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PERSPECTIVE

Platform immunity without the Communications Decency Act

Discover non-CDA defenses to claims based on third-party content.

By John Major

For more than 20 years, the Communications Decency Act has provided an important defense for online platforms — like Facebook, Twitter and Amazon — to liability based on third-party users' content. The classic case for CDA immunity is when a plaintiff attempts to hold an internet platform liable for defamatory user posts. The CDA provides the platform with immunity and tells the plaintiff to sue the party that's directly responsible for the harm — the user who made the posts. The CDA has been credited with creating "a trillion or so dollars of value" by allowing internet companies to flourish in the United States. *See* David Post, "A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or so Dollars of Value," The Volokh Conspiracy (Aug. 27, 2015). It has been repeatedly interpreted to provide broad immunity for all manner of claims against internet platforms.

The CDA, though, has recently come under attack. Politicians from both political parties have floated various proposals for limiting or eliminating CDA immunity. If those efforts succeed, online platforms will find themselves without a key protection against user-content-based litigation. They will face claims that they facilitated defamation, aided and abetted unlawful conduct, and otherwise caused all sorts of harms relating to content that appears on their platforms. Platforms will still have some viable defenses to content-related claims. But those defenses are far less straightforward than the CDA, and they would not replace the reliable defense that the CDA provides. Instead, platforms would be forced to rely on a patchwork of untested defenses that will vary state by state and claim by claim. Nonetheless, these defenses demonstrate that many claims against platforms should fail even without reference to the CDA. A number of recent cases show how some of these defenses are developing and would play out in practice.

Rejecting Efforts to Stretch Traditional Claims

First, internet platforms have successfully pushed back against efforts to stretch traditional claims against brick-and-mortar businesses to apply to their activities. A number of recent cases against Amazon demonstrate that argument in practice. In Erie Insurance Co. v. Amazon.com, Inc., 925 F.3d 135, 141 (4th Cir. 2019), an individual purchased a defective headlamp from a third-party seller on Amazon, which caused a house to burn down. The homeowner's insurer then sued Amazon. It argued that Amazon was liable for the loss under a products liability theory because Amazon was a "seller" of the headlamp. The court held that Amazon could not rely on a CDA defense because the insurer alleged that Amazon did more than simply publish the product listing for the malfunctioning headlamp, by facilitating the sale. But the court went on to hold that the claims against Amazon failed on the merits because Amazon was not a "seller" for purposes of Maryland products liability law. Rather, because Amazon merely "provides a website for use by other sellers of products and facilitates sales under its fulfillment program, it is not a seller, and it does not have the liability of a seller." Other courts have reached similar outcomes, though some have come out the other way. *See, e.g.*, *Fox v. Amazon. com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019) (same, under Tennessee law).

Lack of Wrongful Conduct by Platform

Internet platforms can also defend against claims based on third-party content by pointing out that in such cases, the platform itself does not commit any actionable conduct — the user posting the harmful content does. A number of courts have accepted that very argument. For example, in *Baldino's Lock & Key Service, Inc. v. Google Inc.*, 624 F. App'x 81, 82 (4th Cir. 2015), a locksmith claimed that Google violated the Lanham Act by allowing competitors to publish misleading advertisements in Google search results. The CDA did not bar the claim because it does not apply to intellectual property claims, but the 4th U.S. Circuit Court of Appeals rejected the Lanham Act claim on the merits. The court deemed the claim insufficient because the plaintiff could not point to any false or misleading statement *by Google*, as required to support a Lanham Act claim. Rather, the 4th Circuit held that the competitors who published the misleading advertisements were "solely responsible for making any faulty or misleading representations," and accordingly, Google could not be held liable.

Lack of Duty to Prevent Harm by Third Parties

Internet platforms can also often argue that claims based on third-party content fail because platforms do not have any duty to control the conduct of their users or prevent misconduct. The Seventh Circuit Court of Appeals accepted that type of argument in *Vesely v. Armslist LLC*, 762 F.3d 661, 665-66 (7th Cir. 2014). There, a gunshot victim sued Armslist. com, a website that allows gun owners to list their guns for sale. The victim argued that Armslist. com was liable because it facilitated the unlawful sale of the gun used in the shooting. Armslist. com argued that the CDA barred the lawsuit because it was based on third-party content — the gun seller's listings on its website. But the court affirmed dismissal without reference to the CDA, instead holding that the website did not owe a tort-law duty to prevent the criminal misconduct that led to the shooting. That was the case even though the website allegedly encouraged unlawful gun sales, because the website merely "permitted [a seller] to place an advertisement on its website and nothing more." That was not enough to establish a duty to prevent harm. Other courts have been similarly hesitant to impose broad duties on platforms to prevent user misconduct.

Inability to Prove Elements of Claims

Finally, parties will often struggle to prove other required elements of claims against platforms when a platform's only role was the publication of third-party content. For example, in *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 593-97 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019), an individual attempted to hold the dating app Grindr liable for allegedly facilitating harassment, by permitting an ex-boyfriend to publish false profiles impersonating him. The court rejected the claims on CDA grounds because it held they were based on third-party content on the platform — the fake accounts posted by the ex-boyfriend. But the court went on to hold that "[e] ven if the CDA did not bar" the claims, they failed for other reasons. For example, the individual could not allege that Grindr engaged in outrageous conduct, as required for an infliction of emotional distress claim, because Grindr merely provided "neutral assistance" that facilitated the harassment, which was insufficient. The court similarly held that the individual's fraud and misrepresentation claims failed, because Grindr's alleged misconduct underlying those claims had "only an attenuated connection" to the harm the plaintiff suffered. This case demonstrates a theme that runs through many claims based on third-party content — that such claims often fail because platforms have only a tenuous connection to the misconduct that actually caused harm.

None of this is to say that platforms don't need the CDA or that they would be just fine without it. The opposite is true: The CDA remains an important defense for platforms — one that has been crucial to the success of internet businesses in the United States. The CDA provides a well-tested immunity that platforms can count on to avoid liability for claims based on user content. The above defenses, by contrast, are less established and often involve novel questions of law. Further, as the above cases demonstrate, these sorts of defenses will often be state-specific and claim-specific, underscoring the importance of the uniformity that the CDA provides. But in a world in which the scope of CDA immunity might change in the near future, platforms may be forced to rely on these sorts of defenses more often, and attorneys representing them should be prepared to make these types of arguments. ■

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