Doe v. Backpage.com: The United States Court of Appeals Further Extends Immunity for Internet Service Providers Under the Communications Decency Act

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I. OVERVIEW

Three young women were repeatedly raped as teenagers after being trafficked on the website Backpage.com (Backpage).[1] Backpage provides a platform for users to post online classified advertisements offering a variety of products and services in a range of categories, including a subcategory entitled "Escorts."[2] It was within the "Escorts" category that the three female minors were advertised in posts containing their individual photographs, and consequently, trafficked in Massachusetts and Rhode Island.[3] The three victims allege that this sequence of events resulted from Backpage's strategy to maximize its profits by expanding its adult advertising market.[4] First, the victims allege that Backpage publically minimized its role in the sex trafficking by making false representations to distract from its direct facilitation of such activity by third-party users of its website.[5] Second, the victims claim Backpage's conduct directly facilitated sex trafficking, as it encouraged third parties to easily upload their images as part of advertisements geared toward sex trafficking.[6] Backpage allegedly tailored the posting requirements to make sex trafficking easier and removed postings such as those that victim support organizations and law enforcement agencies advertised on the site.[7] Additionally, the victims aver that Backpage's rules and processes that govern the content of advertisements encourages sex trafficking as phone number and email verification are not required and metadata is removed from photographs,

1. Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 17 (1st Cir. 2016).
2. *Id.* at 16.
3. *Id.* at 16-17.
4. *Id.* at 16.
5. *Id.*
6. *Id.*
7. *Id.*

including information such as date, time, and the location of where the photograph was taken.[8]

Each victim filed suit in October 2014, and pleaded in a second amended complaint multiple claims that Backpage (1) engaged in the sex trafficking of minors as defined by the Trafficking Victims Protection Reauthorization Act (TVPRA) and the Massachusetts Anti-Human Trafficking and Victim Protection Act (MATA), and (2) infringed upon various intellectual property rights.[9] Backpage filed a motion to dismiss claiming that the plaintiffs had failed to state claims upon which relief could be rewarded, which the district court granted.[10] On appeal, the United States Court of Appeals for the First Circuit decided the district court did not err in dismissing the action in its entirety.[11] The court found the Chapter 93A claim, which alleged violation of the Regulation of Business Practices for Consumer Protection statute, too speculative.[12] Moreover the court found the alleged misappropriation and infringement of intellectual property rights unfounded.[13] Finally, the court found the claim that *Backpage* had violated TVPRA due to the alleged sex trafficking of minors on Backpage's website futile and barred by the Communications Decency Act (CDA).[14] The United States Court of Appeals for the First Circuit *held* that Backpage, as an Internet service provider (ISP), was protected from liability as a publisher under the CDA from claims that it structured its website and utilized reporting requirements to facilitate illegal conduct. *Doe No. 1 v. Backpage.com*, LLC, 817 F.3d 12, 22 (1st Cir. 2016).

II. BACKGROUND

The applicability of the CDA is broad.[15] Section 230 of the statute states: "[n]o 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."[16] Congress intended to provide immunity to ISPs who would otherwise be found liable for defamatory statements posted by third parties on the publisher's message boards.[17]

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8. *Id.* at 16-17.
9. *Id.* at 17.
10. *Id.*
11. *Id.* at 15, 24.
12. *Id.* at 25-26.
13. *Id.* at 27-28, 29.
14. *Id.* at 24.
15. *Id.* at 18-19.
16. Communications Decency Act, 47 U.S.C. § 230(c)(1) (2012).
17. *Backpage*, 817 F.3d at 18.

Congress ensured this protection to encourage websites to screen content without fear of liability, and to minimize government regulation of the Internet to allow for its continued development.[18]

Congress enacted § 230 of the CDA in response to *Stratton Oakmont Inc. v. Prodigy Services Co.*, a case in which a New York state court held that an ISP's act of deleting offensive content transformed it into a "publisher" of such content.[19] Under *Stratton*, if an ISP filtered certain content, the ISP would be considered a "publisher," and would be exposed to liability for the content that was not removed.[20] Through its passage of the amendment, Congress intended "to spare interactive computer services . . . by allowing them to perform some editing on user-generated content without" facing liability for offensive material that was not edited or removed.[21]

While various circuits have subsequently and consistently looked to the legislative intent of Congress to protect the immunity granted to ISPs under § 230 of the CDA, others rely on statutory interpretation to determine whether such immunity should be allowed. In *Zeran v. America Online, Inc.*, the Court of Appeals for the Fourth Circuit interpreted the plain language of the statute and found that it provided "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."[22] Therefore, the court held an ISP not liable for failing to delete harmful messages concerning the plaintiff.[23] In dismissing these claims, the court stated that Congress's clear purpose in providing the ISP immunity was to alleviate the burden of screening posts created by millions of users.[24] To avoid the restrictions that would be placed on messages posted in the future as a result of the provider's fear of liability, the Fourth Circuit asserted that the ISP could not be found liable for its conduct.[25]

In contrast, the Ninth Circuit has extended immunity to ISPs upon its statutory interpretation of § 230 of the CDA. In *Barnes v. Yahoo!, Inc.*, the plaintiff brought an action against an interactive computer

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18. *Id.* at 19.

