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The Ten Most Important Section 230 Rulings

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I.	INTRODUCTION	1
II.	THE TEN MOST IMPORTANT SECTION 230 RULINGS.....	2
	1. Zeran v. AOL.....	2
	2. Fair Housing Council of San Fernando Valley v. Roommates.com	3
	3. Doe v. Backpage.....	4
	4. Doe v. MySpace	5
	5. FTC v. Accusearch	6
	6. Zango v. Kaspersky	6
	7. Perfect 10 v. ccBill	7
	8. Blumenthal v. Drudge	7
	9. Blockowicz v. Williams	8
	10. Fields v. Twitter.....	9
III.	HONORABLE MENTIONS.....	9

I. INTRODUCTION

In 1996, Congress enacted the Telecommunications Act of 1996, a major statutory reform of the telecommunications industry.¹ The Act included the Communications Decency Act (CDA),² Congress's first (and unconstitutional)³ regulation of the Internet. The CDA principally

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1. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).
2. Telecommunications Act of 1996, §§ 501-561, 110 Stat. at 133-43 (codified as amended in scattered sections of 47 U.S.C.).
3. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 885 (1997).

criminalized online pornography, but it also included 47 U.S.C. § 230 (Section 230), which says that websites are not legally responsible for third-party content.⁴

While somewhat overshadowed at the time by the Telecommunications Act and the CDA's criminal provisions, Section 230 has emerged as one of Congress's most important accomplishments of the 1990s. Section 230 has been described as "the law that gave us the modern Internet,"⁵ the "most important law in tech,"⁶ and "the law that makes the Internet go."⁷ All of the top ten most-trafficked websites (as ranked by Alexa) republish third-party content, and nine of those sites depend on Section 230 to do so.⁸ In effect, Section 230 provides the legal foundation for the Internet we know and love the most.

Since its passage, Section 230 has been litigated hundreds of times. This jurisprudence has profoundly impacted the law's scope and reach—and has sparked intense policy discussions, including recently introduced congressional bills seeking to reverse one of the cases discussed below.⁹

A review of the most important Section 230 cases tells a story about how the caselaw has built such an important, yet controversial, immunity. This Essay takes that journey by rank-ordering the top Section 230 cases of the past two decades.

II. THE TEN MOST IMPORTANT SECTION 230 RULINGS

1. *Zeran v. AOL*¹⁰

The *Zeran* case involved a cyber-harassment attack on AOL's message boards against businessman Ken Zeran.¹¹ Zeran's subsequent

4. Telecommunications Act of 1996, § 509, 47 U.S.C. § 230 (2012).

5. Derek Khanna, *The Law That Gave Us the Modern Internet—and the Campaign To Kill It*, ATLANTIC (Sept. 12, 2013), <http://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/> (capitalization altered).

6. Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017, 12:00 AM), <http://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/> (capitalization altered).

7. Letter from Josh King, CEO, Avvo, to Honorable Tani Cantil-Sakauye, Chief Justice, Supreme Court of the State of Cal. (Aug. 10, 2016), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?filename=4&article=2266&context=historical&type=additional>.

8. As of July 24, 2017, the top ten services are Google, YouTube, Facebook, Amazon, Reddit, Yahoo, Wikipedia, Twitter, eBay, and Netflix. *Top Sites in the United States*, ALEXA, <http://www.alexa.com/topsites/countries/US> (last visited July 24, 2017). All but Netflix rely on Section 230.

9. See Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (introduced Aug. 1, 2017); Allow States and Victims To Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (introduced Apr. 3, 2017); see also *infra* Section II.3 (discussing *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016)).

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

lawsuit against AOL produced the most important Section 230 ruling to date—and probably the most important court ruling in Internet Law.

Section 230’s statutory language was not 100% clear, putting the courts in the position of deciding how broadly or narrowly to interpret its scope.¹² This ruling by the Fourth Circuit Court of Appeals, coming a little over a year after Congress enacted the law,¹³ read Section 230’s scope expansively—setting the template for all future courts to do the same.

Among other important implications, this ruling established that Section 230’s protection for third-party content could not be eliminated via demand letters or takedown notices.¹⁴ The ruling also made clear that Section 230 protects websites’ decisions about publishing, editing, or removing third-party content—activities that, in the offline world, would ordinarily dictate a publisher’s liability for that content.¹⁵ These conclusions confirmed that Section 230 supplements the First Amendment’s constitutional protections for free speech in important ways. Two decades later, *Zeran* remains the seminal Section 230 opinion, and it has been cited in hundreds of other cases.

