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Communications Decency Act Provides No Safe Harbor Against Antifraud Liability for Hyperlinks to Third-Party Content under the Securities and Exchange Act

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COMMUNICATIONS DECENCY ACT PROVIDES NO SAFE
HARBOR AGAINST ANTIFRAUD LIABILITY FOR HYPERLINKS
TO THIRD-PARTY CONTENT UNDER THE SECURITIES AND
EXCHANGE ACT

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ABSTRACT

In 2008, the U.S. Securities and Exchange Commission (SEC) released interpretive guidelines regarding antifraud liability for statements and disclosures made on company Web sites. The SEC noted that a company may incur both criminal and civil liability under section 10(b) of the Securities Exchange Act and Rule 10b-5 for hyperlinks to third-party content. However, the Communications Decency Act, 47 U.S.C. § 230(c), expressly preempts civil liability for interactive computer service providers that post hyperlinks to third-party content on their Web sites. This Article examines whether section 230 immunizes companies from civil liability for hyperlinks to third-party content despite the SEC's interpretive guidelines imposing antifraud liability. This Article concludes that companies would likely be considered information content providers under section 230 and therefore outside the scope of the safe harbor provision for interactive computer service providers.

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INTRODUCTION

In response to rapidly expanding Internet use, the U.S. Securities and Exchange Commission (SEC) has increasingly recognized the advantage of having issuers of securities publish company communications, statements, and reports on company Web sites.¹ SEC

¹ See, e.g., Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 2005 WL 1692642 (Aug. 3, 2005) [hereinafter 2005 Release]; Use of Electronic Media, Securities Act Release No. 7856, Exchange Act Release No. 42,728, Investment Company Act Release No. 24,426, 2000 WL 502290 (April 28, 2000)

guidelines released since 1995 detail a trend towards not only greater acceptance of the Internet as an efficient means for fulfilling disclosure requirements of the Securities Act ('33 Act) and the Securities and Exchange Act ('34 Act),² but also increased regulation of company disclosures online.³ In the 2008 Commission Guidance on the Use of Company Web Sites (Guidelines), the SEC clarified its position of imposing liability for communications, statements, and reports published on company Web sites.⁴ To protect investors from misleading hyperlinked content on company Web sites, section 10(b) of the '34 Act and Rule 10b-5⁵ impose civil liability for hyperlinked third-party content containing a material misstatement or omission that is attributable to the company.⁶

[hereinafter 2000 Release]; Use of Electronic Media for Delivery Purposes, Securities Act Release No. 7233, Exchange Act Release No. 36,345, Investment Company Act Release No. 21,399, 60 Fed. Reg. 53,458 (Oct. 13, 1995) [hereinafter 1995 Release].

² For instance, issuers are now encouraged to make prospectuses (2005 Release), annual reports (2000 Release), proxy materials (2000 Release), and Regulation FD disclosures (2008 Release) available online.

³ For example, when a company is in registration, communication on the company's Web site—including hyperlinked information—that meets the definition of an "offer to sell," "offer for sale" or "offer" under section 2(a)(3) of the '33 Act is subject to liability under section 5 of the '33 Act. 2000 Release, *supra* note 1. In the 2000 Release the SEC requested comment on whether a company may be liable for communications made by or on behalf of a company on electronic forums, including blogs. In 2008, liability for communications was expanded to communications on electronic forums. Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58,288, Investment Company Act Release No. 28,351, 2008 WL 4068202, (Aug. 7, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

⁴ Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58,288, Investment Company Act Release No. 28,351, 2008 WL 4068202 (Aug. 7, 2008) [hereinafter 2008 Release], available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

⁵ 15 U.S.C. § 78j(b) (2006), available at http://www.law.cornell.edu/uscode/15/usc_sec_15_00000078--j000-.html; 17 C.F.R. § 240.10b-5, available at <http://www.law.uc.edu/CCL/34ActRls/rule10b-5.html>.