19. Jane Doe No. 14 v. Internet Brands, Inc., 767 F.3d 894, 898 (9th Cir. 2014) (citing Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *4 (N.Y. Sup. Ct. 1995)).

20. *See id.* (citing *Stratton*, 1995 WL 323710, at *4).

21. *Id.* (quoting Fair Housing Council v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008)).

22. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

23. *Id.* at 328.

24. *Id.* at 331.

25. *Id.* at 332.

service provider for its failure to remove profiles containing nude photographs that the plaintiff's former boyfriend posted.[26] In light of the plain language of § 230, the court concluded that the parties' emphasis on the congressional intent was insignificant as "[i]t is the language of the statute that defines and enacts the concerns and aims of Congress."[27] Therefore, the Ninth Circuit deviated from the policy rationale of the Fourth Circuit's preclusion of liability due to the congressional intent underlying the statute and supported its holding with a textual argument, stating that based on the plain language of § 230 of the CDA, Yahoo was not liable for its failure to remove the offensive posts.[28]

Similar to the Fourth Circuit, the First Circuit has interpreted § 230 of the CDA through an analysis of Congress's intent. In *Universal Communication Systems, Inc. v. Lycos, Inc.*, the United States Court of Appeals for the First Circuit affirmed the district court's dismissal of claims against Lycos for allowing third parties to post false and defamatory statements on a message board.[29] The First Circuit reiterated that Lycos had immunity because Congress intended to implement broad protections so that "message board operators would not be held responsible for the postings made by others on that board."[30] Furthermore, although the First Circuit had not before interpreted § 230 of the CDA, the court chose to follow other circuits' decisions to the statute effectuate the policy choice of Congress to not deter harmful online content by imposing tort liability on companies that "serve as intermediaries for other parties' potentially injurious messages."[31]

Although the aforementioned circuits have developed differing analyses, including a plain language reading of the statute, as well as, preservation of congressional intent, the First Circuit has also stated in *Barnes v. Yahoo!* that the text of § 230 does not provide "general immunity," or complete protection, from liability deriving from third-party material.[32]

In *Barnes*, the Ninth Circuit held the plaintiff's claim against an ISP for promissory estoppel was not precluded by § 230 of the CDA.[33] "In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract . . . not from any

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26. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098-99 (9th Cir. 2009).
27. *Id.* at 1105.
28. *Id.*
29. Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 415 (1st Cir. 2007).
30. *Id.* at 418.
31. *Id.* (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997)).
32. 570 F.3d at 1100.
33. *Id.* at 1109.

non-contractual conduct or capacity of the defendant."[34] The court decided that contract liability derived from Yahoo's "manifest intention to be legally obligated to do something" because the plaintiff sought to hold the ISP liable to a contract in which a company representative promised to remove offensive content.[35] Under *Barnes*, such activity does not grant an ISP the same broad immunity granted to entities that administer the conduct of third parties.[36]

Similar to the contractual claim in *Barnes*, the Ninth Circuit in *Jane Doe No. 14 v. Internet Brands, Inc.* found that the CDA did not bar a tort claim for the defendant ISP's failure to warn her of a rape scheme conducted by third parties on its website.[37] In *Internet Brands*, the claimant's theory of liability asserted that the ISP could be held liable because it had knowledge of the criminal acts and had maintained a special relationship with its users that triggered its duty to warn.[38] A tort based on this duty was found to be outside of the scope of protection provided by § 230 because a post generated by the ISP warning its users of the third-party harm would not make it a publisher or speaker of information *provided by someone else*.[39] Such a warning would derive from content that Internet Brands produced on its own.[40] As a result, the court held that the district court erred in dismissing the action under the CDA because the claim did not "seek to hold Internet Brands liable as the 'publisher or speaker of any information provided by another information content provider.'"[41] Therefore, the CDA did not bar the claim. Overall, as illustrated by the circuit court's decisions in *Barnes* and *Internet Brands*, the Ninth Circuit does not appear to interpret the scope of CDA protection as broadly as the First Circuit.[42]

In addition to the contract and tort claims mentioned above, claims based on intellectual property laws are also not subject to CDA immunity.[43] According to the CDA, "nothing in [§ 230] shall be

