

10-1-2016

How the Washington State Supreme Court Wrongly Applied the Communications Decency Act in *Village Voice*, and What It Means for Internet Service Providers

Samuel J. Daheim

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wjlta>



Part of the [Internet Law Commons](#)

Recommended Citation

Samuel J. Daheim, *How the Washington State Supreme Court Wrongly Applied the Communications Decency Act in Village Voice, and What It Means for Internet Service Providers*, 12 WASH. J. L. TECH. & ARTS 77 (2016).

Available at: <https://digitalcommons.law.uw.edu/wjlta/vol12/iss1/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Journal of Law, Technology & Arts by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 12, ISSUE 1 FALL 2016

HOW THE WASHINGTON STATE SUPREME COURT
WRONGLY APPLIED THE COMMUNICATIONS DECENCY ACT
IN *VILLAGE VOICE*, AND WHAT IT MEANS FOR INTERNET
SERVICE PROVIDERS

Samuel J. Daheim^{*}
© Samuel J. Daheim

CITE AS: 12 WASH. J.L. TECH. & ARTS 77 (2016)
<http://digital.law.washington.edu/dspace-law/handle/1773.1/1652>

ABSTRACT

In passing the Communications Decency Act of 1996 (CDA), Congress sought to promote and protect the ever-evolving free market of voices and ideas available on the internet. In order to reach this end, section 230(c) of the CDA extends protection from liability to those who provide a means for disseminating speech on the web, dubbed by the statute as “interactive computer service providers” (ICSP). Section 230 protects ICSPs from liability for harm inflicted by content created and posted by third parties on their respective forums. This Article focuses on a 2015 Washington State Supreme Court decision, J.S. v. Village Voice Media Holdings, LLC., which raised the troubling prospect that content requirements prohibiting illegal or immoral activities, could potentially remove an ICSP from Section 230’s immunity in the state of Washington.

^{*} Samuel J. Daheim, University of Washington School of Law, Class of 2017. Thank you to Professor Robert Gomulkiewicz for your exceptional guidance and thoughtful feedback, Paul Lawrence for your generous advice, and my partner, Camille, for your unwavering love and support.

TABLE OF CONTENTS

I.	Explanation of Section 230	79
A.	How the CDA Works	80
B.	Policy Underlying the CDA	81
C.	How Courts Apply the CDA	82
II.	Material Contribution Test	83
III.	The Village Voice Case	84
A.	Procedural Posture/CR 12(b)(6)	85
B.	Opinions.....	86
IV.	The Court’s Misapplication of the CDA	88
A.	The Misreading of Roommates	88
B.	Mistaken Legal Conclusion	89
C.	Applying the Material Contribution Test to Village Voice	89
V.	Potential Consequences of Village Voice	91

INTRODUCTION

The Internet has become the primary means for the dissemination and consumption of information in the technological age. Anticipating these developments, Congress sought to “preserve the vibrant and competitive free market”¹ of ideas and information available on the Internet by enacting Section 230(c) of the Communications Decency Act of 1996 (“CDA”). Section 230(c) of the CDA grants immunity to “interactive computer service providers” (“ICSPs”) from civil liability for content posted by third-party “information content providers” (“ICPs”).² Courts have construed and applied the immunity provisions within Section 230 of the CDA broadly in cases arising from content posted by ICSP users.³ However, in *J.S. v. Village Voice Media Holdings*,

¹ 47 U.S.C. §230(b)(2) (1996)

² 47 U.S.C. § 230 (1996)

³ See, e.g., *Doe v. Myspace, Inc.*, 528 F.3d 413, 418 (5th Cir.2008); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir.3003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir.2003).

