



Internet Association



# A Review Of Section 230's Meaning & Application Based On More Than 500 Cases

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## Executive Summary

Section 230 is the law most responsible for the modern internet. Despite the extensive current policy discussion around the law, there is limited research about how Section 230 is actually used in the courts writ large. To help fill this gap, Internet Association (IA) analyzed more than 500 decisions from the past two decades involving Section 230 in order to better understand, in practice, the variety of parties using the law, how the law is being used, and how courts apply it.

The importance of Section 230 is best demonstrated by the lesser-known cases that escape the headlines. These decisions show the law continues to perform as Congress intended, quietly protecting soccer parents from defamation claims, discussion boards for nurses and police from nuisance suits, and local newspapers from liability for comment trolls.

We found that judges are thoughtfully applying the law and – far from acting as a “blanket immunity” – Section 230 only served as the primary basis for a ruling in 42 percent of the decisions we reviewed.. When courts are concerned platforms may have played a role in creating content, they require discovery before deciding whether to grant 230 immunity. Our review also revealed that in many decisions, the underlying claims where defendants asserted a Section 230 defense were dismissed for lacking merit.

1. **A wide cross-section of individuals and entities rely on Section 230.** Online users; internet service providers and website hosts; newspapers; universities; libraries; search engines; employers; bloggers, website moderators and listserv owners; social media companies; marketplaces; app stores; spam protection and anti-fraud tools; and domain name registrars have all asserted Section 230 immunity.
2. **Section 230 immunity was the primary basis for a court’s decision in only 42 percent of decisions reviewed.** Most courts conduct a careful analysis of the allegations in the complaint, and/or of the facts developed through discovery, to determine whether or not Section 230 should apply. Courts required factual development of cases where there was a question as to whether the platform played a role in the creation or development of the content at issue.
3. **A significant number of claims in the decisions failed without application of Section 230 because courts determined that they lacked merit, or dismissed them for other reasons.** In over a quarter of decisions (28 percent), courts dismissed claims without relying on Section 230 because the plaintiff failed to state a claim upon which relief could be granted, or because of other defects. More than 140 of the 516 decisions examined resulted in claims being dismissed in whole or in part by judges who never had to evaluate the Section 230 defense because the plaintiffs failed to adequately plead legal violations.
4. **Forty-three percent of decisions’ core claims related to allegations of defamation, just like in the *Stratton Oakmont v. Prodigy Services* case that spurred the passage of Section 230.** More than 220 of the decisions IA reviewed involved claims of defamation. The next closest category of case, roughly 10 percent, related to claims asserting online platforms violated the First Amendment or other legal protections by removing, refusing, or limiting user-generated content.
5. **Cases involving allegations of federal or state criminal activity were frequently decided in whole, or in part, on other grounds.** Close examination of court decisions shows that



Section 230 was seldom the sole reason for a court determining the fate of claims based on alleged violations of state or federal criminal laws. The sample size of state efforts to enforce criminal laws where Section 230 came into play is small, and not all of those were government prosecutions.

6. **Section 230 protects providers who engage in content moderation, but typically through application of subsection (c)(1) rather than the good faith provision, (c)(2).** Of the 516 content moderation decisions reviewed, only 19 of the opinions focused on Section 230(c)(2) “good faith” provision. Of these, the vast majority involved disputes over provider efforts to block spam. Another reason (c)(2) has not been invoked more often in cases where providers are sued for removing content is that many of those lawsuits are based on assertions that the provider has violated the First Amendment rights of the user whose content was removed, but the First Amendment only applies to government actors.



## Introduction

Section 230 is the law most responsible for the modern internet. Despite many valuable works of scholarship on Section 230,<sup>1</sup> we know very little about the full body of case law surrounding the “26 words that created the internet.”<sup>2</sup> Public discussion of Section 230 tends to focus on a few extreme cases that break into national media and policy debates or specific content moderation decisions made by a particular provider. Looking at Section 230 through such a narrow lense fails to capture the broad set of entities, beyond internet companies, that assert Section 230, the types of cases in which these entities assert Section 230, and how the courts apply the law. A more holistic approach reveals a much broader ecosystem of nonprofits, educational institutions, and even individuals, who've relied on the law in a variety of circumstances and the measured approach courts have taken in applying the law.

As policymakers stand poised to make changes to Section 230, including suggestions that it be wholly revoked,<sup>3</sup> it is critical that all stakeholders have an informed and reliable understanding of Section 230. This law is the basis for decisions that impact a significant driver of the U.S. economy, products, and services, which many Americans consider essential to their everyday lives, and important values regarding free expression. As detailed in IA's [Submission to the U.S. DOJ on Section 230](#),<sup>4</sup> in connection with its workshop and roundtable on Section 230, IA has observed misunderstandings of Section 230, ranging from the meaning of the plain language of its text<sup>5</sup> to the actual basis on which courts have ruled in cases where Section 230 was asserted.<sup>6</sup>

IA undertook an internal review of Section 230 case law from when it was passed in 1996 to the present day to better understand how Section 230 has been and is currently used in practice.<sup>7</sup> We found clear patterns and observations of important note for policymakers based on more than 500 judicial decisions where Section 230 immunity was implicated. IA believes that this initial effort provides ample basis to support a call for a comprehensive and unbiased review of Section 230 before action is taken to change the law.<sup>8</sup>

<sup>1</sup> See, e.g. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 *Loyola of Los Angeles Law Review* 373 (2010)(one of the few attempts to look at the use of Section 230 empirically); Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 *Notre Dame L. Rev. Online* 33 (2019)(available at: [https://scholarship.law.nd.edu/ndlr\\_online/vol95/iss1/3](https://scholarship.law.nd.edu/ndlr_online/vol95/iss1/3)); Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity* (December 1, 2018); The Oxford Handbook of Online Intermediary Liability (Giancarlo Frosio, ed.) (Forthcoming), Santa Clara Univ. Legal Studies Research Paper (available at SSRN: <https://ssrn.com/abstract=3306737>); Congressional Research Service, *Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230* (June 6, 2019) (available at: <https://fas.org/sgp/crs/misc/LSB10306.pdf>); Congressional Research Service, *How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act* (February 21, 2018)(available at: <https://fas.org/sgp/crs/misc/LSB10082.pdf>).

<sup>2</sup> Jeff Kosseff, *The Twenty-Six Words that Created the Internet* (Cornell University Press)(2019).

<sup>3</sup> <https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke>  
<https://twitter.com/realDonaldTrump/status/1266387743996870656>

<sup>4</sup> [https://internetassociation.org/files/ia\\_revised-doj-section-230-workshop-submission\\_02-27-2020\\_intermediary-liability/](https://internetassociation.org/files/ia_revised-doj-section-230-workshop-submission_02-27-2020_intermediary-liability/)

<sup>5</sup> IA Submission to DOJ on Section 230 at p. 3

<sup>6</sup> *Id.* at p. 5.

<sup>7</sup> Please see the Appendix for an overview of the methodology used to identify and review the decisions and for a list of the decisions.