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34. *Id.* at 1107.
35. *Id.*
36. *Id.* at 1108.
37. Jane Doe No. 14 v. Internet Brands, Inc., 767 F.3d 894, 898 (9th Cir. 2014), *reh'g granted*, *opinion withdrawn*, 778 F.3d 1095 (9th Cir. 2015), *and opinion withdrawn*, *superseded sub nom.*, 824 F.3d 846 (9th Cir. 2016). The court reheard this case on May 31, 2016 and held that the CDA did not bar the aspiring model's claim. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 898, 900.
42. *See id.* at 898.
43. Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422-23 (1st Cir. 2007).

construed to limit or expand any law pertaining to intellectual property."[44] In *Cabaniss v. Hipsley*, the plaintiff alleged that a magazine publisher and private club violated her right of privacy by misappropriating her photograph in an advertisement inviting the public to "Atlanta's Playboy Club."[45] In its discussion, the court stated that the evidence offered might have supported a verdict in favor of the plaintiff under the appropriation theory, however, it did not support an award of damages granted under the theories of disclosure or false light.[46] Similarly, in *Jane Doe No. 1 v. Backpage.com*, the United States District Court of Massachusetts permitted a plaintiff to bring a claim under intellectual property law, when she asserted a right of publicity upon the defendants benefitting from the use of her photographs in various advertisements.[47] These cases illustrate the strong weight courts give to Congress' intent to grant broad immunity to ISPs for publishing, but not expand such protection to other conduct.

III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the First Circuit provided immunity to Backpage under § 230 of the CDA. First, the court held that claims asserting an ISP facilitates illegal conduct "through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties" and, therefore, are precluded by § 230.[48] The court's holding reaffirmed the principle that such conduct governing the structure of a website is protected under § 230 since it is considered to be the function of a publisher.[49] Second, the court held that the appellants' unfair trade practices claims filed under Massachusetts state law, Chapter 93A, failed to allege a causal chain sufficient to award relief.[50] Third, the court held that the plaintiffs' intellectual property claims were invalid, as there was no evidence supporting the misappropriation or infringement of the minors' photographs.[51] Under the theory of misappropriation, the plaintiffs insisted that Backpage generated a profit through advertising revenues from the unauthorized use of their photographs.[52] The court upheld the

44. Communications Decency Act, 47 U.S.C. § 230(e)(2) (2012).
45. Cabaniss v. Hipsley, 151 S.E.2d 496, 501 (Ga. Ct. App. 1966).
46. *Id.* at 505.
47. Jane Doe No. 1 v. Backpage.com, LLC, 104 F. Supp. 3d 149, 164 (D. Mass. 2015).
48. Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 22 (1st Cir. 2016).
49. *Id.*
50. *Id.* at 25-26.
51. *Id.* at 27-29.
52. *Id.* at 26.

district court's dismissal of the plaintiffs' claim since it found that Backpage was "'merely the conduit through which the advertising and publicity matter of customers' is conveyed" and only the advertisers benefit from the misappropriation.[53] Under Doe #3's claim of copyright infringement, the court found that she was not entitled to monetary or injunctive relief since she did not possess a registered copyright while Backpage was displaying the copyrighted image and she did not establish that there was a substantial possibility of future infringement.[54]

The court recognized that the immunity granted to ISPs was to the "near-universal agreement that section 230 should not be construed grudgingly."[55] The court demonstrated its acceptance of this widespread belief by outlining the three elements of § 230(c)(1) that were employed in the district court's finding of immunity for Backpage under the CDA.[56] The elements establish protection for the defendant if the party (1) provides or uses an interactive computer service; (2) the claim is based on information provided by a third party; and (3) the claim would treat the party as the publisher or speaker of the third-party information.[57] Because the plaintiffs did not allege that Backpage failed to satisfy either of the first two elements, but instead based their causes of action on the third element, the court analyzed "whether the cause of action necessarily require[d] that the defendant be treated as the publisher or speaker of content provided by another."[58] The plaintiffs insisted that Backpage was not a publisher of third-party content because it is not involved in the traditional functions of a publisher and was, therefore, precluded from immunity under the CDA.[59] The court disagreed with this assertion, finding that Backpage's practices, including its provision of rules concerning which terms were allowed in postings and its anonymity of email addresses, were "traditional publisher functions under any coherent definition of the term."[60] The court further concluded that this finding was also consistent with case law in other circuits, thus, supporting its holding that Backpage's practices established it as a publisher entitled to protection from liability under the CDA.[61]

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53. *Id.* at 27 (quoting Cabaniss v. Hipsley, 151 S.E.2d 496, 506 (Ga. Ct. App. 1966)).
54. *Id.* at 28-29.
55. *Id.* at 18.
56. *Id.* at 19.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 20.
61. *Id.* at 21.