⁶ 2008 Release, *supra* note 4. While this Article discusses liability for hyperlinks under section 10(b) of the '34 Act, a company may also be liable under provisions of the '33 Act and the '34 Act for hyperlinks to third-party content, such as section

Section 230 of the Communications Decency Act provides a safe harbor for interactive computer service providers by preempting liability for publishing third-party content.⁷ If section 230 preempts antifraud liability under the '34 Act, a company would be immunized from civil liability.⁸ However, a company's antifraud liability for hyperlinks to third-party content under the '34 Act appears to be outside the scope of the section 230 safe harbor for interactive computer service providers. This Article examines (1) the nature of the SEC's Guidelines regarding liability for hyperlinks to third-party information under the Securities and Exchange Act and (2) whether section 230 can immunize a company from antifraud liability described in the Guidelines for hyperlinks to third-party content.

I. SEC GUIDELINES IMPOSE LIABILITY ON COMPANIES HYPERLINKING TO THIRD-PARTY CONTENT TO PROTECT INVESTORS

According to the SEC's interpretive releases on the use of company Web sites, companies are responsible for statements that may "reasonably be expected to reach investors or the securities markets

17(a) of the '33 Act for fraudulent sales or offers to sell securities.

⁷ 47 U.S.C. § 230 (2006), available at <http://www4.law.cornell.edu/uscode/47/230.html>.

⁸ See Eric Goldman, *SEC's Proposed Guidance on Hyperlinking Contravenes 47 USC 230*, TECHNOLOGY & MARKETING LAW BLOG, Nov. 05, 2008, http://blog.ericgoldman.org/archives/2008/11/secs_proposed_g.htm (arguing "§ 230 preempts all civil causes of action based on third party online content - even causes of action enforced by the SEC."); Eric Goldman, *SEC Proposes that Companies Should Be Liable for Content Linked From the Company's Web site*, TECHNOLOGY & MARKETING LAW BLOG, Aug. 28, 2008, http://blog.ericgoldman.org/archives/2008/08/sec_proposes_th.htm (noting section 230 may provide a defense against fraudulent marketing under the '34 Act); Eric Goldman, *Do the FTC's New Endorsement/Testimonial Rules Violate 47 USC 230?*, TECHNOLOGY & MARKETING LAW BLOG, Oct. 06, 2009, http://blog.ericgoldman.org/archives/2009/10/do_the_ftcs_new.htm (analogizing prior arguments made against the SEC to the Federal Trade Commission's imposition of liability for advertisers linking to misleading endorsements under the Federal Trade Commission guidelines codified in 16 C.F.R. § 255).

regardless of the medium through which the statements are made, including the Internet.”⁹ Because of the widespread use of the Internet amongst investors, any online content attributed to a company can reasonably be expected to reach investors. Liability not only extends to communications made by or on behalf of a company on Web sites, blogs, or forums, but may also extend to hyperlinked content of third parties, such as reports made by financial analysts embedded on a company Web site that can be attributed to that company.¹⁰ A private cause of action may be brought against a company for hyperlinked content under section 10(b) of the '34 Act and Rule 10b-5 when the hyperlinked content can be attributed to the company and the hyperlink creates a material misstatement or omission in connection with the sale or purchase of the company's securities.¹¹

The SEC considers hyperlinked content embedded on a company's Web site attributable to that company when the company has either entangled itself in the preparation of the information or adopted the information.¹² Under the entanglement theory, third-party content is attributable to a company when the company was involved in the preparation of the information.¹³ For instance, a company may be

⁹ 2000 Release, *supra* note 1, § II(B); *see also* 2008 Release, *supra* note 5.

¹⁰ 2008 Release, *supra* note 4, §§ II(B)(2),(4). *See generally* Robert A. Prentice, Vernon J. Richardson, & Susan Scholz, *Corporate Web Site Disclosure and Rule 10B-5: An Empirical Evaluation*, 36 AM. BUS. L.J. 531 (1999) (examining the various mechanisms by which a company can be held liable under Rule 10b-5).