2. Fair Housing Council of San Fernando Valley v. Roommates.com¹⁶

The *Roommates.com* opinion is the most frequently cited exception to *Zeran*’s defense-favorable ruling. However, the *Roommates.com* case has (at best) a checkered legacy.

Roommates.com provided an automated matchmaking service for potential roommates.¹⁷ Antidiscrimination housing laws prohibit the consideration of certain demographic attributes in the rental or sale of real property, including gender, sexual orientation, and parental status.¹⁸ To facilitate matchmaking, Roommates.com required prospective roommates to disclose these demographics as well as the demographics of their desired roommates.¹⁹ The Ninth Circuit Court of Appeals, en

11. *Id.* at 328.

12. *See* 47 U.S.C. § 230 (1994 & 1997 Supp.).

13. *See Zeran*, 129 F.3d 327 (decided Nov. 12, 1997); Telecommunications Act of 1996, § 509 (enacted Feb. 8, 1996).

14. *Zeran*, 129 F.3d at 333.

15. *Id.* at 332-33; *see, e.g., Immunity for Online Publishers Under the Communications Decency Act*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act>. *See generally* RESTATEMENT (SECOND) OF TORTS § 557 (AM. LAW INST. 1977) (addressing what constitutes a publication in defamation analysis).

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

17. *Id.* at 1161.

18. *Id.* at 1162.

19. *Id.* at 1161.

banc, held that Roommates.com could not claim Section 230 immunity for asking the discriminatory questions or enabling users to make search queries based on discriminatory criteria.²⁰

Though the opinion contains many extra words, most courts have read Roommates.com's exception to Section 230 fairly narrowly.²¹ The opinion emphatically says the following: "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."²² Perhaps surprisingly, many courts have cited this *Roommates.com* language while ruling in favor of Section 230 immunity.²³

Four years later, the *Roommates.com* case came back to the Ninth Circuit again.²⁴ This time, the Ninth Circuit ruled that roommate-matching was never covered by the housing antidiscrimination laws.²⁵ This subsequent ruling created a conundrum about the prior ruling. In 2008, the Ninth Circuit concluded that Section 230 did not protect Roommates.com because it had "encourage[d] illegal content" or "require[d] users to input illegal content."²⁶ In 2012, the same circuit concluded that Roommates.com never had any illegal content at all—effectively making the 2008 ruling pointless.²⁷

3. Doe v. Backpage²⁸

The *Roommates.com* incursion to Section 230's immunity has faded over the years. Perhaps the clearest rejection of it came in 2016.²⁹ The case involved the defendant Backpage.com, which publishes online classified ads, including ads for prostitution.³⁰ Victim advocates believed those ads facilitated sex trafficking and violated laws against sex trafficking.³¹

20. *Id.* at 1165-66.

21. See Eric Goldman, *Roommates.com Isn't Dealing in Illegal Content, Even Though the Ninth Circuit Denied Section 230 Immunity Because It Was*, TECH. & MARKETING L. BLOG (Feb. 6, 2012), http://blog.ericgoldman.org/archives/2012/02/roommatescom_is.htm.

22. *Roommates I*, 521 F.3d at 1175.

23. See Goldman, *supra* note 21.

24. Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC (*Roommates II*), 666 F.3d 1216 (9th Cir. 2012).

25. *Id.* at 1223.

26. *Roommates I*, 521 F.3d at 1175.

27. See *Roommates II*, 666 F.3d at 1223.

28. Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016).

29. *Id.* at 12.

30. *Id.* at 16.

31. *Id.*

The First Circuit Court of Appeals held that Backpage.com qualified for Section 230 immunity, saying “a website operator’s decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection.”³² This legal conclusion apparently conflicts with *Roommates.com*’s legal standard, which implicitly held that Roommates.com’s website structure and posting requirements disqualified it from Section 230 immunity.³³ Accordingly, the *Backpage* ruling gives websites a powerful and persuasive retort to plaintiffs who cite *Roommates.com*. However, it remains to be seen if the *Backpage* ruling will survive congressional attention.³⁴

4. Doe v. MySpace³⁵

Plaintiffs routinely seek to hold websites responsible for offline problems caused by the site’s users. For example, buyers and sellers in online marketplaces such as eBay or Amazon Marketplace may seek to hold the marketplace responsible for transactions that go wrong, such as undelivered goods or payment defaults. Whether or not the problems take place “within” the marketplace’s virtual premises, Section 230 generally precludes such actions against online marketplaces.

