

Craigslist Case Implicates Important Legal Issues for User Generated Content Sites

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Introduction

Operators of user generated content websites, including social networks, ‘tube’ sites, and online adult classified operations, may be substantially implicated by the outcome of the litigation involving Craigslist.com. This case implicates everything from the scope of Section 230 immunity for user-posted material, to the constitutional prohibition on prior restraint of speech. Whether intentionally or otherwise, Craigslist has taken on a battle that may shape the user generated content business model for decades to come.

Craigslist, of course, has become the best known online classified site of our time. Its (generally) free classified ad posting service attracts over 50 million users per month – both buyers and sellers.¹ Well before the recent dustup involving the state attorneys general - in November, 2008 - Craigslist became concerned with its own “erotic services” ads, and began requiring users to submit personally-identifying information, including phone numbers and credit card numbers prior to placing ads.² This allowed the company to identify the posters of these ads, and provide better cooperation with law enforcement, if necessary. Not satisfied with this adjustment to company policy, a few months later, a Chicago-area sheriff sued Craigslist for facilitating prostitution.³

¹ S. Kirshner, “Craigslist CEO Needs Help on His Soundbites,” *Boston.com* (April 27, 2009), found at: http://www.boston.com/business/technology/articles/2009/04/27/craigslist_ceo_needs_help_on_his_sound_bites/.

² J. Skillings, “Craigslist sues So. Carolina attorney general,” *CNET News* (May 20, 2009), found at: http://news.cnet.com/8301-1023_3-10245380-93.html.

³ “Sheriff sues Craigslist as ‘largest source’ of prostitution,” *Chicago Breaking News Center* (March 5, 2009), found at: <http://www.chicagobreakingnews.com/2009/03/sheriffs-lawsuit-says-craigslist-largest-source-of-prostitution.html>.

Unfortunately for Craigslist, things really heated up the following month, when a Boston man utilized the website to meet a masseuse in a local hotel, where he later allegedly murdered her.⁴ His arrest on April 20, 2009, caused a public outcry against the widespread availability of thinly-veiled ads for prostitution on Craigslist.com

In response to mounting public pressure, Attorney Generals from several states demanded the closure of the “erotic services” section of Craigslist the following month.⁵ Ultimately, Craigslist agreed to close the controversial section on May 13, 2009, and to replace it with a closely-monitored “adult” section.⁶ However, that substantial concession was not enough for South Carolina Attorney General Henry McMaster, who demanded that Craigslist block all of the ads relating to prostitution or pornography from South Carolina resident’s view.⁷ In that regard, he publicly stated: “The only agreement we could have is they block everything (sexually explicit) in South Carolina.” McMaster then penned a letter, which was prominently displayed on the Attorney General’s website, threatening the filing of criminal charges in the event Craigslist did not remove all offending material by 5:00 pm Friday, May 15, 2009.⁸

That no-so-subtle threat turned out to be “a bridge too far” for McMaster in his battle with Craigslist. The ultimatum provided Craigslist with the opportunity to sue South Carolina law enforcement officials, and seek a federal injunction preventing McMaster from carrying out his threat.⁹ Craigslist’s lawsuit resulted in substantial negative publicity for South Carolina’s Attorney General, as the press began to pick up on the critical First Amendment concerns

⁴ “Med Student Arrested In Craigslist Murder,” *CBS News* (April 20, 2009), found at: <http://www.cbsnews.com/stories/2009/04/20/national/main4958272.shtml>.

⁵ A. Johnson, “Authorities seek to crack down on Craigslist,” *NBC Washington* (May 6, 2009), found at: http://www.nbcwashington.com/around_town/the_scene/Authorities_seek_to_crack_down_on_Craigslist.html.

⁶ G. Sandoval, “Craigslist to remove 'erotic services' section,” *CNet News* (May 13, 2009), found at: http://news.cnet.com/8301-1023_3-10239610-93.html?part=rss&subj=news&tag=2547-1023_3-0-5.

⁷ C. LeBlanc, “McMaster says no to Craigslist deal,” *The State* (May 14, 2009), found at: <http://www.thestate.com/local/story/785877.html>.

⁸ Read McMaster’s letter to Craigslist here: http://www.scag.gov/newsroom/pdf/2009/craigslist_letter.pdf.