LLC. (“*Village Voice*”), the Washington State Supreme Court refused to extend Section 230’s immunity to the defendant, Village Voice Media Holdings, LLC., doing business as “backpage.com” (Backpage), in a case arising out of advertisements posted on its website by a third party. The court allowed the claim to survive Backpage’s motion to dismiss for failure to state a claim upon which relief can be granted based on the plaintiff’s allegations that Backpage’s “content requirements” somehow played a “substantial role in creating the content” in the advertisements at issue.⁴

This Article begins by explaining the immunity provision in Section 230 of the CDA, reviewing the provision’s purpose, and providing an account of how courts have interpreted the provision. The Article will continue by recommending a test used by some courts to determine if an ICSP has “developed” content under the CDA, thereby forfeiting immunity. Next, it will analyze the facts, holding, and opinions of the *Village Voice* case to examine the legal and logical fallacies in the majority opinion. The Article will conclude by discussing the potential policy consequences of the holding in *Village Voice* and the negative consequences it bodes for ICSPs in Washington.

I. EXPLANATION OF SECTION 230

Section 230(c) provides ICSPs with immunity from state law civil liability for damages arising out of content that they do not produce, but merely host. In enacting this provision, Congress sought to foster the development of Internet-based communication, and to encourage service providers to self-regulate without fear of being held liable for content provided by third parties.⁵ Courts construe the immunity provision of the CDA broadly and extend immunity to ICSPs wherever they have not generated the content at issue.⁶

⁴ *J.S. v. Village Voice Media Holdings, LLC.*, 184 Wash.2d 95, 103 (2015).

⁵ *See e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir.1997).

⁶ *Id.*

A. *How the CDA Works*

ICSPs and ICPs are distinguished by their relation to the content at issue in any given case. The CDA defines ICSPs as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”⁷ ICPs are defined in the CDA as “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.”⁸ Thus, an ICSP could be an ICP as well if it plays *any* material role in developing the content in question.

Section 230(c) provides immunity from civil liability for ICSPs from claims that arise out of content posted by third-party users, ICPs. 47 U.S.C. § 230(c)(1) provides that “[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.” 47 U.S.C. § 230(e)(3) provides, in relevant part, that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” Together, these two subsections have been read by courts to stand for the principle that Section 230(c)(1) of the CDA “protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as publisher or speaker (3) of information provided by” a third party.⁹

⁷ 47 U.S.C. § 230(f)(2).

⁸ 47 U.S.C. § 230(f)(3) (emphasis added).

⁹ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009).

B. Policy Underlying the CDA

Congress had two purposes in offering immunity under the CDA: (1) to generally promote the expansion of the free marketplace of ideas and innovations presented by the Internet and (2) to remove the disincentive for ICSPs to self-regulate posed by state-law causes of action.¹⁰

In enacting Section 230, Congress intended in part to facilitate the growth of the Internet as the predominant source for the dissemination and procurement of information and ideas. In passing Section 230, Congress explicitly made clear its intention of “promot[ing] the continued development of the Internet and other interactive computer services and other interactive media.”¹¹ Additionally, Congress explained, Section 230 is designed, at least in part, to “preserve the vibrant and competitive free market” of ideas that is presented by the Internet.¹²

Section 230 was also intended to remove disincentives for service providers to “self-regulate the dissemination of offensive material over their services.”¹³ In so doing, Congress was responding to a New York trial court decision¹⁴ holding an ICSP liable for third-party statements because it exercised editorial control over the content posted by its users. The court found that the defendant Prodigy constituted a publisher under state law because it had deleted some messages on its message boards on the basis of offensiveness and bad taste.¹⁵ As a result, Prodigy was held legally responsible for the defamatory messages that it had failed to delete under the theory that the ICSP had undertaken an editorial role and so was subsequently responsible for any and all content displayed on its site.¹⁶ The decision in *Stratton Oakmont*

¹⁰ 28 U.S.C. § 230 (b).

¹¹ 47 U.S.C. § 230(b)(1).

¹² 47 U.S.C. §230(b)(2).

¹³ *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir.1997).

¹⁴ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished).