<sup>8</sup> Please note that this summary and IA's review do not purport to be a comprehensive review and — given the complexities of trying to draw generalizations from litigation — is far from perfect. Our demonstrates that a fuller review from an institution better equipped to perform such a study would offer significant value to the conversation.



## The Mechanics of Section 230 Litigation<sup>1</sup>

### *Litigation Generally*

Litigation is extraordinarily complex and is impacted by numerous factors which have little to do with the guilt or innocence of defendants. Factors that impact the outcome of litigation include: the financial wherewithal of plaintiffs to bring and continue to pursue cases; the financial wherewithal of defendants to mount a full defense; the cost-benefit analysis of whether the discovery process will be more costly than settlement; skill of the lawyers on both sides; and the approach taken by any assigned judge. There are also myriad strategic decisions that must be made at every step of a lawsuit, beginning before a case has even been filed, the pretrial process, and continuing through trial (assuming one should occur). Any number of procedural and substantive issues will play a role in determining the outcome at any given stage in a case, as well as the final resolution. In fact, up to 97 percent of civil cases filed are resolved by means other than trial.<sup>2</sup>

### *Section 230 Litigation*

Courts generally consider Section 230 to be an affirmative defense,<sup>3</sup> and while some courts have specifically refused to consider Section 230 on a motion to dismiss,<sup>4</sup> most will consider the applicability of the immunity at the earliest stage in litigation to avoid imposing needless costs on courts or the parties. This is a reflection of the law's intent, which was to ensure frivolous litigation didn't stifle speech or innovation.<sup>5</sup>

When determining the applicability of Section 230, courts apply a three part test which evaluates:

- Whether the party asserting Section 230 is a person or entity covered by the provision (i.e., an interactive computer service or a user of an interactive computer service);
- Whether the content at issue was developed by another information content provider; and
- Whether the claims asserted seek to hold the party liable as though they were the speaker or publisher of the content at issue.<sup>6</sup>

If the answer to each of the three questions above is “yes,” Section 230 generally applies. Courts may also evaluate the applicability of any of the Section 230 exceptions, including for enforcement of federal criminal laws, intellectual property claims, sex trafficking, and violations of the Electronic Communications Privacy Act.<sup>7</sup>

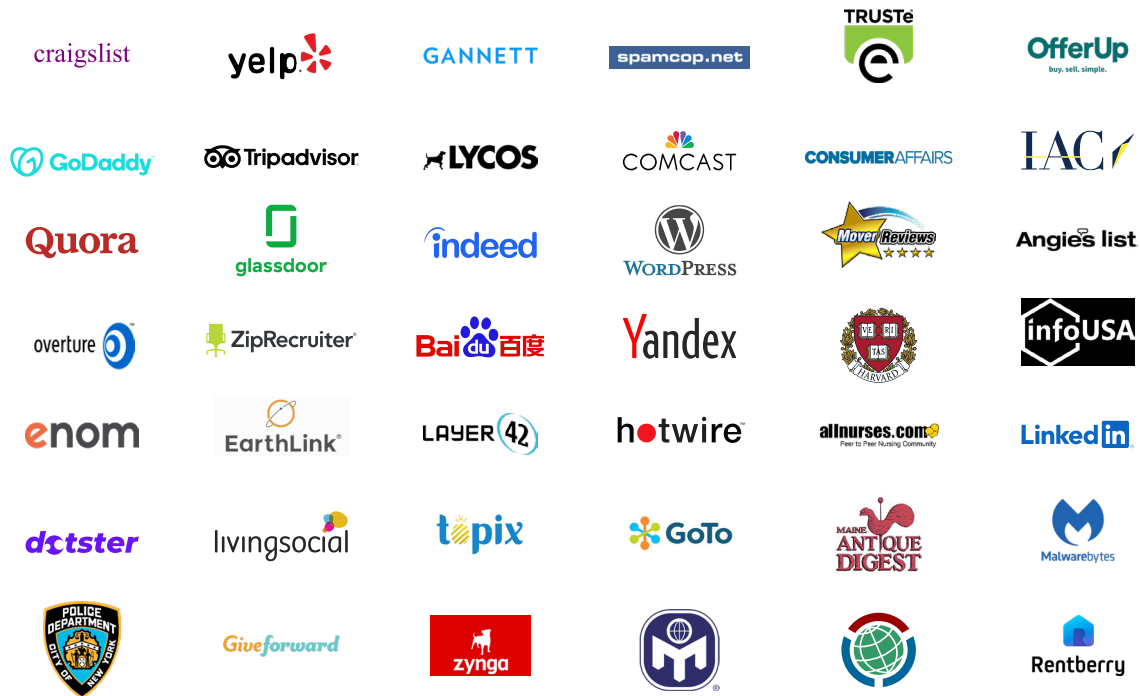
If a court determines that, based on the most favorable reading of the allegations in the complaint,<sup>8</sup> the claim is barred by Section 230, the court may dismiss the complaint with or without prejudice (i.e., allowing the plaintiff an opportunity to amend the complaint). If the court finds that there are questions of fact regarding whether Section 230 applies, the court will decline to apply Section 230 at that stage in the case and allow discovery to proceed. After discovery, a party may assert Section 230 again on a motion for summary judgment. If the court finds that a factual issue remains after discovery, the court will require the case to be fully litigated before a judgment will be given. A court's application of Section 230, or its failure to do so, may result in an appeal to a higher court.

*References for this section can be found on page 24.*



### Finding 1: A wide cross-section of individuals and entities rely on Section 230.

IA’s review of the Section 230 case law revealed that online users; internet service providers and website hosts; newspapers; universities; libraries; search engines; employers; bloggers, website moderators and listserv owners; marketplaces; app stores; spam protection and anti-fraud tools; domain name registrars; and social media companies have all asserted Section 230 immunity. As the partial list below demonstrates, many of the parties that have relied on Section 230 as a legal defense are not social media companies:



### Finding 2: Section 230 immunity was the primary basis for decision by a court in only 42 percent of decisions reviewed. Courts required factual development of cases where there was a question as to whether the platform played a role in the creation or development of the content at issue.

Our review found that, far from acting as a “blanket immunity,”<sup>9</sup> most courts conducted a careful analysis of the allegations in the complaint, and/or of the facts developed through discovery, to determine whether or not Section 230 should apply.<sup>10</sup> While there were cases that presented questions as to whether the party asserting Section 230 immunity was a covered entity; whether Section 230 applied to the claims alleged in a given case; or whether an exception applied, more often the issue presented to the court was whether or not the party asserting Section 230 immunity

<sup>9</sup> See, Exec. Order No. 13925 (May 28, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>. Department Of Justice's Review Of Section 230 Of The Communications Decency Act Of 1996, at 4(a). Available at: [https://www.justice.gov/ag/departement-justice-s-review-section-230-communications-decency-act-1996?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/ag/departement-justice-s-review-section-230-communications-decency-act-1996?utm_medium=email&utm_source=govdelivery) (last accessed July 20, 2020).