¹¹ 2008 Release, *supra* note 4; *see also* 15 U.S.C. § 78j(b) (2006), *available at* http://www.law.cornell.edu/uscode/15/usc_sec_15_00000078--j000-.html; 17 C.F.R. § 240.10b-5, *available at* <http://www.law.uc.edu/CCL/34ActRls/rule10b-5.html>.

¹² 2000 Release, *supra* note 1, § II(B)(1).

¹³ *Id.* *See also In re Presstek, Inc.*, Exchange Act Release No. 997, 66 SEC Docket 328, § III(C)(3)(a) (Dec. 22, 1997) (holding issuers liable for false statements by others made in a research report if the issuer has “sufficiently entangled itself” with the content. (quoting *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980))). *In re Presstek* indicates that proof of an issuers involvement in the preparation is necessary, but notes *Eisenstadt v. Allen*, 113 F.3d 1240, 1997 WL 211313 (9th Cir. 1997) (unpublished table decision), leaving the door open for post-preparation involvement to be sufficient to attribute content to the issuer. *Id.*

entangled if its activity suggests an implied representation that the third-party content was reviewed and is in accordance with the company's views.¹⁴

Under the adoption theory, the content is attributable to the company if the company either "explicitly or implicitly endorsed or approved the information" regardless of whether the company was involved in the preparation of the content.¹⁵ A company is presumed to have implicitly adopted information when it includes a hyperlink within a report that must be filed pursuant to federal securities laws.¹⁶ However, when hyperlinks are used, for example, on a company Web site, the circumstances surrounding the use of the hyperlinks must be considered to determine whether the hyperlinked content should be implicitly attributed to a company.¹⁷ In general, providing a link to third-party content indicates a company's belief that "the information on the third-party website may be of interest to the users of its website."¹⁸

To avoid the attribution of hyperlinked content, a company may use disclaimers, intermediary screens explaining why the link was provided, or exit notices between the company's Web site and the third-party's Web site.¹⁹ However, no single tactic immunizes a company from attribution of content under the adoption theory.²⁰ Ultimately, adoption of content is determined by examining whether there

¹⁴ *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980).

¹⁵ 2000 Release, *supra* note 1, § II(B)(1).

¹⁶ *Id.*

¹⁷ 2008 Release, *supra* note 4, § II(B)(2) (for instance, the SEC notes that a company's statements about the hyperlink, the risk of confusion for investors, precautions taken to warn investors, and the presentation of the hyperlinked information on the Web site should inform a company as to whether a hyperlink will be attributable).

¹⁸ *Id.*

¹⁹ *Id.* See also Mason Miller, *Technoliability: Corporate Websites, Hyperlinks, and Rule 10(b)-5*, 58 WASH. & LEE L. REV. 367, 395 (2001) (discussing use of disclaimers accompanying hyperlinks to fall within the safe harbor for forward-looking statements codified in the 1995 Private Securities Litigation Reform Act).

²⁰ *Id.* Of note, waivers of liability under the '34 Act are ineffective. 15 USC § 78cc (2006).

is a reasonable inference that the company endorsed or approved the content.²¹

II. SAFE HARBOR UNDER SECTION 230 DOES NOT IMMUNIZE COMPANIES FROM LIABILITY UNDER SECTION 10(B) OF THE '34 ACT AND RULE 10B-5

Section 230(c) of the Communication Decency Act (CDA) is generally understood to immunize interactive computer service providers (service providers) from civil liability for state and federal claims regarding third-party content published on their Web site.²² It has been suggested that section 230 may immunize a company that violated section 10(b) of the '34 Act and Rule 10b-5 by hyperlinking from the company Web site to third-party content.²³ However, section 230 cannot preempt antifraud liability under section 10(b) of the '34 Act and Rule 10b-5 when the section 230 safe harbor can be harmonized with the SEC's imposition of liability under the Guidelines and there is no conflict between the two rules.²⁴ Because companies that have

