[194] *See* Craigslist Open Letter, *supra* note 44.

[195] People v. Foley, 731 N.E.2d 123, 132 (N.Y. 2000) (stating that the protection of children is a compelling state justification for N.Y. PENAL LAW § 235.22).

[196] Matt Zimmerman, *Beyond "Censored": What Craigslist's "Adult Services" Decision Means for Free Speech*, ELECTRONIC FRONTIER FOUND. (Sept. 8, 2010), http://www.eff.org/deeplinks/2010/09/craigslist-beyond-censored.

[197] Obscene speech is not protected by the First Amendment. *See generally* Miller v. California, 413 U.S. 15 (1973). However, the standard for obscenity, laid out in *Miller*, is fairly ambiguous, and community-specific. *Id.* at 24. When Congress tried to regulate "obscene or indecent" materials on the Internet through section 223 of the CDA, the Court struck the statute down on the ground of its ambiguity and vagueness. Reno v. ACLU, 521 U.S. 844, 844 (1997). The adult advertisements on classified-ads websites likely do not rise to the level of obscene speech.

[198] It is true that "[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children." Ashcroft v. Free Speech Coal., 535 U.S. 234, 252 (2002). The CSDA, however, is aimed at speech that is illegal for children and adults alike. *See supra* notes 193-94 and accompanying text.

[199] New York v. Ferber, 458 U.S. 747, 765 (1982) (holding that New York Penal Law section 263.15, "Promoting a sexual performance by a child," passes First Amendment scrutiny).

words and deeds, between ideas and conduct."[200] On this foundation, the government enjoys greater latitude in regulating conduct, rather than "pure speech."[201] The government may "proscribe advocacy of . . . law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[202]

The CSDA proscribes the advocacy of prostitution and sex trafficking—forms of conduct, not pure speech. Many of the commercial sex advertisements on classified-ads websites lead to immediate lawless action and thus are not entitled to constitutional protection. As one law enforcement official noted, prostitutes and facilitators alike are using the "Internet 'in real time' to drum up customers," telling potential customers that "'[t]he girls are here right now, come quick.'"[203] During one CNN investigation in which a reporter posted a suggestive advertisement on the Craigslist "Adult Services" section, the reporter subsequently received fifteen calls from interested men within three hours of posting the ad.[204] In a significant number of advertisements in the adult or erotic services sections on classified-ads websites, the third-party posters extend an immediate invitation to engage in unlawful sexual activity,[205] and "[a]n invitation or enticement is distinguishable from pure speech."[206] For this reason, the CSDA should be subject to a lesser

---

[200] *Ashcroft*, 535 U.S. at 253.

[201] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Thus, a "statute is subjected to less scrutiny where the behavior sought to be prohibited moves from 'pure speech' toward conduct." People v. Foley, 731 N.E.2d 123, 128 (N.Y. 2000) (citing *Broadrick*, 413 U.S. at 615).

[202] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). As two legal scholars recently suggested, "the balance that the Court struck in *Brandenburg* between protecting speech and protecting society against the commission of unlawful acts is appropriate for internet communication." Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of* Brandenburg, 4 HARV. L. & POL'Y REV. 361, 363 (2010).

[203] Trish Crawford, *Recession Means Tough Times for Sex Workers*, THESTAR.COM (June 7, 2009), http://www.thestar.com/living/article/646871--recession-means-tough-times-for-sex-workers.

[204] Lyon, *supra* note 4. Tellingly, all of the men who called identified themselves as "John," a common name for a consumer of prostitution. *Id*.

[205] *See, e.g.*, *Post 4919418Maxine*, CLASSIFIEDADS.COM, http://adult.classifiedads.com/erotic_services-ad4919418.htm (last visited Oct. 14, 2011); *Post by BRANDY*, CLASSIFIEDADS.COM, http://adult.classifiedads.com/erotic_services-ad6169506.htm (last visited Oct. 5, 2011); *Post by Smiltholady*, CLASSIFIEDADS.COM, http://adult.classifiedads.com/erotic_services-ad6097327.htm (last visited Oct. 5, 2011).