<sup>10</sup> See, e.g., *General Steel v. Chumley*, 840 F.3d 1178 (10th Cir. 2016); *Samsel v. DeSoto County School District*, 242 F.Supp.3d 496 (N.D. Miss. 2017); *Pirozzi v. Apple*, 913 F. Supp. 2d 840 (N.D. Cal. 2012); *Cornelius v. Delca*, 709 F. Supp. 2d 1003 (D. Idaho 2010); *Best Western v. Furber*, No. CV-06-1537-PHX-DGC (D. Ariz. September 5, 2008); *Energy Automation Systems v. Xcentric Ventures*, Case No. 3:06-1079 (M.D. Tenn. May. 25, 2007); *Hy Cite v. Badbusinessbureau.com*, 418 F. Supp. 2d 1142 (D. Ariz. 2005).



played any role in the development of the content that was the subject of the lawsuit. If a party “materially contributes to the illegality” of the content at issue<sup>11</sup> or is in fact the content provider,<sup>12</sup> Section 230 does not apply.

Of the court decisions reviewed, courts relied primarily on the Section 230 immunity to determine the outcome in 42 percent of the decisions. This number includes decisions where Section 230 was before the court on a Motion to Dismiss or a Motion for Summary Judgment (before or after discovery).<sup>13</sup> Even when courts applied Section 230 immunity at the motion to dismiss stage, there are innumerable examples where courts gave plaintiffs multiple opportunities to amend complaints to try to avoid the Section 230 immunity (typically by alleging that the defendant played a role in content development), and only dismissed with prejudice when it was clear to the court that there was no basis for such an allegation.<sup>14</sup>

In our sample, courts refused to apply Section 230 immunity in over 12 percent of the decisions because there was an exception applied or the court determined that the immunity was not applicable to the case before it.<sup>15</sup>

### **Finding 3: A significant number of claims in the decisions failed without application of Section 230 because courts determined that they lacked merit, or dismissed them for other reasons.**

In over a quarter of decisions (28 percent), the courts dismissed claims without relying on Section 230 because the claims lacked merit or were flawed for another reason. More than 140 of the 516 decisions examined resulted in claims being dismissed in whole or in part by judges for failing to adequately plead legal violations *without* relying on Section 230.<sup>16</sup> For example, courts have rejected defamation claims where the statements at issue did not violate defamation law because they were protected opinion or a public official could not show the required intent.<sup>17</sup> In other instances, courts have analyzed the definitions in a statute and found that the law did not apply

<sup>11</sup> *Fair Housing Council of San Fernando Valley v. Roommate.com*, 521 F.3d 1157, 1168 (9th Cir. 2008) (*en banc*). See also, *Carafano v. MetroSplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *Nemet at 257* (discussing *Fair Housing Council v. Roommate.com* and distinguishing *consumeraffairs.com*); *Phan v. Pham*, 182 Cal. App. 4th 323 (2010) (applying “material contribution” test to a user who forwarded an email alleged to be defamatory).

<sup>12</sup> See, e.g., *Enigma Software Group v. Bleeping Computer*, 194 F. Supp. 3d 263 (2016); *Tanisha Systems v. Chandra*, 2015 U.S. Dist. LEXIS 177164 (N.D. Ga. 2015); *Perkins v. LinkedIn*, 53 F. Supp. 3d 1222 (2014); *Brummer v. Wey*, 2016 NY Slip Op 31021(U); *Dimetriades v. Yelp*, 228 Cal. App. 4th 294 (2014).

<sup>13</sup> Our review did not comprehensively track the stage of the litigation where the decision on 230 was made, but there are numerous examples where Section 230 was before the court on a Motion for Summary Judgment either before or after discovery: *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003); *Sen v. Amazon*, Case No. 3:16-CV-01486-JAH-JLB. (S.D. Cal. 2018), *Nasser v. White Pages*, 2013 WL 6147677 (W.D. Va. Nov. 21, 2013); *Ramey v. Darksides Productions*, 2004 WL 5550485 (D. D.C. 2004); *Whitney v. XCentric Ventures*, 347 F. Supp. 2d 1242 (M.D. Fla. 2004); *Smith v. Intercosmos*, 2002 U.S. Dist LEXIS 24251 (E.D. La. Dec. 17, 2002); *Witkoff v. Topix*, No. B257656M (Cal. App. September 18, 2015); *Internet Brands v. Jape*, 328 Ga. App. 272 (Ga. 2014).

<sup>14</sup> See, e.g., *Colon v. Twitter*, No. 6:18-cv-00515 (M.D. Fla. 2018) (plaintiff’s third amended complaint is pending before the court); *M.A. v. Village Voice*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011); *Doe II v. MySpace*, 2009 WL 1862779 (Cal. App. June 30, 2009); *Avalos v. IAC/Interactive*, 1:13-cv-08351 (S.D.N.Y. 2014); *Six4Three v. Facebook*, No. A154890 (Cal. App. Sep. 30, 2019) (reviewing plaintiff’s fourth amended complaint); *Hall v. Yahoo!*, No. BC556269 (Cal. App. August 3, 2017).

<sup>15</sup> See, e.g., *FTC v. Accusearch*, 570 F.3d 1187, 1197 (10th Cir. 2009); *Gilmore v. Jones*, No. 3:18-cv-00017 (W.D. Va. March 29, 2019); *Diamond Ranch Academy, Inc. v. Filer*, 2016 Dist. LEXIS 19210 (D. Utah Feb. 17, 2016); *Consumer Cellular v. ConsumerAffairs.com*, 2016 U.S. Dist. LEXIS 72573 (D. Or. Feb. 29, 2016); *Opperman v. Path*, 87 F. Supp. 3d 1018 (N.D. Cal. 2014); *Moving & Storage, Inc. v. Panayotov*, Civil Action No. 12-12262-GAO. (D. Mass. March 12, 2014); *Swift v. Zynga Game Network*, 2010 WL 4569889 (N.D. Cal. Nov. 3, 2010); *Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008); *Anthony v. Yahoo!*, 421 F.Supp.2d 1257 (N.D. Cal. 2006); *David Werner Intl. Corp. v. Gray*, 2011 NY Slip Op 30275 (N.Y. Sup. 2011).

<sup>16</sup> See, e.g., *Mosha v. Yandex*, 2019 WL 4805922 (S.D.N.Y. Sept. 30, 2019); *Kimbrell v. Twitter*, Case No. 18-cv-04144-PJH (N.D. Cal. 2019); *Avalos v. IAC/Interactive*, 1:13-cv-08351 (S.D.N.Y. 2014); *Casterlow-Bey v. Ebay*, 3:17-cv-05686 (W.D. Wash 2018) (See also, *Casterlow-Bey v. Google*, *Casterlow-Bey v. Amazon*); *Novak v. Overture Services*, 309 F.Supp.2d 446 (E.D.N.Y.2004); *Cross v. Facebook*, A148623 (Cal. Ct. App. 2017).