²¹ *Id.*

²² 47 U.S.C. § 230(c) (2006), available at <http://www4.law.cornell.edu/uscode/47/230.html>. A service provider can be immunized from a variety of claims under the section 230 safe harbor. See *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (stating that "courts have construed the immunity provisions in section 230 broadly in all cases arising from the publication of user-generated content."); Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295, 297-98 (2002) (describing the broad application of the section 230 safe harbor to various state law claims ranging from negligence to infliction of emotional distress).

²³ See, e.g., Eric Goldman, *SEC's Proposed Guidance on Hyperlinking Contravenes 47 USC 230*, TECHNOLOGY & MARKETING LAW BLOG, Nov. 05, 2008 http://blog.ericgoldman.org/archives/2008/11/secs_proposed_g.htm. Goldman suggests that section 230 preempts antifraud liability. However, if section 230 and the imposition of liability under section 10(b) of the '34 Act and Rule 10b-5 are not in conflict because antifraud liability for a company is outside the scope of the section 230 safe harbor, section 230 cannot preempt antifraud liability.

²⁴ The canon of harmonization requires a court to reconcile conflicting statutes where possible so that each is effective in its purpose. See Timothy K. Armstrong,

adopted third-party content, or participated in its preparation, appear to be outside the intended, apparent, and judicially interpreted scope of section 230 safe harbor for service providers, the rules are not in conflict and section 230 cannot be used as an affirmative defense to a section 10(b) of the '34 Act and Rule 10b-5 violation.

A. *The Congressional Intent of Section 230 Indicates that Company Liability Under the '34 Act is Outside the Scope of Safe Harbor*

The CDA was promulgated to prevent exposure of objectionable and indecent materials to minors.²⁵ Congress recognized that while service providers may be able to limit the quantity of objectionable and indecent materials online, the service providers could not possibly regulate all materials posted by third parties. Because Congress feared the threat of tort liability would decrease incentives for service providers to continue contributing to the growth of the Internet,²⁶ section 230 was added to immunize service providers who blocked or screened objectionable material²⁷ by providing that service providers shall not be held liable on account of self-regulatory activity and “shall not be treated as the publisher or speaker of any information provided

Chevron Deference and Agency Self-Interest, 13 CORNELL J.L. & PUB. POL'Y 203, FN 341 (2004) (describing the role of the judiciary to harmonize apparently conflicting statutes when possible). *But see* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (noting that there are number of applicable canons, many of which may be paradoxically applied, and their ultimate usefulness is heavily influenced by the desired outcome).

²⁵ See Communications Decency Act of 1996, Pub. L. No. 104-104, Title V § 230 (1996).

²⁶ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998). *See also* 47 U.S.C. § 230(b) (affirming “It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media . . .”).

²⁷ H.R. Rep. No. 104-458, at 194 (1996) (where the House of Representatives amendment, later codified as section 230, is intended to “protect[] from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.”).

by another information content provider.”²⁸

By enacting section 230, Congress specifically intended to overrule decisions such as *Stratton Oakmont v. Prodigy Services*, which imposed liability on service providers for third-party content.²⁹ In *Stratton*, Prodigy Services was a service provider of an online bulletin holding itself out to the public as controlling the content of messages posted by third parties.³⁰ When the service provider did not either edit or remove unlawful content, the service provider was found liable as a publisher of unlawful third-party content despite the service provider’s arguments that it was impossible to patrol all of the content posted to the bulletin.³¹ Section 230 specifically overturned *Stratton* by precluding the imposition of publisher liability on a service provider for editing or regulating third-party content.