The *Doe v. MySpace* ruling from the Fifth Circuit Court of Appeals illustrates this principle. An underage MySpace user exaggerated her age to take advantage of the MySpace social networking service without restrictive protections that MySpace otherwise would have imposed on young users’ accounts.³⁶ She met another MySpace user online, they agreed to meet in person, and he sexually assaulted her.³⁷ The court held that MySpace’s only contribution to the criminal assault on the victim was its provision of communication tools to both users.³⁸ Accordingly, Section 230 immunized MySpace from liability for those user-to-user communications.³⁹

32. *Id.* at 22.

33. *See Roommates I*, 521 F.3d 1157, 1175 (9th Cir. 2008).

34. *See* Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (introduced Aug. 1, 2017); Allow States and Victims To Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (introduced Apr. 3, 2017).

35. *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

36. *Id.* at 416.

37. *Id.*

38. *Id.* at 422.

39. *Id.*

5. FTC v. Accusearch⁴⁰

In 2009, the Tenth Circuit Court of Appeals embraced—and extended—the *Roommates.com* exception. As the *Roommates.com* exception has been withering elsewhere,⁴¹ the Tenth Circuit’s jurisprudence has emerged as perhaps the most significant remaining incursion into *Zeran’s* defense-favorable immunity.

In the *Accusearch* case, the defendants ran a website that sold pretexted phone records (i.e., phone records acquired illegally).⁴² The court held that “a service provider is ‘responsible’ for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content.”⁴³ This talismanic statement possibly covers more publisher behavior than the *Roommates.com* standard (which said “encouraging illegal content” was not covered by Section 230).⁴⁴ As a result, the *Accusearch* ruling now sometimes contributes to defense losses instead of *Roommates.com’s* ruling.⁴⁵

6. Zango v. Kaspersky⁴⁶

As a complement to Section 230(c)(1)’s rule that websites are not liable for third-party content, Section 230(c)(2) says that online services are not liable for blocking or removing third-party content.⁴⁷ Defendants prefer to rely on Section 230(c)(1) instead because, among other things, Section 230(c)(2) requires that blocking and removal decisions be made “in good faith.”⁴⁸ Plaintiffs *always* have incentives to contest the defendant’s good faith, which delays the court’s application of Section 230(c)(2)’s immunity—and sometimes overcomes it.⁴⁹

Nevertheless, in 2009, the Ninth Circuit Court of Appeals used Section 230(c)(2) to provide wide-ranging protection for vendors of anti-spam, anti-virus, and anti-malware services.⁵⁰ This ruling is the main

40. Fed. Trade Comm’n v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009).

41. See, e.g., Doe v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016).

42. *Accusearch*, 570 F.3d at 1191-92.

43. *Id.* at 1199.

44. *Roommates I*, 521 F.3d 1157, 1175 (9th Cir. 2008).

45. See, e.g., Fed. Trade Comm’n v. LeadClick Media, LLC, 838 F.3d 158 (2d Cir. 2016).

46. Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169 (9th Cir. 2009).

47. 47 U.S.C. § 230(c)(1), (2) (2012).

48. *Id.* at (2)(A); see *Zango*, 568 F.3d at 1177.

49. See generally Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659 (2012).

50. *Zango*, 568 F.3d at 1176-78.

reason why we rarely see lawsuits anymore against those service providers for their blocking or removal decisions.

7. Perfect 10 v. ccBill⁵¹

Section 230 does not immunize intellectual property claims.⁵² This partially explains why Congress enacted a different statutory scheme for handling website liability for user-caused copyright infringement.⁵³

In *Perfect 10*, the Ninth Circuit Court of Appeals held that Section 230 does not apply to *federal* intellectual property claims, but *state* IP claims were immunized if based on third-party content.⁵⁴ Courts outside the Ninth Circuit have universally rejected this result.⁵⁵ Nevertheless, because so many Internet companies are located in California (part of the Ninth Circuit), this ruling has outsized consequences. For those companies, claims for trade secrets, publicity rights, state trademarks, and other state IP doctrines can be immunized by Section 230.