<sup>17</sup> See, e.g., *Schuler v. Duke*, Case No. 2:16-CV-0501-VEH (N.D. Ala. May 31, 2018); *Seaton v. TripAdvisor*, 2013 WL 4525870 (6th Cir. Aug. 28, 2013); *Cruz v. Sickle*, No. 15-0129 (Tex. June 24, 2015); *Fox v. Albanese*, 2011 NY Slip Op 30678 (N.Y. Sup. Mar. 24, 2011).





to the transaction at issue.<sup>18</sup> Courts also dismissed cases when a critical element of the claim was missing, such as causation.<sup>19</sup> In cases where First Amendment claims are brought against companies, courts have dismissed the claims without having to reach Section 230 because First Amendment violations require state action and none was present.<sup>20</sup>

In addition, there are many cases where courts found Section 230 to be grounds for dismissal, but also noted that the claims alleged were not legally sufficient to move forward.<sup>21</sup> Many of these cases involved repeat plaintiffs, repeat claims, repeat lawsuits, or other abuses of the legal system.<sup>22</sup> In other instances, courts made the choice to resolve the case based on Section 230 grounds and specifically identified that as the reason they were refraining from addressing other grounds for dismissal.<sup>23</sup> It appears this is a call made by a judge on whether it is best to rule on Section 230 grounds, analyze the substance of the claims, or do both.<sup>24</sup> For this reason, it would be an error to assume that these cases would have moved forward in the absence of Section 230.

Several states have an Anti-SLAPP (Strategic Litigation against Public Participation) statute<sup>25</sup> that makes available a special motion to strike a complaint that lacks merit and appears to have been filed by the plaintiff in an effort to silence or intimidate critics. In many instances, a SLAPP motion, either with or without Section 230 analysis, is an effective method of ending a case that targets a defendant for speech on issues of public importance.<sup>26</sup> For example, there have been several cases where local politicians have sued online discussion fora, newsletters, or blogs to silence criticism.<sup>27</sup>

<sup>18</sup> See, e.g., *Shulman v. Facebook*, No. 2:2017cv00764 (D. N.J. November 6, 2017); *McDonald v. LG Chem Ltd.*, Civil Action No. RDB-16-1093 (D. Md. May. 8, 2017); *Earth Flag v. Alamo Flag*, 153 F. Supp. 2d 349 (2001).

<sup>19</sup> See, e.g., *Fields v. Twitter*, 2018 WL 626800 (9th Cir. Jan. 31, 2018); *Cain v. Twitter*, 2018 WL 4657275 (N.D. Cal. Sept. 24, 2018); *Crosby v. Twitter*, 303 F. Supp. 3d 564 (E.D. Mich. 2018).

<sup>20</sup> See, e.g., *Federal Agency of News LLC v. Facebook*, Case No. 18-CV-07041 (N.D. Cal. July 20, 2019); *Jayne v. Google*, 263 F. App'x 268 (3rd Cir. Feb. 7, 2008); *Buza v. Yahoo!*, 2011 WL 5041174 (N.D. Cal. Oct. 24, 2011).

<sup>21</sup> See, e.g., *Echenique v. Google* (where in dismissing the claims under Section 230, the court noted that any appeal would not be well-taken given the frivolous nature of the claims).

<sup>22</sup> See, e.g., *McCready v. Ebay*, 453 F.3d 882 (7th Cir.2006)(requiring plaintiff to show cause why he should not be sanctioned for abuse of process due to the "litany of his repetitive and frivolous legal maneuvers"); *Sekiya v. Zuckerberg*, 2017 WL 3084476 (D. N.M. July 17, 2017) (noting prior lawsuits on same claims against same defendants); *Despot v. Balt. Life Ins. Co.*, Civil Action No. 15-1672, at \*6 n.4 (W.D. Pa. Jun. 28, 2016) ("Casetext indicates that its own website reveals 10 lawsuits, BLIC refers specifically to 5, Google states that he has filed "over 40" and Microsoft contends that he has been a plaintiff in 45 cases and a defendant in 3 more"); *Riches v. Giambi*, Case No. 3:07-cv-06324-MJJ (N.D. Cal. January 2, 2008)(addressing 22 separate civil actions, including one against the virus E. Coli as well as others against MySpace.com and Youtube.com, and noting that plaintiff filed a total of 190 civil actions).

<sup>23</sup> See, e.g., *Mezey v. Twitter*, Case No. 1:18-cv-21069-KMM, at p. 1 fn. 1 (S.D. Fla. July 19, 2018).

<sup>24</sup> See, e.g., *Mosha v. Yandex Inc.*, No. 18 Civ. 5444 (ER) (S.D.N.Y. September 30, 2019)(dismissing based on 230 grounds and the insufficiencies of the claims barred by Section 230).

<sup>25</sup> See, e.g., California Code of Civil Procedure § 426.16; Oregon Revised Statutes § 31.150.

<sup>26</sup> See, e.g., *Heying v. Anschutz Entm't Group*, No. B276375. (Cal. App. November 29, 2017); *Bernath v. Tabitha J.*, No. 1305-06167 (Or. Cir. August 26, 2013); *Wong v. Jing*, 189 Cal. App. 4th 1354 (2010); *International Padi v. Diverlink*, 2005 WL 1635347 (9th Cir. Jul. 13, 2005) (unpublished); *Hupp v. Freedom Communications, Inc.*, No. E057390 (Cal. App. November 7, 2013); *Johnson v. Twitter*, No. 18CECG00078 (Cal. Super. June 6, 2018).

<sup>27</sup> See, e.g. *Jonathan Griffith v. Merlene Wall*, 224 So.3d 1293 (Miss. Ct. App. 2017); *Cruz v. Sickie*, 452 S.W.3d 503 (2014); *Vogel v. Felice*, 26 Cal.Rptr.3d 350 (2005); *Mezzacappa v. O'Hare*, No. C-48-CV-2014-4521 (Pa. Com. Pleas March 31, 2015).





#### **Finding 4: Forty-three percent of decisions' core claims related to allegations of defamation, just like in the *Stratton Oakmont v. Prodigy Services*<sup>28</sup> case that spurred the passage of Section 230.**

More than forty-three percent of the decisions IA reviewed involved claims of defamation.<sup>29</sup> The next closest category of case, roughly 10 percent, relates to claims asserting online platforms violated the First Amendment or other legal protections by removing, refusing, or limiting user content.

Other categories of cases include: 1) intellectual property cases where Section 230 was asserted against non-IP state tort claims (8 percent);<sup>30</sup> 2) unfair commercial practices (6 percent);<sup>31</sup> and 3) a range of other allegations including negligence, failure to warn, and state regulatory claims — all in far smaller numbers.

#### **Finding 5: Cases involving allegations of federal or state criminal activity were frequently decided in whole, or in part, on other grounds.**

Though in place since 1996, Section 230 was rarely discussed by the news media prior to the attention garnered by criminal and civil enforcement efforts in relation to the Backpage service. Given the serious harm to victims of sex trafficking crimes and the perception that Section 230 was an obstacle to criminal or civil action against Backpage, Congress passed the SESTA/FOSTA amendments to Section 230.<sup>32</sup> The federal government ultimately used its criminal enforcement authority, not the new provisions created by SESTA/FOSTA, against Backpage, but there remains a perception that Section 230 protects bad actors who actively participate in criminal enterprises.

