



Seventh Circuit Rules Section 230 of the Communications Decency Act Does Not Confer StubHub! Immunity from Chicago Tax Law

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The Good Samaritan provision of the Communications Decency Act ("CDA"), 42 U.S.C. § 230(c), shields online service providers from liability for content third parties post on their web sites.¹ Specifically, this provision has been interpreted by numerous courts as conferring immunity for information services providers from tort liability for third-party materials posted to the providers' web sites over which the providers have no control. See, e.g., *Zeran v. America Online, Inc.*, 129

¹ Section 47 U.S.C. § 230 of the CDA states in relevant part that:

"Protection for 'good samaritan' blocking and screening of offensive material

(c)(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or...

(e)(2) **No effect on intellectual property law** Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) **State law** ...No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(f) Definitions

... (2) **Interactive computer service** ...means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server...

... (3) **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.



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F.3d 327, 330 (4th Cir. 1997) ("lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred."); *Ben Ezra, Weinstein, and Co. Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (affirming summary judgment finding AOL not liable for publishing inaccurate stock quotes); *Doe v. MySpace* 528 F.3d 413 (5th Cir. 2008) (MySpace not liable for failure to police its users). The Fourth Circuit in *Zeran* stated it best: "[b]y its plain language, [section] 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." 129 F.3d at 330.

StubHub!, an Internet ticket auction site, attempted to rely upon Section 230 to avoid having to collect and remit taxes to the City of Chicago on behalf of its users. On its face, the argument seems like "a stretch," as Professor Goldman has noted. See http://blog.ericgoldman.org/archives/2010/09/stubhub_cant_be.htm. Yet reading the statute in tandem with *Zeran*, one can see the appeal of StubHub!'s argument (apart from the policy issues raised by taxing these transactions). Section 230(c)(3) states that "no liability may be imposed under any state or local law that is inconsistent with this section." The court in *Zeran* found that Section 230(c)(1) offers a service provider with complete immunity for information originating with a third party – just like the ticket sales in StubHub! was facilitating.

The opinion does not discuss StubHub!'s theory under Section 230 in detail. Presumably, StubHub! argued that Chicago seeks to treat StubHub! as the actor behind the resale of tickets on the StubHub! web site when, in fact, it is merely a service provider for its ticket sellers and purchasers. Thus, Chicago cannot pass a law that holds StubHub! accountable for taxes arising from its users' transactions.

The CDA does not go so far, in this author's opinion, and the plain statutory language, despite the statement in *Zeran*, does not support StubHub!'s theory. The Seventh Circuit took an even narrower approach to CDA immunity, as Judge Easterbrook, writing for the court, explained his belief that Section 230(c) does not provide any type of immunity:

[S]ubsection (c)(1) does not create an "immunity" of any kind. (citations omitted). It limits who may be called the publisher of information that appears online. . . . Chicago's amusement tax does not depend on who "publishes" any information or is a "speaker." Section 230(c) is irrelevant.

This broad pronouncement places the Seventh Circuit somewhat at odds with every other circuit court that has looked at Section 230. It also has significant implications for companies whose web sites contain third-party content (*i.e.*, almost all of them) and are subject to jurisdiction in the Seventh Circuit.

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