The legislative record does not indicate blanket immunity for all service providers under section 230. Rather, section 230 safe harbor appears to be restricted to those service providers, such as Prodigy Services, that are not claiming the content as their own but rather are acting merely as conduits or editors of material posted by third parties. Companies liable under the ’34 Act for hyperlinks to third-party content are more than mere service providers, such as Prodigy Services, that may or may not edit third-party content. Such companies deliberately place hyperlinks to third-party content because they have determined that the information is useful and intend Web site visitors to read and consider the content. Companies that post content to further a Web site visitor’s understanding of the company are readily distinguishable from companies, such as Prodigy Services, offering a forum by which third parties can choose to post their own content. As such, a company liable under the ’34 Act appears to be outside the intended scope of the section 230 safe harbor.

²⁸ 47 U.S.C. § 230(c) (2006).

²⁹ H.R. Rep. No. 104-458, at 194 (1996) (citing *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995) (unpublished opinion)).

³⁰ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995) (unpublished opinion).

³¹ *Id.*

Further, the SEC's goal of protecting investors from being misled in the securities market by holding companies liable for hyperlinked information is consistent with Congress's intent that section 230 only provide safe harbor for service providers acting as mere conduits of third-party content on the Internet. Precluding companies from invoking the section 230 safe harbor for conduct impermissible under the '34 Act would not have the detrimental effect on the growth of the Internet Congress sought to avoid. In fact, the SEC anticipates increasing use of the Internet by companies seeking to communicate with investors.³²

B. The Plain Meaning of Section 230 Indicates that Companies Liable Under the '34 Act are Outside the Scope of Safe Harbor

The plain meaning of section 230(c) broadly grants federal immunity against all civil causes of action.³³ The only significant limitation to section 230(c) is that safe harbor only applies to service providers, not information content providers (content providers).³⁴ A service provider is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."³⁵ By contrast, a content provider is "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."³⁶ While service providers act as a conduit for posting information, content providers have played some role in creating or developing the information posted online. Because section 230(c)(1) immunizes only

³² See *supra* note 7.

³³ § 230(e). See also, Band & Schruers, *supra* note 22.

³⁴ § 230(c)(1) (stating, "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.").

³⁵ § 230(f)(2).

³⁶ § 230(f)(3).

service providers, any content provider that contributed to the objectionable content remains subject to civil liability for content posted online.³⁷

A company that maintains a company Web site is likely a content provider and not a service provider in situations where antifraud liability under the '34 Act is at issue. The SEC requires that third-party content be attributable to a company for the company to incur liability under the '34 Act. Under the entanglement theory, information is attributed to a company if the company was responsible for the preparation of the information.³⁸ Content providers meet the attribution definition under entanglement theory because they are responsible for the preparation of information or have participated, in whole or in part, in the "creation or development" of the information. Therefore, demonstration that a company is entangled with the hyperlinked information may also demonstrate that a company is a content provider and outside the bounds of safe harbor protection under section 230.

C. The Judicial Interpretation of Section 230 Indicates that Companies Liable Under the '34 Act are Outside the Scope of Safe Harbor

Courts are generally cautious about extending the scope of safe harbor under section 230 and will often try to balance the seemingly narrow congressional intent of section 230 against the apparently broad grant of immunity in section 230(c)(1).³⁹ Ultimately, the scope of section 230 is determined by whether the provider is considered a

³⁷ See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (where soliciting data through an online questionnaire did not constitute "a significant role in creating, developing or 'transforming' the relevant information" and therefore the online dating service was not an internet content provider under 47 U.S.C. § 230(f)(3)).

³⁸ See *supra* note 13.

³⁹ See *Carafano*, 339 F.3d at 1122-23 (refusing to expand section 230 so broadly as to create an advantage for online businesses over businesses operating in the "real world"); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

service provider or content provider.⁴⁰ The clearest example of service providers with immunity under the section 230 safe harbor are generally Web sites, like eBay, Google and AOL, that publish content volunteered by third parties.⁴¹ The mantra appears to be that a passive provider is a safe provider. However, the distinction between a service provider that merely publishes another's content and a content provider that creates and develops content is not clear, especially when a provider can operate within both spheres.⁴² To resolve the distinction, courts have largely relied on the extent of the contribution to the creation or development of the content and the extent to which the provider is the "publisher or speaker" of the content.