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 4.

made clear that where an ICSP exercised editorial control over third-party posts, it could be held liable for the content of those posts. Concerned that *Stratton Oakmont* decision would provide a disincentive for ICSPs to exert any control over third-party content, Congress included the immunity provision in Section 230 in the CDA.¹⁷

C. How Courts Apply the CDA

Consistent with the policy underlying the CDA, courts have consistently construed the immunity provisions in Section 230 expansively “in all cases arising from the publication of user-generated content.”¹⁸ Courts read the language in Section 230(c) as providing ICSPs with immunity that is “quite robust.”¹⁹ Courts “apply an expansive definition of ‘interactive computer service provider’ and a rather restrictive definition of ‘information content provider.’”²⁰ In light of Congress’s noted concerns ICSPs qualify for immunity from liability, so long as they do not also function as an ICP, by producing content for the portion of the statement or publication at issue.²¹ Close cases “must be resolved in favor of immunity, lest we cut the heart out of Section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.”²²

¹⁷ Congressional intent to override such a disincentive can be found in 47 U.S.C. § 230(b)(4); *see also Zeran*, 129 F.3d at 331 (stating “§ 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995)”).

¹⁸ *Myspace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008).

¹⁹ *J.S. v. Village Voice Media Holdings, LLC.*, 184 Wash.2d 95, 122 (2015) (citing *Carafano*, 339 F.3d 1119, 1123 (9th Cir. 2003)) (dissent).

²⁰ *Id.*

²¹ *Carafano*, 339 F.3d 1119, 1123 (9th Cir. 2003).

²² *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008)).

II. MATERIAL CONTRIBUTION TEST

In *Village Voice*, the court held that Backpage would be liable for third-party advertisements if plaintiffs could show that Backpage's policies somehow helped develop those advertisements. Like many other cases involving Section 230 immunity, *Village Voice* hinges on the breadth afforded to the word "development" in Section 230(f)(3)'s definition of ICP. As previously discussed, Section 230(c) provides that "no provider or user of an [ICSP] shall be treated as the publisher or speaker" of content posted by an ICP. Section 230(f)(3) further defines an ICP as "any person or entity that is responsible, in whole or in part, for the creation or *development* of information provided through the Internet" (emphasis added). As such, unless a person develops content, that individual cannot be held liable for damages arising from that content under the CDA.

In order to determine whether an ICSP has "developed" content in a given case, a few courts have adopted the "material contribution" test.²³ In *Hill v. StubHub, Inc.*,²⁴ Hill sued StubHub for participating in the sale of tickets for more than \$3.00 over face value; an action considered an unfair and deceptive trade practice under North Carolina state law. Hill argued that StubHub was participating in a civil conspiracy, along with those who sold tickets on its website for excessive profits.²⁵ The trial court granted Hill's motion for summary judgment against StubHub, finding that StubHub's conduct constituted an unfair and deceptive trade practice.²⁶

StubHub appealed, arguing that the suit should have been dismissed on the grounds that, as an ICSP, Section 230 provided it with immunity.²⁷ The court agreed and found that plaintiff's claims

²³ See e.g., *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014); *Roommates.com*, 521 F.3d 1157; *Hill v. StubHub, Inc.*, 727 S.E.2d 550; 219 N.C.App. 227 (N.C. App. 2012).

²⁴ *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 553.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 555.

were barred by Section 230(c).²⁸ For an ICSP to forfeit immunity, the court held, it must materially contribute to the unlawful content.²⁹ The court explained that “in order to ‘materially contribute’ to the creation of unlawful material, a website must effectively control the content posted by third parties or take other actions which essentially ensure the creation of unlawful material.”³⁰

As a result, the North Carolina Court of Appeals found that StubHub could not be found to have materially contributed to the unlawful content, simply because it had not taken steps to ensure that unlawful content would be posted.³¹ Even if StubHub had encouraged sellers on its website to sell at prices higher than \$3.00 over their face value—or had been aware of the risk that tickets sold on its website would exceed face value by over \$3.00—the court reasoned that it still would not have been enough to find that it materially contributed to the unlawful content as an ICSP.³²

In deciding *Village Voice*, the Washington Supreme Court should have applied the material contributions test. Had the court applied the test, it would have held that Backpage neither effectively controlled the illegal content posted by third parties, nor took actions to ensure the creation of illegal content.

