Internet Users Are Liable Only for Their Own Content – An Introduction to Section 230 of the Communications Decency Act

Communications Decency Act, section 509 protects the "provider or user of an interactive computer service" from being held liable for "information provided by another information content provider" 47 U.S.C. §§ 230(c)(1), 230(d)(3)

The basic rule: on the Internet, you are liable only for your own content
an essential part of the system of free speech online

The issue most commonly comes up with respect to the operators of web sites that allow the posting of user content; this includes commercial sites that facilitate sales by third-party sellers, such as eBay and Amazon

But it also protects those who sell web server space to those site operators, providers of email and other facilities for communication, providers of Internet access, and backbone providers: all depend on section 230

State law (and federal law as well) have various doctrines of secondary liability

As a general matter, tort law exposes any participant in the tort to liability

For example, under state defamation law, not only authors are liable for defamatory content, but also owners of newspapers, or book publishing companies, or broadcasters, where defamatory content is published. Different rules apply to "distributors" of printed defamation, such as booksellers. But the post office faces no liability for carrying defamatory printed material.

An early case applying such doctrines in the Internet context:
Stratton Oakmont v. Prodigy Servs Co., 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995)
Prodigy was held liable for defamatory content placed on its servers by its customers, in light of the fact that it held itself out as reviewing content with a view to eliminating offensive material

It is not always easy for Internet providers carrying the work of authors to predict where they may be sued for what content — should the rules for their liability be set by state or federal law?

Statute's Adoption and Language:
Congress set a uniform federal rule in section 509 of the Telecommunications Act of 1996, 110 Stat. 137-139. It is the final section of Subtitle I of Title V, the Communications Decency Act, codified at 47 U.S.C. § 230. Enacted in the course of regulating online pornography.

ISP's worried they would be held liable for users' pornographic content that they tried, but failed, to identify and block

Section title: "Protection for private blocking and screening of offensive material"
Subsection (c): "Protection for 'Good Samaritan' blocking and screening of offensive material"

> does contain a Good Samaritan provision:
>
> 2) Civil liability
> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to the material described in paragraph (1).

But other provisions are much more significant:

§ 230(c)(1):

> (1) Treatment of publisher or speaker
> 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.

§ 230(e)(3)
(e) Effect on other laws

> (3) State law
> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Two of the definitions are especially significant:
§ 230(f) Definitions
As used in this section:

> (2) Interactive computer service
> The term "interactive computer service" means any information service, system,

or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider
The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

Gist of Communications Decency Act regulating online pornography was struck down under the First Amendment
Reno v ACLU. 521 U.S. 844 (1997)

The one thing clear from the legislative history: Purpose was to overrule *Stratton Oakmont*

Courts rely heavily on the findings, § 230(a), and purpose, § 230(b)

Bottom line: Congress neither made providers of interactive computer services common carriers, obligated to carry all without exception, nor made them liable for the content they carry. In allowing discretion to screen out offensive or actionable matter, Congress chose to protect providers from legal consequences for the screening choices they make or don't make — Congress trusted the market to punish providers whose services carry too much offensive matter.

Basic Interpretive Issues

Not being treated as "publisher or speaker" of content provided by another under § 230(c)(1) means:

can't be sued for their speech

"precludes courts from entertaining claims that would place a computer service provider in a publisher's role"

i.e., "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content"

courts rejected distinction between liability as "publisher" and liability as "distributor"
§ 230 uses "publisher" in same general sense as defamation law under which defamation requires the "publication" of the words

Zeran v AOL, 129 F.3d 327 (4th Cir. 1997)
Ben Ezra, Weinstein & Co. v. AOL, 206 F.3d 980 (10th Cir. 2000)
Green v. AOL, 318 F.3d 465 (3d Cir. 2003)
Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (AOL immune)

Although AOL is an Internet access provider, § 230 extends to web hosts that do not provide access:

Universal Communications Sys v. Lycos, 478 F.3d 413 (1st Cir. 2007)
Carafano v. Metrosplash.com, 339 F.3d 1119 (9th Cir. 2003)
Doe v. MySpace, 528 F.3d 413 (5th Cir. 2008)
Jones v. Dirty World Entm't Recordings, 755 F.3d 398 (6th Cir. 2014)
AOL cases above all involved AOL in its capacity as host, not as Internet access provider

Helpful table lists CDA cases, identifying the winner, the type of defendant, and the type of information at issue as of 2006. The defendant almost always wins (even since then)

Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia,* 20 Harv. J. Law & Tech. 163, 205-208 (2006)

Many federal protections get only grudging application in state courts; that is not true of § 230, which is applied just as expansively in state court:

Austin v. CrystalTech Web Hosting, 125 P.3d 389, 211 Ariz. 569 (2003)
Donato v. Moldow, 374 N.J. Super. 475, 865 A.2d 711(2005)
Doe v. AOL, 783 So.2d 1010 (Fla. 2001)
Schneider v. Amazon.com, 31 P.3d 37 (Wash. App. 2001)
Barrett v. Rosenthal, 40 Cal.4th 33 (2006)
Shiamili v. The Real Estate Group of New York, 17 N.Y.3d 281, 952 N.E.2d 1011 (N.Y. 2011)
Gains v. Romkey, 2013 IL App (3d) 110594-U, 2012 WL 7007002 (Ill. App. 3 Dist. July 3, 2012).
Vazquez v. Buhl, 150 Conn. App. 117, 90 A.3d 331 (Conn. App. 2014)

Limits to Section 230

No protection against federal criminal liability — § 230(e)(1)

but there is immunity against state criminal codes

Section does not affect intellectual property claims — § 230(e)(2)

The Digital Millenium Copyright Act ("DMCA") provides its own form of protection for those who a bulletin board or other interactive service, but note possibility of liability for failure to remove material that infringes on copyright after receiving notice of its presence, or failure to provide reasonable means for such notification. *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004). The Copyright Office mst be notified of the means for notification. http://www.copyright.gov/onlinesp/; 15 U.S.C. § 512(c)(2). The statutory scheme is quite complex.

Registration of the DMCA contact is key to retaining immunity under section 512. One well-known copyright troll filed actions for damages and attorney fees, targeting providers who had neglected to register.

how broad is the scope of the phrase "intellectual property"? the meaning is a question of federal law

can it be argued that trademarks are not "intellectual property" as a matter of federal law?

Trade-Mark Cases, 100 U.S. 82, 94 (1879); 11 U.S.C. § 101(35)(A); *In re Gucci*, 126 F.3d 380 (2d Cir. 1997).

courts routinely treat trademarks as intellectual property and apply § 230(e)(2) to deny immunity

Ninth Circuit has held that § 230 immunity extends to state law IP claims
Perfect 10 v. CCBill, 488 F.3d 1102 (9th Cir. 2007)

two district courts rejected this holding
Doe v. Friendfinder Network, 540 F.Supp.2d 288 (D.N.H. 2008)
Atlantic Recording Corp. v. Project Playlist, 603 F.Supp.2d 690 (S.D.N.Y. 2009)

Major limit:
even an interactive computer service provider is liable to the extent that information is information that **it** provided

in words of § 230(f)(3):
information for whose "creation or development" "the provider is responsible, in whole or in part"

But courts maintain a "robust" immunity by applying a "relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information

content provider.'"
Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir.2003)

Appellate cases exploring the limits of section 230 protection

Batzel v. Smith: 333 F.3d 1018 (9th Cir. 2003)
remand of decision denying immunity for operator of a moderated discussion list
court treats the moderator, not as the operator of an interactive computer service, but as an "information content provider" who is held not responsible for content provided by a different "information content provider" so long as situation made clear that content was subject to posting in discussion

procedural issue:
interlocutory appeal of a denial of dismissal for § 230 immunity

Barrett v. Rosenthal , 40 Cal.4th 33, 51 Cal.Rptr.3d 55, 146 P.3d 510, 514, 525 (Cal. 2006), *reversing Barrett v. Rosenthal*, 114 Cal. App.4th 1379, 9 Cal. Rptr. 3d 142 (2004)

participant in news group is immune for posting email received from a third party
see also Sinclair v. TubeSockTedD, 596 F. Supp.2d 128, 133 (D.D.C. 2009)

news site that linked to allegedly defamatory blog post that it discovered is not provider of that information *Vazquez v. Buhl*, 150 Conn. App. 117, 90 A.3d 331 (Conn. App. 2014)

beyond *Barrett*:
should section 230 immunity apply to previously posted speech shown here?
http://consumerist.com/5144296/10-confessions-of-a-cash4gold-employee

Cash4Gold sued Consumers Union for this posting, but withdrew that suit

what about here:
http://glennbeckrapedandmurderedayounggirlin1990.com
Glenn Beck filed a UDRP complaint but did not sue for defamation
(for a response to Beck's URDP complaint, see
http://randazza.files.wordpress.com/2009/09/d2009-1182-filed-response-brief.pdf

Fair Housing Council v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (*en banc*)
host of site is not immune from claims based on requiring answers to discriminatory questions, but is immune from claims based on discriminatory content in open-ended comments box

FTC v. Accusearch, 570 F.3d 1187 (10th Cir. 2009)

host of site that sells telephone records or incoming and outgoing telephone calls, is not immune for procuring information gleaned unlawfully from confidential telephone records; knowing that its source would be unlawful

service provider responsible for offensive content only if it specifically encourages development of what is offensive about the content

see Woodhull v. Meinel, 145 N.M. 533, 540, 202 P.2d 126 (N. Mex. App. 2008) (defendant solicited defamatory material for the stated purpose of "making fun of" plaintiff)