1. Contribution to the Creation or Development of Content

When a provider is merely a conduit for information and provides no editorial contribution—similar to a telephone company relaying signals between two customers—safe harbor under section 230 is permissible.⁴³ For example, in *Zeran v. America Online* the Fourth

⁴⁰ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 327 (4th Cir. 1997) (establishing that section 230 immunity depends on whether the provider is an interactive computer service provider and not an information content provider).

⁴¹ See *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714-15 (Cal. Dist. Ct. App. 2002) (provider of online marketplace is an internet service provider); *Parker v. Google*, 422 F.Supp.2d 492, 500-01 (E.D. Pa. 2006) (stating "there is no doubt that Google qualifies as an 'interactive computer service'" eligible for immunity under section 230); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 (10th Cir. 2000) (provider of e-mail service is an interactive computer service provider).

⁴² See, e.g., *Mazur v. eBay*, No. 07-03967, 2008 WL 618988 (N.D. Cal. July 23, 2008), available at http://scholar.google.com/scholar_case?case=7015046710981364619&hl=en&as_sdt=2&as_vis=1&oi=scholar (defining eBay as an interactive computer service provider with immunity under section 230 when eBay failed to withdraw third-party content it knew to be illegal, but noting that eBay can function as both an interactive computer service provider as well as an information content provider).

⁴³ See *Ben Ezra*, 206 F.3d at 986 (holding America Online immune from liability for publishing inaccurate stock information by third parties because the contract between America Online and the third parties provided that AOL "may not modify,

Circuit held America Online not liable for inappropriate content posted to its message board by a third party when America Online merely provided the message board service and was not involved in either creating the content or encouraging third parties to post such content.⁴⁴

However, a provider who makes a material editorial contribution, beyond merely transmitting a third party's content or making minor edits, will be considered to have participated in the "creation or development" of content under section 230 and will not be eligible for safe harbor.⁴⁵ In *Fair Housing Council v. Roommates.com*, a roommate-matching Web site was considered a content provider, unable to claim section 230 immunity, because it was considered the developer of infringing content when it created a questionnaire and required users to answer questions that violated the Fair Housing Act.⁴⁶ Even though the Roommates.com users ultimately made the selections using a drop-down menu in the questionnaire, Roommates.com was liable as a content provider because it created a questionnaire where the users had no choice but to violate the Fair Housing Act.⁴⁷ The court determined that "development" is defined as "making usable or

revise, or change" the information it received from the third parties. America Online was therefore contractually prohibited from being a content provider); *Universal Commc'n Sys., Inc. v. Lycos*, 478 F.3d 413, 420 (1st Cir. 2007) (determining that a message board operator is protected under section 230 for postings by third parties, even when the message board operator knew that the content was illegal, when the message board operation was not involved in the creation or development of the content).

⁴⁴ *Zeran*, 129 F.3d at 330.

⁴⁵ See *Hy Cite Corp. v. badbusinessbureau.com, LLC*, 418 F.Supp.2d 1142, 1149 (D. Ariz. 2005) (denying CDA immunity to a provider that contributes content and solicits third-party content for a newsletter even though the provider did not contribute to the creation of the newsletter's unlawful content); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding a publishing of a gossip column immune from liability as a service provider, but indicated that section 230 would not immunize the creator of the gossip column because such a creator is an information content provider).