In our case review, we found that the reality is substantially more complicated as it relates to Backpage<sup>33</sup> and in cases involving other defendants. Close examination of court decisions shows that Section 230 was seldom the sole basis on which a court decided the fate of claims based on allegations of violations of state or federal criminal laws. The sample size of state efforts to enforce criminal laws where Section 230 came into play is small, and not all of those were government prosecutions. At least two of the cases involving Backpage and state Attorneys General were lawsuits brought to challenge the constitutionality of state laws specifically designed to target Backpage's business model,<sup>34</sup> and another case was a First Amendment lawsuit against a sheriff who was pressuring payment processors not to work with Backpage.<sup>35</sup>

More frequently, the decisions reviewed in this category were in private civil actions related to alleged violations of state and federal criminal laws. The largest number of these cases involve

<sup>28</sup> 1995 WL 323710 (NY Sup. Ct. 1995).

<sup>29</sup> This number would be even higher if it included attempts to plead around Section 230 by filing claims for negligence, intentional infliction of emotional distress, false light or other torts when the conduct at issue involves potentially defamatory speech.

<sup>30</sup> Section 230 is inapplicable to claims involving intellectual property (IP) violations per the exception in 47 U.S.C. § 230(e)(2). However, plaintiffs filing lawsuits for IP violations frequently include a range of civil tort claims. Section 230 may apply to the non-IP claims. Only a limited number of IP cases were reviewed. For examples of Section 230 applied to state tort claims filed with IP claims, see, e.g., *Rosetta Stone v. Google*, 676 F.3d 144 (4th Cir. 2012); *Perfect10 v. Giganeews*, 2013 WL 2109963 (C.D. Cal. March 8, 2013); *Atlantic Recording v. Project Playlist*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

<sup>31</sup> See, e.g., *Moretti v. The Hertz Co.*, C.A. No. 14-469 (D. Del. March 17, 2017); *Donaher, III v. Vannini*, 2017 WL 4518378 (Me. Super. Ct. Aug. 18, 2017); *Chelsea Fine Custom Kitchens, Inc. v Apartment Therapy LLC*, 2008 WL 2693129 (N.Y. Sup. Feb. 8, 2008).

<sup>32</sup> Public Law 115-164 (April 11, 2018).

<sup>33</sup> For a helpful overview, see, e.g., Goldman, Eric, *The Complicated Story of FOSTA and Section 230* (2019). First Amendment Law Review, Vol. 17, page 279, 2019, Available at SSRN: <https://ssrn.com/abstract=3362975>.

<sup>34</sup> See, e.g., *Backpage.com, LLC v. Hoffman*, 2013 U.S. Dist. LEXIS 119811 (2013); *Backpage.com LLC v. McKenna*, 881 F.Supp.2d 1262 (2012).

<sup>35</sup> *Backpage.com, LLC v. Dart*, No. 15-3047 (7th Cir. 2015).



claims filed against social media companies based on the federal Anti-Terrorism Act.<sup>36</sup> Of the 14 decisions reviewed, the claims were dismissed in each instance.<sup>37</sup> Approximately 70 percent percent of these judgments were decided against the plaintiffs without relying on Section 230, and instead focused on the plaintiffs' failure to assert a legally valid claim under the Anti-Terrorism Act.<sup>38</sup> Even where Section 230 was the basis for dismissal, the underlying facts and claims in the cases were largely identical to those dismissed on other grounds<sup>39</sup> and just as easily could have been resolved based on the failure to state a claim as they were in the other cases.

### **Finding 6: Section 230 protects providers who engage in content moderation, but typically through application of subsection (c)(1) rather than (c)(2).**

Section 230 has two operative provisions. Section 230(c)(1) contains the immunity that provides that an interactive computer service shall not be held liable as the speaker of content provided by a third party. Section 230(c)(2) has the "Good Samaritan" clause which provides immunity for actions taken "voluntarily" in "good faith" to restrict content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Of the decisions reviewed pertaining to content moderation decisions made by a provider to either allow content to remain available or remove or restrict content, only 19 of the opinions focused on Section 230(c)(2). Of these, the vast majority involved disputes over provider efforts to block spam.<sup>40</sup> The remainder were resolved under Section 230(c)(1),<sup>41</sup> Anti-SLAPP motions,<sup>42</sup> the First Amendment,<sup>43</sup> or for failure to state a claim based on other deficiencies.<sup>44</sup>

Another reason (c)(2) has not been invoked more often in cases where providers are sued for removing content is that many of those lawsuits are based on assertions that the provider has violated the First Amendment rights of the user whose content was removed.<sup>45</sup> As the First Amendment only applies to government actors, these cases have been dismissed for failure to state a claim without the necessity of defendants asserting or a court analyzing Section 230. In fact, courts have found that service providers have First Amendment rights on whether and how to display content.

<sup>36</sup> 18 U.S.C. § 2331 *et seq.*

<sup>37</sup> Some of the cases are pending appeal before the Ninth Circuit Court of Appeals, which has previously dismissed similar claims in *Fields v. Twitter* based on a failure to adequately plead proximate cause as required by the Anti-Terrorism Act.

<sup>38</sup> See, e.g., dismissing claims without Section 230: *Fields v. Twitter*, 2018 WL 626800 (9th Cir. Jan. 31, 2018); *Cain v. Twitter*; *Crosby v. Twitter*; *Clayborn v. Twitter*, 2018 WL 6839754 (N.D. Cal. Dec. 31, 2018); *Copeland v. Twitter*, 352 F. Supp. 3d 965 (N.D. Cal. 2018); *Taamneh v. Twitter*, 343 F. Supp. 3d 904 (N.D. Cal. 2018); *Palmucci v. Twitter*, Case No. 18-cv-03947-WHO (N.D. Cal. April 17, 2019); *Sinclair v. Twitter*, Case 4:17-cv-05710-SBA (N.D. Cal. March 20, 2019); Compare with decisions applying 230 immunity: *Cohen v. Facebook*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017); *Pennie v. Twitter*, 281 F. Supp. 3d 874 (N.D. Cal. 2017); *Force v. Facebook*, 304 F. Supp. 3d 315 (E.D.N.Y. 2018).

<sup>39</sup> In fact, many of the complaints were filed by the same law firm and are almost identical.

<sup>40</sup> See, e.g., *Holomaxx Technologies Corp. v. Yahoo!, Inc.*, No. 10-cv-04926 JF (PSG) (N.D. Cal. August 23, 2011), *E360INSIGHT, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008); *Pallorium v. Jared*, G036124 (Cal. Ct. App. Jan. 11, 2007); *America Online, Inc. v. GreatDeals. Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999).

<sup>41</sup> See, e.g., *DeLima v. YouTube*, 2019 WL 1620756 (1st Cir. Apr. 3, 2019); *Green v. AOL*, 318 F.3d 465 (3d Cir. 2003); *King v. Facebook*, 3:19-cv-01987 (N.D. Cal. Sept 5, 2019).