III. THE VILLAGE VOICE CASE

In *Village Voice*, the Washington Supreme Court allowed plaintiffs’ claims to survive a motion to dismiss, holding that their allegations of Backpage’s involvement in their claims were sufficient to state a claim upon which relief could be granted.

Advertisements featuring plaintiffs—three minor girls, J.S., S.L., and L.C. (collectively referred to as J.S.)—had purportedly been posted on Backpage.³³ J.S. was allegedly raped multiple times

²⁸ *Id.* at 561.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Village Voice*, 184 Wash.2d 95, 98 (2015).

by adult customers who responded to the advertisements.³⁴ However, Backpage's content requirements prohibited "advertisements on its website to contain naked images, images featuring transparent clothing, sexually explicit language, suggestions of an exchange of sex acts for money, or advertisements for illegal services."³⁵ Backpage held additional requirements for content posted in the 'escort' section of its website. Backpage's requirements at the time read: "Backpage does not allow 'any solicitation . . . for any illegal service exchanging sexual favors for money or other valuable consideration,' 'any material on the Site that exploits minors in any way,' or 'any material . . . that in any way constitutes or assists in human trafficking.'"³⁶

The advertisements featuring J.S. were posted on Backpage's website without any guidance from Backpage personnel. J.S. conceded that all of the advertisements featuring J.S. complied with Backpage's content requirements.³⁷ However, J.S. alleged that, by setting content requirements that prohibited sex trafficking, Backpage had helped pimps and prostitutes evade law enforcement by giving the appearance of lawful activity on Backpage's site. As a result, J.S. alleged, Backpage had materially contributed to the development of the content at issue.

Backpage moved to dismiss the claim, arguing that Section 230(c) provided it with immunity because it had not contributed to the development of the advertisements at issue. The court found that the plaintiffs could overcome the motion to dismiss because they had pled facts sufficient to bring an action against Backpage.

A. *Procedural Posture/CR 12(b)(6)*

The *Village Voice* case made its way to the Washington State Supreme Court on direct appeal from a trial court's denial of

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Village Voice*, 184 Wash.2d 95, 98 (2015).

Backpage's motion to dismiss. J.S. made state law claims for "negligence, outrage, sexual exploitation of children, ratification/vicarious liability, unjust enrichment, invasion of privacy, sexual assault and battery, and civil conspiracy."³⁸ In response to these claims, Backpage filed a CR 12(b)(6) motion to dismiss the suit on the grounds that J.S.'s claims were preempted by Section 230(c) of the CDA. Backpage argued that it could not be held liable for J.S.'s damages because it did not play a role in producing the advertisements at issue. Because the CDA immunizes ICSPs that take no part in creating content from liability arising therefrom, Backpage could not be held liable for the damages arising out of advertisements wholly designed and produced by a third party.

When courts in Washington review CR 12(b)(6) motions, they "accept as true the allegations in a plaintiff's complaint and any reasonable inferences therein."³⁹ In response to Backpage's motion, J.S. argued that Backpage played a substantial role in contributing to the content of the advertisements at issue, and therefore CDA immunity did not apply.⁴⁰

B. Opinions

The majority opinion in *Village Voice*, authored by Justice Steven C. González, held that dismissal of J.S.'s claims under CR 12(b)(6) would not be appropriate, based on J.S.'s allegations.⁴¹ J.S. claimed that "Backpage.com [knew] the foregoing content requirements [were] a fraud and a ruse [] aimed at helping pimps, prostitutes, and Backpage.com to continue to evade law enforcement by giving the [false] appearance that [it did] not allow

³⁸ *Id.*

³⁹ *Id.* at 100 (citing *Reid v. Pierce County*, 136 Wash.2d 195, 20 (1998)).

⁴⁰ *Id.* at 103.