⁹ “Craigslist sues So. Carolina attorney general,” *supra*.

generated by law enforcement's demand for censorship of Craigslist.com. The flap also generated some important public discussion of the protections afforded to user generated content websites under federal law; specifically Section 230 of the Communications Decency Act, which provides a safe harbor for websites that allow third party postings. Had McMaster done even the slightest bit of homework on the issue, he would have undoubtedly concluded that his demand - requiring a complete ban on access to constitutionally-protected, erotic material - was actionable under the First Amendment. The aggressive litigation response by the site required some fancy backpedaling by McMaster, as he tried to spin this as a victory for South Carolina, and take credit for the elimination of the erotic services category from Craigslist. Unfortunately for McMaster, Craigslist had removed the disputed classified section even before he submitted the ultimatum, and that point was not lost on the local and national media covering the dispute.¹⁰

Shortly after filing the lawsuit, McMaster's legal team wisely consented to the issuance of a temporary restraining order, preventing his office from initiating any criminal charges as a result of Craigslist's classified ads.¹¹ In the end, McMaster agreed not to file the threatened criminal charges against Craigslist, thereby resolving that issue in the lawsuit.¹² Had McMaster not backed down, the court would have almost certainly enjoined the threatened criminal prosecution on its own.

The legal arguments advanced by Craigslist in this lawsuit are of significant importance to adult webmasters operating any type of user generated content site or community forum.

¹⁰ E.g., M. Arrington, Stand firm, Craig (and Jim), *Washington Post* (May 18, 2009), found at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051800628.html>;

Bad Publicity May Backfire, *The Independent Mail* (May 19, 2009), found at: <http://www.independentmail.com/news/2009/may/19/bad-publicity-might-backfire/>

¹¹ *Craigslist, Inc. v. Henry D. McMaster, et. al.*, Civil Action No. 2:09-1308-CWH (May 22, 2009) (Consent Order, Honorable Weston Houck).

¹² "McMaster says no to Craigslist deal," *supra*.

Given the widespread popularity of this business model, and its many permutations, an analysis of the legal issues raised by the Craigslist case is important to the industry as a whole.

First Amendment – Prior Restraint Issues

The most compelling argument that can be advanced by Craigslist in this case is premised on the First Amendment's protection of free expression. Not only does Craigslist have the right to publish its ads, its users have a right to receive the information found on the website.¹³ Important in the First Amendment analysis is the fact that Craigslist does not (and from a practical standpoint, cannot) review or approve each advertisement before it is published on the website. Given the sheer number of ads appearing throughout this classified mega-site, any review or approval requirement would likely put the Company out of business. Accordingly, even if McMaster is correct about the legality of the advertisements at issue, Craigslist is not in control of the content of its classified ads, and therefore would not likely possess the requisite *scienter* or criminal intent to violate either prostitution or obscenity laws.

With respect to obscenity, it must be noted that all sexually-explicit materials appearing on the Internet are presumed to be protected by the First Amendment, unless and until they are found obscene by the trier of fact.¹⁴ Accordingly, law enforcement cannot constitutionally issue a blanket demand that Craigslist prevent any obscene material from appearing on the website, since Craigslist cannot know, in advance, which materials might be found obscene by a judge or jury at some place and time in the future.¹⁵

McMaster is not the first law enforcement official to use the heavy hand of possible obscenity prosecution as a tool to accomplish censorship of erotic materials. In the 1970's, law

¹³*Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

¹⁴*Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

¹⁵ Of course, the inability to know, in advance, what materials are illegal should render all obscenity laws unconstitutional, in violation of Due Process rights, in this author's view, however obscenity laws have inexplicably withstood such challenges over the years.

enforcement would routinely harass retailers selling erotic publications such as *Penthouse* magazine, with the intent to force the magazine off the shelves.¹⁶ The Fifth Circuit Court of Appeal affirmed the issuance of an injunction prohibiting this sort of bad faith harassment and prosecution of the retailers, finding the activity to be an unconstitutional prior restraint on speech. In a similar case, an anti-pornography campaign was put to an end by the Ninth Circuit Court of Appeal which found the effort to be unconstitutional.¹⁷ There, the Mayor of Phoenix, Arizona even went so far as to suggest that the owners and clerks working in newsstands and bookstores selling sexually-explicit material were involved in the Mafia.¹⁸ As the court explained: “[This sort of activity] can put the plaintiffs out of business without ever convicting any of them of anything.”¹⁹ Numerous other bad faith prosecutions, in retaliation for the exercise of First Amendment rights, have been enjoined by the courts, over the years.²⁰