<sup>42</sup> See, e.g., *Sikhs for Justice v. Facebook*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015); *Johnson v. Twitter*, No. 18CECG00078 (Cal. Superior Ct. June 6, 2018).

<sup>43</sup> See, e.g., *Davison v. Facebook*, 370 F. Supp. 3d 621 (E.D. Va. 2019); *Estavillo v. Sony Computer Entm't Am.*, 2009 WL 3072887 (N.D. Cal. Sept. 2, 2009).

<sup>44</sup> See, e.g., *Roberson v. YouTube*, 2018 DNH 117 (D. N.H. 2018); *Young v. Facebook*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011); *Lewis v. YouTube*, No. H041127 (Cal. App. January 25, 2016)

<sup>45</sup> See, e.g., *Tulsi Now, Inc. v. Google, LLC*; *Prager v. Google*; *Kamango v. Facebook, Inc.*, No. 3:11-CV-0435, 2011 WL 1899561 (N.D. NY April 19, 2011); *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621 (E.D. Va. 2019); *Federal Agency of News LLC v. Facebook, Inc.*, 2020 WL 137154 (N.D. Cal. Jan. 13, 2020); *Zhang v. Baidu. com Inc.*, 932 F. Supp. 2d 561 (S.D.N.Y. 2013); *Buza v. Yahoo!, Inc.*, No. C 11-4422 RS (N.D. Cal. 2011).



## Conclusion

In our review, we saw that the importance of Section 230 is best demonstrated by the cases that few have heard of and that will never make headlines — whether they involve a group of soccer parents, discussion boards for nurses and police, or a local newspaper’s comments section. When it passed in 1996, Section 230 removed legal disincentives for those who offer online services to engage in responsible content moderation activities and to allow online services to grow and innovate, striking a careful balance that is being evaluated today. To assess how Section 230 has performed over the last decade, it is critical to avoid drawing generalizations from a small set of cases that are not representative of the larger body of case law.

Painting Section 230 with too broad a brush ignores its wide impact and the implications of significant changes to the law. Our review pointed to areas where additional work needs to be done to understand how Section 230 impacts litigation today and whether changes would alter the end result of litigation or simply make it more costly. Finally, the review underscored the importance of understanding the interplay between Section 230 and the First Amendment, recognizing that even without Section 230, the First Amendment will remain. IA looks forward to continuing to support and contribute to efforts to understand these important issues.



## Appendix

### Methodology

This review started as a refresher on the most well-known Section 230 cases from passage in 1996 to the present. The value of a more extensive review of Section 230 jurisprudence became clear quickly, and the effort was expanded to include the cases cited in those better known cases, as well as the cases cited in those decisions. When those efforts no longer yielded new cases, free legal search services<sup>46</sup> were used to check for cases citing the list of Section 230 decisions and to perform keyword searches related to 230, and specific topics and defendants. In many instances, court decisions were readily available from free sites, including directly from the courts.<sup>47</sup> When necessary, Pacer was used.

In addition, many readily available online resources and academic literature on Section 230, including Professor Eric Goldman's [blog](#), the Santa Clara Law Digital Commons [Section 230 archive](#) maintained by Professor Goldman and Professor Jeff Kosseff, and the Digital Media Law Program's [archived site](#) were used as a source for cases.

The goal for this project was to track what courts and, to a lesser extent, litigants do when presented with questions touching on Section 230. For this reason, there was less focus on the final result in any given case, including whether it is still good law. An effort was made to track down the result of cases where Section 230 was asserted, but no decision was rendered. The decision referenced is generally the ruling that considered Section 230 in the most depth and does not necessarily reflect the decision of the highest court in that case (e.g. a magistrate's findings and recommendations may have been included over a district court decision merely adopting the recommendation in the ruling). There are some cases where Section 230 was not, or has not yet been, asserted but where it would be applicable (e.g., where platforms are sued for content removal and could assert Section 230(c)(1) or (2), but instead relied on First Amendment arguments). Where litigation was repetitive, only one decision was included with only a few exceptions which were included because they are notable examples of litigious plaintiffs.

Decisions were tracked based on the case name,<sup>48</sup> a case category assigned based on predominant type of claim, the decision of the court regarding 230 (including where there was none), case number, and date of decision.

#### *Cases In Our Sample:*

- 800-JR Cigar, Inc. v. GoTo.com, D.N.J., No. 00-3179, Jul 13, 2006
- A.R.K. v. La Petite Academy, W.D. Tex., No. SA-18-CV-294-XR, May 2, 2018
- Abate v. Maine Antique Digest, Mass. Super., No. 03-3759, Jan 26, 2004
- Acquino v. Electriciti, Inc, Cal. Super., No. 984751, Feb 18, 1997
- Advanfort Co. v. Int'l. Registries, Inc., E.D. Va., No. 1:15-cv-220, May 12, 2015
- AF Holdings LLC v. Burnell, W.D. Mich., No. 1:12-cv-01256-GJQ, Mar 21, 2013
- AF Holdings LLC v. Dawkins, S.D. Mich., No. 2:12-cv-13436-AJT-LJM, Oct 31, 2012

<sup>46</sup> These search tools include: <https://www.courtlistener.com>, <https://casetext.com>, <https://scholar.google.com>, <https://dockets.justia.com>, <https://caselaw.findlaw.com>

<sup>47</sup> Unfortunately, state court decisions are not as widely available as federal decisions using free online research tools. For that reason, state court decisions are a limited part of the sample of cases reviewed.

<sup>48</sup> Please note that the case name may not reflect all of the parties and, while we made some effort to track who asserted Section 230, in cases with multiple defendants we did not track all of them.