⁴¹ In Washington, courts allow claims to be brought, unless it appears "beyond a reasonable doubt that no facts exist that would justify recovery." *In re Parentage of C.M.F.*, 179 Wash.2d 411, 418; 314 P.3d 1109 (2013) (emphasis added).

sex trafficking on its website.”⁴² Because of this, they argued, “Backpage [had] a ‘substantial role in creating the content . . . of the advertisements on its website.’”⁴³ Taking as true the plaintiffs’ allegations that the content requirements were “specifically designed . . . so that pimps can continue to use Backpage.com to traffic in sex,”⁴⁴ the court determined that the case could proceed and held that the

In a dissenting opinion, Justice Sheryl Gordon McCloud concluded that the plaintiffs’ claims could not overcome Section 230(c) in this case because “Backpage did not materially contribute to the development or creation of the content at issue.”⁴⁵ Justice Gordon McCloud pointed out that courts interpreting the Section 230 of the CDA have read the provision as providing “full immunity” for ICSPs in cases where a third party “willingly provides the essential published content,” regardless of the editing or selection process.⁴⁶ She also criticized the reasoning of the majority and concurrence’s misapplication of a Ninth Circuit holding involving an ICSP’s material contribution to unlawful content on its website.⁴⁷ Ultimately, Justice Gordon McCloud held that the CDA should have preempted the case brought by plaintiffs for the simple reason that “J.S.’s complaint clearly alleges that another content provider, not Backpage, provided the content for the advertisements.”⁴⁸

⁴² *Village Voice*, 184 Wash.2d 95, 102 (2015).

⁴³ *Id.* at 102-03.

⁴⁴ *Village Voice*, 184 Wash.2d 95, 103 (2015).

⁴⁵ *Village Voice*, 184 Wash.2d 95, 136 (2015) (dissent).

⁴⁶ *Id.* at 122 (quoting *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1098-99, 1118 (W.D. Wash. 2004).

⁴⁷ *Village Voice*, 184 Wash.2d 95, 131 (2015) (dissent).

⁴⁸ *Id.* at 116.

IV. THE COURT'S MISAPPLICATION OF THE CDA

This case was wrongly decided. The Court reached the conclusion that “it does not appear ‘beyond a reasonable doubt that no facts exist that would justify recovery.’”⁴⁹ This conclusion was based on a mistaken interpretation of a landmark Ninth Circuit case interpreting the CDA, and reliance on a mistaken legal conclusion.

A. *The Misreading of Roommates*

The majority and concurrence both read the Ninth Circuit's holding in *Fair House Council v. Roommates.com, LLC*,⁵⁰ as support for the proposition that setting content requirements that induce unlawful advertisements creates a material contribution to said ads.⁵¹ However, the facts and reasoning in *Roommates* significantly distinguish it from the case at hand.

Roommates.com was a website “designed to match people renting out spare rooms with people looking for a place to live.”⁵² The site required users to answer questions about gender, sexual orientation, and whether they would bring children into the household by selecting from pre-written answer choices in drop-down menus.⁵³ Because of this practice, Roommates.com was sued by two housing groups who argued that the site was renting housing based on discriminatory criteria in violation of the federal Fair Housing Act (FHA) and California state law.⁵⁴

Roommates.com asserted Section 230 immunity. However, the Ninth Circuit found that Roommates.com had contributed materially to the illegal conduct because it had written questions aimed at prompting discriminatory preferences, required users to answer them, and provided the user with a list of answer choices

⁴⁹ *Village Voice*, 184 Wash.2d 95, 103 (2015).

⁵⁰ 521 F.3d 1157, 1162-63 (9th Cir. 2008).

⁵¹ *Village Voice*, 184 Wash.2d 95 (2015).

⁵² 521 F.3d at 1161.

⁵³ *Id.* at 1164.

⁵⁴ *Id.* at 1162.

that it had created.⁵⁵

The *Village Voice* Court misread the holding of *Roommates* in holding that Backpage could have forfeited immunity by intentionally setting policy requirements that encouraged or induced illegal activity. In *Roommates*, the court held that Roommates.com had forfeited liability where it had required users to submit unlawful answers to unlawful questions, both of which it had created. In contrast, Backpage maintained a policy against a certain type of unlawful content. Regardless of whether Backpage's policies were set deceptively—which this Article discusses later—*Roommates* does not provide that setting policies against unlawful content invites liability as a material contribution to content developed by third parties.