⁴⁶ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

⁴⁷ *Id.* at 1172.

available” or “the process of researching, writing, gathering, organizing and editing information for publication on web sites.”⁴⁸ If Roommates.com had merely created an open-ended questionnaire, where users had a choice whether or not to provide infringing content, section 230 safe harbor may have been appropriate because Roommates.com would not have contributed to the “development” of the infringing content by either writing, gathering, organizing or editing the user provided information.⁴⁹ While a service provider may offer traditional editorial input without such input being considered a contribution to the creation or development of content,⁵⁰ a provider that induces the unlawful content or impermissibly selects content for publication will be considered a content provider and outside the scope of the section 230 safe harbor.⁵¹

⁴⁸ *Id.* at 1168 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY for the definition of “develop” and WIKIPEDIA for the definition of “web content development”).

⁴⁹ See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (soliciting data from an open-ended questionnaire where users filled in blank space did not constitute “a significant role in creating, developing or ‘transforming’ the relevant information” because the users had a choice whether to provide infringing content and, therefore, the online dating service was not a content provider. In contrast to *Roommates.com*, the court considered the answers unlawful, not the questionnaire).

⁵⁰ *Mazur v. eBay*, No. 07-03967, 2008 WL 618988 (N.D. Cal. July 23, 2008) (deciding whether to publish is a traditional editorial function that is acceptable for an internet service provider seeking safe harbor under section 230). See also *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (determining that a defendant was not an information content provider of an e-mail when he made minor alterations to a tortious e-mail provided by a third party to include in a newsletter); *Doe v. Friendfinder Network, Inc.*, 540 F.Supp.2d 288 (D.N.H. 2008) (finding that a provider who re-posted a profile on a social networking site with “slight” modifications that did not contribute to the injurious character of the posting was immune from state law causes of action).

⁵¹ *Fair Hous. Council*, 521 F.3d at 1166-69 (a service provider cannot claim safe harbor if it “contributes materially to the alleged illegality of the conduct,” such as when it requests users to supply discriminatory criteria or uses the unlawful criteria to limit information that users can access). Compare *NPS LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009) (citing *Fair Housing Council* to bar StubHub from claiming section 230 immunity when it

Under current jurisprudence, a court would likely characterize a company, liable under the '34 Act for hyperlinking to third party content, as a content provider. In particular, posting hyperlinks is an editorial function and clearly “creation or development.”⁵² The judiciary has refused to immunize service providers that have either contributed more than traditional edits to the content⁵³ or contributed materially to the development of the third-party content.⁵⁴ Under the entanglement theory of attribution, an issuer can only be liable under the securities laws when the issuer has so involved itself in the preparation of the information that the content can be attributed to the issuer.⁵⁵ Such preparation involves more than mere editing or providing a conduit by which third parties may pass along information. Rather, in order for information to be attributed to a company, the company must have aided in the development or creation of the content; by implication, this content is deemed to represent the company's views.

Like in *Fair Housing Council*, a company liable under the '34 Act for fraudulent hyperlinks is more than a “passive transmitter” when it contributes, at least in part, to the development of infringing content by researching, gathering, and making the third-party content available on its Web site. Because the entanglement theory has substantial requirements for the content to be attributed to a company, a company that is found liable under section 10(b) of the '34 Act and Rule 10b-5 may also be considered a content provider and, therefore, ineligible for the section 230 safe harbor.

“materially contributed to the illegal ‘ticket scalping’ of its sellers” by allowing ticket scalpers to resale tickets in a way that blocked the identify of the resellers and purchasers), with *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (finding that Craigslist was immune as a service provider because Craigslist did not “induce[] anyone to post any particular listing or express a preference for discrimination.”).

⁵² See *supra* text accompanying note 45.

⁵³ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

⁵⁴ *Fair Hous. Council*, 521 F.3d at 1167-68.

⁵⁵ See *supra* text accompanying note 13.