- AF Holdings LLC v. Doe, S.D. Cal., No. 5:12-CV-02048-EJD, Oct 3, 2012
- AF Holdings LLC v. Johnson, E.D. Mich., No. 2:12-cv-13434, Oct 31, 2012
- Airbnb, Inc. v. City and County of San Francisco, N.D. Cal., No. 3:16-cv-03615-JD, Nov 8, 2016
- Airbnb, Inc. v. City of Anaheim, C.D. Cal., No. 8:16-cv-01398, Jul 28, 2016
- Airbnb, Inc. v. City of Boston, D. Mass., No. 18-12358-LTS, May 3, 2019
- Airbnb, Inc. v. City of Miami Beach, S.D. Fla., No. 1:19-cv-20045, Jan 4, 2019
- Airbnb, Inc. v. County of Palm Beach, S.D. Fla., No. 9:18-cv-81640, Nov 30, 2018
- Airbnb, Inc. v. Schneiderman, S.D.N.Y., No. 1:16-cv-08239, Dec 5, 2016
- Al Harabi v. TheBlaze, Inc., D. Mass., No. 14-11550-PBS, Aug 9, 2016
- Albert v. Ragland, Cal. App., No. G052204, Mar 6, 2018
- Albert v. Yelp, Inc., Cal. App., No. G051607, Jul 15, 2016
- Allstate N.J. Ins. Co. v. Amazon.com, Inc., D. N.J., No. 17-2738 (FLW) (LHG), Jul 24, 2018
- Almeida v. Amazon.com, Inc., 11th Circuit, No. 04-15341, Jul 18, 2006
- Alvi Armani Medical, Inc. v. Hennessey, S.D. Fla., No. 08-21449-CIV, Dec 9, 2008
- Amcol Sys. v. Lemberg Law, LLC, D.S.C., No. 3:15-3422-CM, Feb 16, 2016
- Amer. Income Life Ins. Co. v. GOOGLE, Inc., N.D. Ala., No. 11-CV-4126-SLB, Sep 8, 2014
- America Online, Inc. v. GreatDeals.Net, E.D. Va., No. Civ.A. 99-62-A, May 4, 1999
- American Freedom Defense Initiative v. Lynch, D.D.C., No. 16-1437 (JEB), Nov 9, 2016
- American Income Life Insurance Co. v. Google, Inc., N.D. Ala., No. 2:11-CV-4126-SLB, Sep 8, 2014
- Amerigas Propane, L.P. v. Opinion Corp., E.D. Pa., No. 2:12-cv-00713-RB, Jun 19, 2012
- Anthony v. Yahoo! Inc., N.D. Cal., No. C-05-04175 RMW, Mar 17, 2006
- Ark Promotions, Inc. v. Justin.tv, Inc., D. Mass., No. 3:12-cv-131-RJC-DCK, Oct 17, 2012
- Ascend Health Corp. v. Wells, E.D.N.C., No. 4:12-CV-00083-BR, Mar 14, 2013
- Ascentive, LLC v. Opinion Corp., E.D.N.Y., No. 10 Civ. 4433(ILG)(SMG), Dec 13, 2011
- Asia Economic Institute v. Xcentric Ventures, LLC LLC, C.D. Cal., No. 2:10-cv-01360, May 4, 2011
- Associated Bank-Corp v. Earthlink, Inc., W.D. Wis., No. 05-C-0233-S, Sep 13, 2005
- Atari Interactive, Inc. v. Sunfrog, N.D. Cal., No. 3:18-cv-04949, Aug 13, 2019
- Atlantic Recording Corp. v. Project Playlist, Inc., S.D.N.Y., No. 08 Civ. 3922 (DC), Mar 25, 2009
- Austin v. CrystalTech Web Hosting, Ariz. App., No. 1 CA-CV 04-0823, Dec 22, 2005
- Avalos v. IAC/Interactive Corp., S.D.N.Y., No. 1:13-cv-08351-JMF, Oct 30, 2014
- Avery v. Idleaire Technologies Corp., E.D. Tenn., No. 3:04-CV-312, May 29, 2007
- Ayyadurai v. Floor64, Inc., D. Mass., No. Civ.A. 17-10011-FDS, Sep 6, 2017
- Bacharach v. Garcia, Tex. App., No. 14-14-00958-CV, Feb 2, 2016
- Backpage.com, LLC v. Cooper, M.D. Tenn., No. 3:12-cv-00654, Jan 3, 2013
- Backpage.com, LLC v. Hawley, E.D. Mo., No. 4:17-CV-1951 PLC, Nov 28, 2017
- Backpage.com, LLC v. Hoffman, D.N.J., No. 2:13-cv-03952-CCC-JBC, Jul 12, 2018
- Backpage.com, LLC v. McKenna, W.D. Wash., No. 2:12-cv-000954-RSM, Jul 27, 2012
- Baldino's Lock & Key Service v. Google, Inc., E.D. Va., No. 1:14-cv-00636, Jan 27, 2015
- Bank Julius Baer & Co. Ltd. v. Wikileaks, N.D. Cal., No. 3:08-cv-00824-JSW, Feb 26, 2018
- Barnes v. Yahoo!, Inc., 9th Circuit, No. 05-36189, Jun 22, 2009
- Barrett v. Fonorow, Ill. App., No. 2-02-0886, Oct 28, 2003
- Barrett v. Rosenthal, Cal., No. S122953, Nov 20, 2006
- Bartholomew v. YouTube LLC, Cal. App., No. H042775, Nov 2, 2017
- Batzel v. Smith, 9th Circuit, No. 01-56380, 01-56556, Jun 24, 2003
- Bauer v. Glatzer, D.N.J., No. L-1169-07, Jul 21, 2008
- Beckman v. Match.com, LLC, 9th Circuit, No. CV 13-0097 JCM NJK, Nov 21, 2018
- Ben Ezra, Weinstein, & Co. v. America Online Inc., 10th Circuit, No. 99-2068, Mar 14, 2000
- Bennett v. Google, Inc., D.D.C., No. 2016-2283, Jun 21, 2017
- Bergtraf v. Ebay, Inc., N.J. Super., No. L-566-02, Oct 1, 2003