In 2016, Congress implicitly preserved the Ninth Circuit's quirky exception for trade secret claims when it made the new federal trade secret law subject to Section 230.⁵⁶

8. Blumenthal v. Drudge⁵⁷

Matt Drudge writes a gossip column, the well-known *Drudge Report*, and AOL licensed his material to republish on its network.⁵⁸ Drudge was an independent contractor, but AOL's royalties were his only income source.⁵⁹ Drudge allegedly defamed Sidney Blumenthal, who sued AOL as well.⁶⁰

Nowadays, this looks like an easy Section 230 case. However, this case came in 1998, shortly after the *Zeran* ruling, when courts were still figuring out the statute; yet the ruling reinforced *Zeran*'s conclusion.⁶¹

51. *Perfect 10, Inc. v. ccBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

52. 47 U.S.C. § 230(e)(2).

53. *See* Digital Millennium Copyright Act of 1998 § 202, 17 U.S.C. § 512 (2012).

54. *Perfect 10*, 488 F.3d at 1118-19, 1121.

55. IAN C. BALLON, 4 E-COMMERCE AND INTERNET LAW § 37.05[5] (2016).

56. *See* Defend Trade Secrets Act § 2(f)-(g), 130 Stat. 382, 18 U.S.C. § 1833; *see also* Eric Goldman, *The Defend Trade Secrets Act Isn't an Intellectual Property Law*, 33 SANTA CLARA HIGH TECH. L.J. 541 (2017) (discussing the Defend Trade Secret Act's adherence to Section 230).

57. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

58. *Id.* at 47.

59. *Id.*

60. *Id.* at 50.

61. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332-33 (4th Cir. 1997).

Specifically, AOL's contract with Drudge gave AOL broad editing rights over Drudge's content, but the court said that Section 230 applies anyway.⁶² Thus, like *Zeran*, the opinion shows that Section 230 equally protects passive conduits and editorially controlled publications against claims based on third-party content.⁶³ As the *Blumenthal* court said, "[P]laintiffs' argument that the *Washington Post* would be liable if it had done what AOL did here . . . has been rendered irrelevant by Congress."⁶⁴

Furthermore, the *Blumenthal* ruling confirmed that Section 230 could apply to licensed content supplied by contractors, not just to "user content."⁶⁵ As a corollary, it also meant websites could pay for content without losing Section 230's immunity.⁶⁶

9. *Blockowicz v. Williams*⁶⁷

This opinion does not mention Section 230 once, yet its outcome plays a key role in Section 230 jurisprudence. The case involves an allegedly defamatory user posting to *Ripoff Report*.⁶⁸ The plaintiffs did not sue *Ripoff Report* because Section 230 would immunize the lawsuit. Instead, the plaintiffs got a default judgment against the review author, including an injunction requiring the author to remove the post.⁶⁹ This created a conundrum, because *Ripoff Report* had a very strict policy against removing user posts.⁷⁰

The Seventh Circuit Court of Appeals held that the applicable federal civil procedure rules did not allow *Ripoff Report* to be forced to remove the review.⁷¹ The ruling's consequences are counterintuitive—because Section 230 says the online publisher cannot be sued directly and also cannot be bound by an injunction against the user, plaintiffs have no legal mechanism to force the publisher to remove a defamatory user post.⁷² This outcome only occurs when the online publisher chooses not to voluntarily honor the court's ruling and the author lacks the technical power to remove a post once made,⁷³ but it is a startling outcome nonetheless.

62. *Blumenthal*, 992 F. Supp. at 50.

63. *See id.*; *Zeran*, 129 F.3d at 332-33.

64. *Blumenthal*, 992 F. Supp. at 49-50.

65. *Id.* at 52-53.

66. *Id.*

67. *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010).

68. *Id.* at 564.

69. *Id.* at 564-65.

70. *Id.* at 565.

71. *Id.* at 565-69.

72. *See id.*

73. *See id.*

Recently, *Hassell v. Bird*⁷⁴ reached a conclusion that seemingly conflicts with the *Blockowicz* result. In *Hassell*, a court ordered Yelp to remove a user review even though Yelp was not sued and therefore never had a chance to object to the order.⁷⁵ As of August 2017, the *Hassell* case is on appeal to the California Supreme Court.