2. Provider as Publisher or Speaker of Content

In addition to considering the extent of editorial contribution, courts have also weighed the extent to which a provider is said to be a publisher or speaker of third-party content when distinguishing a content provider from a service provider.⁵⁶ In *Anthony v. Yahoo!*, Yahoo sent profiles of former subscribers of its dating service to current subscribers in order to mislead and induce current subscribers to continue subscribing.⁵⁷ While the profiles were created by third parties, Yahoo was considered a “publisher or speaker” of the profiles when it intentionally misrepresented the profiles to current subscribers of the dating service.⁵⁸ Because Yahoo was considered the “publisher or speaker” of the misrepresented profiles, Yahoo was considered a content provider and was barred from using the section 230 safe harbor as a defense for its tortious actions.⁵⁹

A company found liable for violating the '34 Act would likely be considered a content provider and outside the scope of the section 230 safe harbor pursuant to the holding in *Anthony*. Just as Yahoo was considered a content provider when it used former-subscriber profiles to perpetrate a fraud or misrepresentation, a company liable under the '34 Act would be a content provider when the company uses hyperlinks to misrepresent material information to investors.⁶⁰ Under the adoption theory, attribution is presumed when a company

⁵⁶ *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006); *Batzel v. Smith*, 333 F.3d 1033 (9th Cir. 2003) (noting that if the “information is provided to those individuals in a capacity unrelated to their function as a provider or user of interactive computer services, then there is no reason to protect them with special statutory immunity.”).

⁵⁷ *Anthony*, 421 F. Supp. 2d at 1259-60.

⁵⁸ *Id.* at 1263. The court also considered Yahoo an information content provider when it created false profiles to send to subscribers because Yahoo was entirely responsible for the creation or development of such content.

⁵⁹ *Id.*

⁶⁰ Of note, in both situations, the profiles used by Yahoo or the third-party information used by a company are not themselves unlawful, it is the use of the content by Yahoo or a company that is impermissible.

intentionally hyperlinks to third-party content unless the circumstances surrounding the use of the hyperlink, such as the presence of a disclaimer, would lead a reasonable investor to understand that the company has not adopted the hyperlinked content.⁶¹ Therefore, a company that implicitly adopts third-party content may also be considered a content provider under section 230 because the company is necessarily using third-party content to misrepresent information to investors and perpetrate a fraud under the '34 Act.

Regardless of whether content is attributable to a company under the entanglement theory or the adoption theory, a company liable under the '34 Act for hyperlinking to fraudulent third-party content will likely be considered a content provider because the company is (1) aiding in the creation or development of the content, as distinguished from providing minor editorial contributions like in *Zeran*; (2) contributing to the development of the infringing content by researching, gathering, and making available infringing third-party content on its Web site like in *Fair Housing Council*; or (3) using the third-party content to perpetrate a fraud or misrepresentation like in *Anthony*.

CONCLUSION

Because the SEC's Guidelines indicate that company liability under section 10(b) of the '34 Act and Rule 10b-5 for hyperlinked third-party content require the hyperlinked content be attributable to a company, a company would likely be considered an information content provider under section 230 and outside the scope of the section 230 safe harbor for interactive computer service providers. As such, section 230 safe harbor may not immunize a company from a section 10(b) of the '34 Act and Rule 10b-5 violation.

⁶¹ See *supra* text accompanying note 13.

PRACTICE POINTERS

- To avoid the possibility of liability, companies that post statements, disclosures, and reports on their Web sites should protect themselves as if they could be held liable under section 10(b) of the Exchange Act and Rule 10b-5 for embedded hyperlinks to fraudulent third-party content.
- A company that embeds hyperlinks to third-party content on its Web site may avoid antifraud liability by using disclaimers, intermediary screens, exit notices between the issuer's Web site and the third party's Web site, or explanations of why the links were provided to ensure that the content is not attributed to the company.
- Because 47 U.S.C. § 230 can be harmonized with the SEC's Guidelines on antifraud liability for information on company Web sites, section 230 safe harbor is likely a poor defense against private causes of action for fraudulent misstatements or omissions involved in the sale or purchase of securities under section 10(b) of the Exchange Act and Rule 10b-5.