Next, the court used the plausibility standard to determine whether the plaintiffs' state law claims under Chapter 93A were too speculative as a matter of law.[62] The law does not require the pleadings to entail specific details, but "the complaint must allege enough facts to state a claim to relief that is plausible on its face."[63] The court then employed a two-step process to evaluate the plausibility of a complaint.[64] First, it stated that the factual and conclusory legal allegations must be separated under judicial authority.[65] Second, it must be discerned whether the remaining facts allow the court to reasonably infer that the defendant is liable, as alleged.[66] Moreover, this evaluation requires that the court consider the claim in its entirety.[67]

When considering this standard under a Chapter 93A claim, the party must also satisfy an element of causation, proving that the defendant's unfair or deceptive act resulted in an adverse loss to the plaintiff.[68] Here the court analyzed the facts of the appellants' claims, which alleged that Backpage misrepresented its role in combating sex trafficking, and thus harmed the young women as a result of its substantial increase in market share.[69] The court's evaluation, based on these facts, determined that the appellants' claims were insufficient to successfully establish rights under Chapter 93A, as the causal chain was speculative.[70]

Last, the court's analysis of the appellants' misappropriation and copyright infringement claims were based on the exception listed in § 230, which provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."[71] Since no prior case law was developed through the Massachusetts or Rhode Island Supreme Courts regarding the misappropriation claim, the court based its decision on similar state court holdings within the states', other jurisdictional decisions, and relevant policy rationales.[72] In applying the facts to the statutes, which both required a showing that use of the plaintiff's image resulted in commercial exploitation without consent, the

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62. *Id.* at 24.
63. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* (quoting Rhodes v. AIG Domestic Claims, Inc., 961 N.E.2d 1067, 1076 (Mass. 2012)).
69. *Id.* at 25.
70. *Id.*
71. Communications Decency Act (CDA), 47 U.S.C. § 230(e)(2) (2012).
72. *Backpage*, 817 F.3d at 26.

court concluded that there was no foundation for the plaintiff's claim that the defendant exploited the commercial value of the images of the young women.[73]

With regards to the copyright infringement claims, the court found that the plaintiff's assertion that a publisher generates revenue from allowing third parties to display photographs in advertisements implausible, and therefore, they could not be entitled to statutory damages or attorney's fees under the Copyright Act.[74]

In the end, the United States Court of Appeals for the First Circuit affirmed the district court's judgment and dismissed all of the plaintiffs' claims.[75]

IV. ANALYSIS

The court's decision in the noted case was consistent with the underlying intent and policy goals of Congress in its enactment of the CDA.[76] Courts have the ability to justify the broad application of immunity to ISPs because of Congress's intent in enacting the statute. However, the statute also bars the allowance of various claims that are not covered by the immunity of the CDA, which does not specify a "general" protection.[77] This creates confusion for plaintiffs seeking relief. The resulting inconsistency has resulted in a circuit split as illustrated above. As previously discussed, the First Circuit in the noted case barred claims against Backpage under the CDA and protected it from liability under tort law for criminal acts facilitated by the website.[78] In contrast, the Ninth Circuit has found that ISPs are not barred by the CDA from liability for similar conduct and has provided plaintiffs with the opportunity to seek remedies beyond the scope of the CDA.[79] For example, the Ninth Circuit in *Internet Brands* found that the plaintiff's failure to warn claim was not barred by the CDA, and, thus, could not be dismissed due to the validity of the complaint.[80] Both *Backpage* and *Internet Brands* demonstrate the inconsistency that is present among various circuits when determining whether ISPs should be granted immunity according to the CDA.

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73. *Id.*
74. *Id.* at 28.
75. *Id.* at 29.
76. *Id.*
77. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009).
78. *Backpage*, 817 F.3d at 29.
79. Jane Doe No. 14 v. Internet Brands, 767 F.3d 894, 898 (9th Cir. 2014).
80. *Id.* at 900.

In order to provide a clear line of authority regarding the actions taken by ISPs necessary for a court to hold that a CDA claim is not barred, and also to provide Internet users who have been harmed on websites with an opportunity to be consistently granted relief by the courts of various circuits, Congress should amend § 230 of the CDA to include notice and take-down provisions.[81] "The revised statute should clarify that intermediaries, as distributors, will be held liable for communicating defamatory material after receiving notice of the defamation."[82] While Congress seeks to limit government regulation of the Internet and foster its development by protecting ISPs,[83] the court's narrowing of the immunity extended to these entities, which is not explicitly granted by the CDA, provides plaintiffs the opportunity to potentially receive monetary relief from ISPs in certain situations where ISPs are not protected. To create greater consistency in circuit interpretations, the language of the statute should delineate which types of claims ISPs should be granted immunity for, thus providing a better foundation for courts when adjudicating disputes that arise under the CDA.

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81. Vanessa S. Brown Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1559 (2015).

82 *Id.*

83 Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016).

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