10. *Fields v. Twitter*⁷⁶

This is one of several cases against social media service providers for “materially supporting” terrorists by allowing them to disseminate terroristic content.⁷⁷ On the surface, these appear to be easy Section 230 wins for defendants. The terroristic content comes from third parties, and the claims do not fit into one of Section 230’s statutory exclusions.⁷⁸ Thus, Section 230 applies irrespective of the social media sites’ scienter about these terroristic activities, or how much (or little) the social media sites tried to screen out terrorists’ user accounts.⁷⁹

This case nevertheless makes the “top ten” list because of its high stakes. In effect, the plaintiffs seek to treat the social media sites as financial guarantors of all civil damages caused by known terrorists who have one or more accounts on their networks.⁸⁰ Such financial obligations pose an existential challenge to the social media sites. If the social media sites face such financial exposure, they will almost certainly go bankrupt. Thus, without Section 230’s immunity against claims of material support for terrorists, social media sites are probably doomed. As of August 2017, the *Fields* case is on appeal to the Ninth Circuit Court of Appeals.

III. HONORABLE MENTIONS

- *Airbnb v. San Francisco*.⁸¹ Section 230 does not protect Airbnb from regulation of Airbnb’s provision of “booking services.”⁸²

74. *Hassell v. Bird*, 203 Cal. Rptr. 3d 203 (Cal. App. Ct. 2016).

75. *Id.* at 225-27.

76. *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016).

77. *See, e.g.*, *Cohen v. Facebook, Inc.*, 16-CV-4453 (NGG) (LB), 2017 WL 2192621, at *3 (E.D.N.Y. May 18, 2017); Complaint at 2, *Sinclair v. Twitter, Inc.*, 4:17-CV-05710-KAW (N.D. Cal. Oct. 4, 2017), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2568&context=historical>; Complaint at 2, *Crosby v. Twitter, Inc.*, 2:16-CV-14406-DML-DRG (E.D. Mich. Dec. 19, 2016), http://online.wsj.com/public/resources/documents/2016_1220_crosby_vs_twitter_et_al.pdf.

78. *See Fields*, 217 F. Supp. 3d at 1129.

79. *See id.*

80. *Id.* at 1119.

81. *Airbnb, Inc. v. City & Cty. of S.F.*, 217 F. Supp. 3d 1066 (N.D. Cal.).

82. *Id.* at 1069, 1074.

This ruling seemingly enables regulators of all stripes to regulate online marketplace transactions without worrying about Section 230.⁸³ In 2017, while the case was on appeal, it settled⁸⁴—leaving the court’s conclusion intact.

- *Doe v. Internet Brands*.⁸⁵ Section 230 does not protect websites from a “failure to warn” claim when users meet offline and one user commits a physical crime against the other.⁸⁶ This ruling implicitly conflicts with the Fifth Circuit’s *Doe v. MySpace* ruling.⁸⁷
- *Jones v. TheDirty*.⁸⁸ Soliciting gossip, and then adding non-defamatory comments to the users’ submissions, does not constitute “encouragement” of illegal content.⁸⁹ Also, Section 230 applies even if the publisher “adopted” or “ratified” defamatory user content.⁹⁰
- *Goddard v. Google*.⁹¹ Section 230 applies to allegedly fraudulent third-party ads.⁹²
- *Barrett v. Rosenthal*.⁹³ The leading case extending Section 230 to defendants who forward emails to others.⁹⁴
- *Gentry v. eBay*.⁹⁵ Section 230 protects eBay from liability for fake sports memorabilia sold by its users.⁹⁶
- *Maughan v. Google*.⁹⁷ Section 230 protects Google’s search results snippets, even if an automated process of generating snippets may create a defamatory implication.⁹⁸

83. See *id.* at 1074.

84. Heather Somerville & Dan Levine, *Airbnb, San Francisco Settle Lawsuit over Short-Term Rental Law*, REUTERS (May 1, 2017, 12:36 PM), <http://www.reuters.com/article/us-airbnb-sanfrancisco-settlement/airbnb-san-francisco-settle-lawsuit-over-short-term-rental-law-idUSKBN17X254>.

85. *Doe #14 v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016).

86. *Id.* at 851.

87. See *Doe v. MySpace, Inc.*, 528 F. 3d 413, 422 (5th Cir. 2008).

88. *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398 (6th Cir. 2014).

89. See *id.* at 409-15 (addressing the plaintiff’s “encouragement” argument).

90. *Id.* at 415.

91. *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008).

92. *Id.* at *7.

93. *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

94. *Id.* at 529.

95. *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002).

96. *Id.* at 712-16.

97. *Maughan v. Google Tech., Inc.*, 49 Cal. Rptr. 3d 861 (Cal. Ct. App. 2006).

98. *Id.* at 864-65.