[206] *Foley*, 731 N.E.2d at 129 ("[T]erms such as 'procure' or 'solicit' used to define the advancement of prostitution ([N.Y.] Penal Law § 230.15) . . . describe *acts* of communication; they do not describe the content of one's views."); *see also* United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004) ("Speech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech

standard of scrutiny than statutes aimed at limiting pure speech, and thus, should withstand First Amendment challenges.

CONCLUSION

The Commercial Sex Distribution Amendment would be an effective tool in the fight against online prostitution and sex trafficking. Both forms of illegal sex sales have been enormously transformed by the Internet, and are now more widely available than ever before. Currently, facilitators and prostitutes are free to create anonymous advertisements on classified-ads websites in which sex is offered in exchange for money, and the classified-ads websites enjoy complete legal immunity for such content under section 230 of the Communications Decency Act.[207] With such immunity, law enforcement agencies have been unable to stem online sex sales at the point where it would be most effective—the point of distribution.[208]

Although courts have declined to distinguish between publisher liability and distributor liability for websites that knowingly distribute tortious content created by third parties,[209] section 230 only explicitly immunizes interactive computer services from publisher liability, and stays silent on distributor liability.[210] Therefore, room remains for the imposition of distributor liability on websites that knowingly host illegal commercial sex advertisements and that is where the CSDA applies.

With the CSDA, plaintiffs would no longer have to use increasingly weak litigation tactics to circumvent section 230.[211] Instead, plaintiffs, including law enforcement officials like Sheriff Dart, will have recourse in the statute itself with the CSDA. Armed with the proposed amendment, law enforcement agencies could more effectively combat online prostitution and sex trafficking, by

---

attempting to arrange any other type of crime."); Podracky v. Commonwealth, 662 S.E.2d 81, 84 (Va. 2008) ("[N]ot all words are entitled to the protection of the First Amendment, and the weight of authorities in Virginia and elsewhere clearly permit the state to prohibit the solicitation of a crime.").

[207] *See supra* Parts II, III.

[208] Given the end-to-end design of the Internet, regulating individual users is arguably an inefficient method of regulation. As various legal scholars have argued, targeting Internet intermediaries, such as interactive computer services, is an economically and socially efficient regulatory strategy. *See, e.g.*, Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221 (2006).

[209] *See supra* notes 158-59 and accompanying text.

[210] 47 U.S.C. § 230(c) (2006).

[211] *See supra* Part III (discussing the Estoppel, *Grokster*, *Roommates.com*, and Default-Injunction litigation tactics).

focusing on the mass distributors of illegal advertisements, rather than the individual, anonymous posters. Law enforcement agencies could police the virtual Red Light District.

Certainly, legitimate free-speech concerns have the potential to exist with the CSDA.[212] However, the immediate accessibility of sex for money removes online sex sales advertisements from the realm of pure speech, into the area of conduct.[213] For this reason, the CSDA should be subject to a lesser standard of judicial scrutiny under which the amendment would stand up to First Amendment challenges. Due to the social harms produced by online prostitution and sex trafficking,[214] as well as the fact that both are illegal, the reduction of online sex sales constitutes a compelling justification, and the CSDA is the tool that can aid in that diminishment. With this tool, women and children will hopefully avoid "experiences of victimization, poverty, and abuse" that have become so prevalent through Internet sex sales.[215]

Abby R. Perer[†]

---

[212] *See supra* Part V.

[213] *See supra* notes 200-06 and accompanying text.

[214] *See supra* note 151 and accompanying text.

[215] Malika Saada Saar, *Girl Slavery in America*, HUFFINGTON POST (Apr. 20, 2010), http://www.huffingtonpost.com/malika-saada-saar/girl-slavery-in-america_b_544978.html.

[†] J.D. Candidate, Brooklyn Law School, 2012; B.A., Hamilton College, 2009. I would like to thank the editors and the staff of the *Brooklyn Law Review* for their dedication and hard work throughout this process. I would also like to thank Professor Miriam Baer for her feedback and guidance. And thank you to my friends, especially B.E.D., for always being my support network. Finally, to my family, you are my motivation, my reason, and my heart—I love you.