B. Mistaken Legal Conclusion

The *Village Voice* court held that plaintiffs' assertions that Backpage's rules encouraged unlawful content, if true, could justify recovery in spite of Section 230. However, previous courts have made clear that such immunity is *not* eliminated, even where ICSPs do induce illegal content. “[T]he fact that a website acted in such a manner as to encourage the publication of unlawful material does not preclude a finding of immunity pursuant to [Section] 230.”⁵⁶ Even if Backpage had developed its content requirements for the purposes of allowing users to evade law enforcement, Section 230 immunity would still apply.

C. Applying the Material Contribution Test to Village Voice

Wider application of the material contributions test would simplify Section 230 analysis and ensure broader compliance with Section 230. In *Village Voice*, the Washington Supreme Court should have applied the material contribution test. Under this test,

⁵⁵ *Id.* at 1164.

⁵⁶ *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 560 (N.C. App. 2012); *See also Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014) (declining to follow an “encouragement” theory of liability).

Backpage could not be found to have materially contributed to the advertisements at issue because it neither controlled the content posted by third parties nor ensured the creation of unlawful content. Similar to StubHub, even if Backpage had used its policy requirements to encourage the advertisements, or known of the risk of these sorts of ads, it still could not be said to have materially contributed to their content.

In several respects, the facts of *StubHub* closely resemble those in *Village Voice*. Backpage users were able to use the site to display advertisements, similar to StubHub.⁵⁷ Many advertisers used the site to break Washington state laws by advertising for the sexual assault and abuse of minors.⁵⁸ However, Backpage had a policy against doing exactly what the advertisers did. And, because J.S. successfully argued that those policies somehow helped advertisers, the Washington Supreme Court held that Backpage had forfeited Section 230(c) immunity.⁵⁹

An analogy to *StubHub* might be if StubHub had a policy against North Carolina sellers advertising the tickets for more than \$3.00 over their face value, but sellers continued to do so anyway. Under the reasoning in *Village Voice*, if plaintiffs argued that StubHub's policies somehow helped sellers break the law, it would then forfeit Section 230 immunity. This result runs contrary to the purpose of Section 230.

The Washington Supreme Court should have applied the material contribution test for an accurate application of Section 230. Under the material contribution test, it would have found that: (1) Backpage did not effectively control the content posted by third parties, nor (2) did it ensure the creation of unlawful content.

First, Backpage had minimal control of the advertisements posted by third parties. At most, the site asserted some control by prohibiting certain illegal content in advertisements.⁶⁰ Further, plaintiffs admitted that Backpage provided no guidance

⁵⁷ *Village Voice*, 184 Wash.2d 95, at 98.

⁵⁸ *Id.*

⁵⁹ *Id.* at 101-03.

⁶⁰ *Id.* at 99.

whatsoever to the third-party advertisers.⁶¹

Second, Backpage did not ensure the creation of unlawful content. Backpage had a policy *against* the sort of illegal content posted by third parties. A failure to enforce this policy does not forfeit immunity. To hold otherwise would go against the very purpose of the CDA.⁶²

V. POTENTIAL CONSEQUENCES OF VILLAGE VOICE

The court's decision in *Village Voice* turns Section 230 on its head by allowing a claim against an ICSP for the very activity that Congress sought to protect. Section 230 was intended to encourage ICSPs to self-regulate by protecting them from state-law causes of action, which might allege that such actions constitute playing the role of "publisher."⁶³ Nevertheless, the case at issue involves a plaintiff bringing suit against an ICSP for engaging in the very sort of self-governance referenced in the statute. As a result, the outcome of *Village Voice* puts other ICSPs in an uncertain position with regard to Section 230 protections in Washington.