Barnes v. Yahoo!, 570 F.3d 1096 (9th Cir. 2009)

site host who allegedly promised to remove offensive material to induce plaintiff not to appear in interviews after media showed interest in the situation, and not to testify before state legislature, is immune from claim based on negligent undertaking, but not from promissory estoppel pertaining to removal of content

procedural issue:
raising § 230 immunity by a motion to dismiss
original opinion said no; on rehearing, court deleted that part of its opinion
see also Gibson v. Craigslist, 2009 WL 1704355 (S.D.N.Y., June 15, 2009)

Other issues and cases

Ripoff Report cases
GW Equity v. XCentric Ventures, 2009 WL 62173 (N.D.Tex. Jan. 9, 2009)
GW Equity v. Xcentric Ventures, 2009 WL 62168 (N.D.Tex., Jan. 9, 2009)
Certain Approval Programs v. XCentric Ventures, 2009 WL 596582 (D. Ariz. March 9, 2009)
Global Royalties v. XCentric Ventures, 544 F. Supp.2d 929 (D. Ariz. 2008).
Global Royalties v. XCentric Ventures, 2007 WL 2949002 D.Ariz. Oct. 10, 2007)
Energy Automation Systems v. XCentric Ventures, 2007 WL 1557202 (M.D. Tenn. May 25, 2007)
Whitney Information Network v. XCentric Ventures, 199 Fed. Appx. 738 (11th Cir. 2006)
George May Int'l Co. v. XCentric Ventures, 409 F. Supp.2d 1052 (N.D. Ill. 2006)
Hy Cite Corp. v. badbusinessbureau.com, 418 F. Supp.2d 1142 (D.Ariz. 2005)
Hy Cite Corp. v. badbusinessbureau.com, 297 F. Supp.2d 1154 (W.D. Wis. 2004)
MCW, Inc. v. badbusinessbureau.com, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004)

Small Justice LLC v. Xcentric Ventures LLC, No. 13-CV-11701, 2014 WL 1214828, at *9 (D. Mass. Mar. 24, 2014)

host did not forfeit section 230 immunity by allegedly acquiring an exclusive copyright license to publish criticisms (thus preventing the target from acquiring the copyright as a way of forcing the removal of the material)

Rip-off Report goes out of its way to proclaim that it will never settle suits brought over its content, and emphasizes that it has never lost a case on the merits (although there have been some adverse decisions on motions to dismiss).
http://www.ripoffreport.com/wantToSueRipoffReport.asp
This can be an expensive stance to maintain in the short run

beyond Ripoff Report:
Video Professor v. Graziosi, No. 1:09-cv-01025-RPM (D. Colo.)

Discussion of these issues here:
http://pubcit.typepad.com/clpblog/2009/07/infomercialscamscom-is-no-more-a-sad-end-to-a-useful-consumer-web-site-.html

Claims about postings using an employer's email or computer system
Higher Balance v. Quantum Future Group, 2008 WL 5281487 (D. Ore. Dec. 18, 2008)
Delfino v. Agilent Technologies, 145 Cal. App.4th 790, 52 Cal. Rptr.3d 376 (Cal. App. 6 Dist. 2006).

Interplay with user anonymity
Donato v. Moldow, 374 N.J. Super. 475, 865 A.2d 711(2005)

Interplay between interactivity for § 230 and interactivity for personal jurisdiction
Personal jurisdiction over web site operators turns, at least in part on the *Zippo* sliding scale that considers whether the web site is interactive
Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (W.D. Pa. 1997)
Soma Medical Int'l. v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999)

Rule 65 of the Federal Rules of Civil Procedure does not permit an injunction against an information content provider, requiring him to take down speech has been held to been tortious, to be enforced against the web host on the theory that the host is acting in concert with the content provider.

> *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010), *affirming* 675 F. Supp.2d 912 (N.D. Ill. 2009) (the court did not address section 230, which was not at issue on appeal).

Procedural consequences of the fact that § 230 provides immunity from suit under state and local law, not just protection against liability

> § 230(e)(3): "No cause of action may be brought and no liability may be imposed"
> Section 230 immunity includes immunity from suit:
> *Carafano v. Metrosplash.com,* 339 F.3d 1119, 1125 (9th Cir.. 2003)
> *Ben Ezra*, *Weinstein & Co. v. AOL*, 206 F.3d 980, 983 (10th Cir. 2000)
> *Contra Energy Automation Sys. v XCentric Ventures*, 2007 WL 1557202, at *12

Application of section 230(c)(2)(B)
Zango v. Kapersky Lab, 568 F.3d 1169 (9th Cir. 2009)
Excellent discussion of legislative history of CDA generally in amicus brief from Center for Democracy & Technology, www.cdt.org/privacy/spyware/20080505amicus.pdf

Some useful online resources

Two from law schools:
Eric Goldman's Tech and Marketing Law Blog
covers a number of issues, but detailed commentary on every section 230 ruling
http://blog.ericgoldman.org/

Citizen Media Law Project's Section 230 pages
http://www.citmedialaw.org/section-230

Two from private practitioners
Evan Brown, http://blog.internetcases.com/
Jeff Neuburger, http://newmedialaw.proskauer.com/