- Bernath v. Tabitha J., D. Or., No. 1305-06167, Aug 26, 2013
- Best Western Int'l. v. Furber, D. Ariz., No. CV-06-1537-PHX-DGC, Sep 5, 2008
- Beyer v. Parents For Megan's Law, N.Y. Sup., No. 13-15544, Mot. Seq. No. 001-MG, Jun 19, 2014
- Beyond Sys., Inc. v. Keynetics, Inc., D. Md., No. CIV.PJM 04-686, Feb 14, 2006
- Black v. Google, Inc., 9th Circuit, No. 10-16992, Nov 1, 2011
- Blockowicz v. Williams, N.D. Ill., No. 09-C-3955, Dec 21, 2009
- Blumenthal v. Drudge, D.D.C., No. CIV.A. 97-1968 PLF, Apr 22, 1998
- Bollaert v. Gore, S.D. Cal., No. 17-cv-2022-WQH-AGS, Nov 5, 2018
- Bowen v. YouTube, Inc., W.D. Wash., No. C08-5050FDB, Apr 15, 2008
- Bravado v. Gearlaunch, C.D. Cal., No. 2:16-cv-08657, Feb 9, 2018
- Braverman v. Yelp, Inc., N.Y. Sup., No. 15189 158299/13, Jun 28, 2013
- Brennerman v. Guardian News & Media Limited, D. Del., No. 14-188-SLR/SRF, Mar 30, 2016
- Brittan v. Twitter, Inc., N.D. Cal., No. 19-cv-00114-YGR, Jun 10, 2019
- Browne v. Avvo, Inc., W.D. Wash., No. C07-0920RSL, Dec 18, 2007
- Brummer v. Wey, N.Y. Sup., No. 153583/2015, Motion Seq. No. 004, Mar 1, 2016
- Buza v. Yahoo! Inc., N.D. Cal., No. C 11-4422 RS, Oct 24, 2011
- Cain v. Twitter, Inc., N.D. Cal., No. 17-cv-02506-JD, Sep 24, 2018
- Capital Corp. Merchant Banking v. Corp. Colocation Inc., M.D. Fla., No. 6:07-cv-1626-Orl-19KRS, Aug 27, 2008
- Caraccioli v. Facebook, Inc., 9th Circuit, No. 16-15610, Jun 6, 2017
- Carafano v. Metrosplash.com, Inc., C.D. Cal., No. CV-01-0018 DT(CWX), Mar 11, 2002
- Carpenter v. Amazon.com, Inc., N.D. Cal., No. 17-cv-03221-JST, Mar 19, 2019
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- Castleberry v. Angie's List, Inc., Ala., No. 1180241, May 17, 2019
- Cats and Dogs Animal Hospital, Inc. v. Yelp! Inc., N.D. Cal., No. 3:10-cv-02351, May 28, 2010
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- Choyce v. SF Bay Independent Media Center, N.D. Cal., No. 13-cv-08142-JST, Dec 2, 2013
- Cisneros v. Yahoo! Inc., Cal. Super., No. CGC-04-433518, Nov 6, 2008
- City of Chicago, Ill. v. StubHub!, Inc., 7th Circuit, 624 F.3d 363, Sep 29, 2010
- City of Portland v. HomeAway.com, Inc., D. Or., No. 3:15-cv-01984-MO, Mar 9, 2017
- Clayborn v. Twitter, Inc., N.D. Cal., No. 17-cv-06894-LB, Dec 31, 2018
- Cohen v. Facebook, Inc., E.D.N.Y., No. 16-CV-4453 (NGG) (LB) 16-CV-5158 (NGG) (LB), May 18, 2017
- Cohen v. Facebook, Inc., N.D. Cal., No. C 10-5282 RS, Jun 28, 2011
- Collins v. Purdue University, N.D. Ind., No. 4:09-cv-12, Mar 24, 2010
- Colon v. Twitter, Inc., M.D. Fla., No. 6:18-cv-00515, Apr 4, 2018
- Competitive Enterprise Institute v. Mann, D.C. App., No. 14-CV-101, Dec 22, 2016
- Congoo, LLC v. Revcontent, LLC, D.N.J., No. 16-401 (MAS) (TJB), Apr 15, 2016
- Consumer Cellular, Inc. v. ConsumerAffairs.com, D. Or., No. 3:15-CV-1908-PK, Feb 29, 2016
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- Cox v. Twitter, Inc., N.D. Cal., No. C17-cv-05710-SBA, Mar 20, 2019
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- Diamond Ranch Acad., Inc. v. Filer, D. Utah, No. 2:14-CV-751-TC, Feb 17, 2016
- DiMeo v. Max, E.D. Pa., No. 06-cv-01544, Sep 19, 2007
- Dimetriades v. Yelp, Inc., Cal. App., No. B247151, Jul 24, 2014
- DiNapoli v. Yelp Inc., D. Mass., No. 18-10776-FDS, Jan 15, 2019
- Dipp-Paz v. Facebook, S.D.N.Y., No. 18-CV-9037 (LLS), Jul 12, 2019
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- Doe v. Facebook, Inc., Tex. Dist., No. 2018-69816 & 82214, May 22, 2019
- Doe v. GTE Corp., 7th Circuit, No. 02-4323, Oct 21, 2003
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- E360INSIGHT, LLC v. Comcast Corp., N.D. Ill., No. 08 C 340, Apr 10, 2008
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- Earth Flag Ltd. v. Alamo Flag Co., S.D.N.Y., No. 00 CIV. 3961, May 17, 2001
- East Coast Test Prep LLC v. Allnurses. com, Inc., D. Minn., No. Civ. 15-3705 (JRT/SER), Jan 29, 2018
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- Eberhart v. Amazon.com, Inc., S.D.N.Y., No. 16-CV-8546 (JPO), Aug 27, 2018
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- Ecommerce Innovations, L.L.C. v. Does 1-10,, D. Ariz., No. MC-08-93, Feb 10, 2009
- eDrop-off Chicago LLC v. Burke, C.D. Cal., No. 2:12-cv-04095, Aug 9, 2013
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## Endnotes

<sup>1</sup> This section discusses Section 230 when it is asserted as a defense in litigation as this is the most common use. There are other instances where plaintiffs have asserted Section 230 as a basis to seek declaratory relief prior to being sued or having a legal instrument (such as a court order or statute) used against them. See, e.g., *Google v. Equustek*, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017); *GiveForward, Inc. v. Hodges*, 2015 WL 4716046 (D. Md. Aug. 6, 2015); *Craigslist v. McMaster*, No. 2:09-cv-01308-CWH. (D. S.C. August 5, 2010); *Publius v. Boyer-Vine*, 237 F.Supp.3d 997 (E.D. Cal. 2017). There are also cases where plaintiffs unsuccessfully tried to assert that Section 230 had been violated by service providers and other defendants. See, e.g., *Ramirez v. BOOST MOBILE/SPRINT*, No. 17-cv-01404-JSC (N.D. Cal. February 5, 2018); *Voicenet Communications Inc. v. Corbett*, No. 04-1318 (E.D. Pa. Sep. 13, 2010.)

<sup>2</sup> John Barkai, Elizabeth Kent, and Pamela Martin, A Profile of Settlement, Court Review Volume 45, Issue 3-4 (2006)(available at: <http://ajncsc.dni.us/courtrv/cr42-3and4/CR42-3BarkaiKentMartin.pdf>)

<sup>3</sup> An affirmative defense generally is a defense raised by a defendant which mitigates or negates liability even if the allegations in the complaint are true. Barring exceptions like Section 230, typically, affirmative defenses may not be raised in a Motion to Dismiss, which is the earliest opportunity for the court to dismiss a case.

<sup>4</sup> See, e.g., *Wang v. OCZ Technology Group, Inc.*, Case No. C 11-1415 (N.D. Cal. October 14, 2011)(refusing to apply 230 pursuant to a Motion to Strike); *Perfect10 v. Google*, Case No. CV 04-9484 (C.D. Cal. July 16, 2008)(declining to apply Section 230 at Motion to Dismiss stage); *Doctor's Associates, Inc. v. QIP Holders, LLC*, 2007 WL 1186026 (D. Conn. April 19, 2007)(refusing to apply 230 at the Motion to Dismiss stage).

<sup>5</sup> See, e.g., *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009)(stating “[w]e thus aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from ‘ultimate liability,’ but also from ‘having to fight costly and protracted legal battles.’ *Roommate.com*, 521 F.3d at 1175”).

<sup>6</sup> *Getachew v. Google*, 2012 WL 3217611 (10th Cir. August 9, 2012).

<sup>7</sup> See 47 U.S.C. § 230(e), Effect on Other Laws, for the exceptions to Section 230.

<sup>8</sup> If a defendant files a motion to dismiss based on a failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6), they may argue that the allegations in the complaint are insufficient to satisfy all of the legal elements of the legal violation alleged and/or that Section 230 bars recovery regardless of whether the complaint is sufficient to survive the motion to dismiss. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is worth noting that a loss on a motion to dismiss does not mean that the defendant engaged in the behavior alleged in the complaint. Many defendants who lost on the motion to dismiss were later found to have not violated the law after discovery. The most notable example of this may be *Roommates.com* who was denied Section 230 immunity for its questionnaire which was alleged to be in violation of fair housing laws but was ultimately found not to be in violation. *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012)(finding that fair housing laws do not apply to selection of a roommate).



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