The *Village Voice* decision erred primarily by suggesting that an ICSP's decision to police its website for illegal activity could leave it open to liability. The outcome of this case hinged on Backpage's policy of "not allow[ing] . . . suggestions of an exchange of sex acts for money, or advertisements for illegal

⁶¹ *Id.* at 99 ("J.S. allegedly was featured in Backpage advertisements posted in accordance with instructions on Backpage's website *without any special guidance from Backpage personnel.*") (emphasis added).

⁶² See *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (1997) ("The amount of information communicated via [ICSPs] is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.")

⁶³ 47 U.S.C. § 230(c)(1).

services.”⁶⁴ In 2011, Washington State Attorney General Rob McKenna, along with more than forty other attorneys general across the country, sent a letter to Backpage's counsel, demanding that the site actively enforce its aforementioned content policies.⁶⁵ The policies on which the court's decision rested, were the same policies that Backpage was being pressed to enforce less than five years prior to the decision.

This case allows a plaintiff who is able to allege a connection between the tortious or illegal conduct of a third party and content policies of an ICSP to sustain a claim for damages. J.S. was able to overcome Section 230 immunity by merely alleging that Backpage, through its content requirements, contributed to the development of content posted by third parties on its website.⁶⁶ Accordingly, if Washington state courts interpret Section 230 consistent with *Village Voice*, plaintiffs will be able to overcome immunity by simply pleading that a defendant-ICSP's content requirements provided an environment in which tortious conduct could occur.

An example might be where an ICSP maintains a prohibition against slander on its website. If a plaintiff alleged that this prohibition was a fraud, intended to provide plausible deniability in regard to the slanderous actions of third parties, that ICSP could be sued for damages arising out of a third party's tortious conduct. This seems a troubling proposition for ICSPs who hope to maintain a website free from tortious and illegal activity, while also avoiding liability if such activity were to go undetected or unremoved. In order to avoid liability under such a theory, it seems that ICSPs should be advised to refrain from maintaining any sort of protective content requirements lest they be held liable, or at the very least dragged into court, for content posted by third parties. To allow these sorts of cases to proceed to trial in the face

⁶⁴ *Village Voice*, 184 Wash.2d 95, at 99.

⁶⁵ Sara Green Jean, *McKenna, AGs confront backpage.com on prostitution ads*, THE SEATTLE TIMES (Sept. 1, 2011, 9:32 PM), <http://www.seattletimes.com/2016/8/7/seattle-news/mckenna-ags-confront-backpagecom-on-prostitution-ads/>.

⁶⁶ *Village Voice*, 184 Wash.2d 95, at 100-03.

of Section 230 immunity is to misinterpret the law. This misinterpretation could have one of two consequences. For one, many Washington ICSPs could halt their business activities in Washington State, fearing lawsuits arising out of third-party content in Washington courts. This would cause a lack of access to online services on which many Washington citizens have grown dependent. As another consequence, Washington ICSPs may read this opinion as instructing them to abstain from holding policies relating to third-party content. Either outcome runs contrary to the policy stated in the CDA.

CONCLUSION

Section 230 was intended to prevent ICSPs from being sued for harm caused by third parties. *Village Voice* involved an ICSP that was sued for damages inflicted by a third party.

The CDA should have barred the plaintiffs' claims in *Village Voice* because they arose out of advertisements that were not, in whole or in part, developed by Backpage. Although the majority opinion reasoned that Backpage's specific content requirements might essentially constitute "material contributions" to the content, there is no basis for this conclusion. Applying the material contribution test shows that Backpage played no part in ensuring the creation of unlawful content. Merely hosting content requirements that prohibit certain content from appearing in advertisements on a website does not equate to ensuring the creation of unlawful content, even if those content requirements were set deceptively. As such, immunity should've applied and J.S.'s claims should have been barred.

PRACTICE POINTERS

- If you are, or your client is, a Washington ICSP avoid maintaining policies regarding content posted by third parties on your website.
- If you are, or your client is, a Washington ICSP that holds policies regarding content posted by third parties on your website, enforce those policies vigorously.
- If you are, or your client is, a Washington ICSP, and you are sued for harm caused through or by content posted on your website by a third party, file a motion to dismiss based on Section 230 immunity, and cite this Article.