McMaster appears to be particularly concerned about the availability of “pornography” to South Carolina residents.²¹ However, the only way to ensure that this state’s residents will not be exposed to such material would be to block the entire website, including all its categories, from the State of South Carolina. Again, Craigslist cannot control the nature of the content appearing in its classified ads, and therefore complete censorship is the only way to comply with South Carolina’s demands. Needless to say, the demand to block pornography from South

¹⁶ *Penthouse Int’l Ltd. v. McAuliff*, 610 F.2d 1353 (5th Cir. 1980), cert. dismissed 447 U.S. 931 (1980).

¹⁷ *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972).

¹⁸ *Id.* at 705-06.

¹⁹ *Id.*

²⁰ E.g. *Weston v. McDaniel*, 760 F.Supp. 1363, 1371 (N.D. Ga. 1991) (grand jury proceeding against criminal defense attorney enjoined as retaliatory against Plaintiff exercising his right to Freedom of Speech); *Entertainment Ventures, Inc. v. Brewer*, 306 F.Supp. 802, 822 (N.D. Ala. 1969) (enjoining all state criminal obscenity prosecutions); *Daughterty v. City of Eastpoint*, 447 F.Supp. 290, 296 (N.D. Ga. 1978) (prosecution under sign ordinance enjoined notwithstanding pendency of appeal of criminal action); *The Video Store, Inc. v. Holcumb*, 729 F.Supp 579 (S.D. Ohio 1990) (state court criminal prosecutions against video store owner enjoined because of bad faith harassment); *Empire News, Inc., v. Soloman*, 818 F.Supp. 307 (D.Nev. 1993) (adult bookstore licensing law prosecutions against owners of adult bookstore enjoined on First Amendment grounds).

²¹ S. Gaudin, “State AG ultimatum to Craigslist: Pull racy ads or face prosecution,” *Computerworld* (May 6, 2009), found at: <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9132631>.

Carolina is, itself, blatantly unconstitutional, given the First Amendment protections afforded to sexually-explicit speech.²² Accordingly, it appears that Craigslist would be successful in its claim that compliance with McMaster's ultimatum constitutes an illegal prior restraint on protected speech.

Section 230 Issues

Sites like Craigslist are protected not only by the First Amendment, but also by specific provisions of federal law. When enacting the Communications Decency Act,²³ Congress wisely recognized the practical problems that would result from any attempt to impose liability on website operators for the speech or communications of third parties. If such liability were permitted, Internet service providers could be held responsible for the content of each and every website hosted on their servers, and search engines could be held responsible for the content of all of the search results provided by their services. To alleviate this concern, Congress included Section 230 in the Communications Decency Act, which provides: "No provider...of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."²⁴ This "safe harbor" language has been given broad scope and effect by the courts.²⁵ Websites that allow third party content have been found to be immune from a wide variety of civil claims ranging from housing discrimination suits, to negligence, to civil rights.²⁶ Federal intellectual property claims are excluded from the scope of Section 230 immunity; however another federal statute, the Digital Millennium

²² *Reno, supra.*

²³ 47 U.S.C. § 230(c)(1).

²⁴ *Id.*, see also Section 230(e)(3): "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."

²⁵ *Chicago Lawyers' Committee for Civil Rights Under Law, Inc., v. Craigslist, Inc.* 519 F.3d 666 (7th Cir. 2008); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003); *Doe v. AOL*, 783 So.2d 1010 (Fla. 2001) *cert. den.* 534 U.S. 891 (2001)

²⁶ *Chicago Lawyers' Committee for Civil Rights Under Law, Inc., v. Craigslist, Inc.* 519 F.3d 666 (7th Cir. 2008)(fair housing claims) *Doe v. AOL*, 783 So.2d 1010 (Fla. 2001) *cert. den.* 534 U.S. 891 (2001)(negligence); *Noah v. AOL Time-Warner, Inc.*, 261 F.Supp.2d 532, 538 (E.D. Va. 2003)(civil rights).

Copyright Act,²⁷ provides its own similar safe harbor for copyright claims, if certain conditions are met.²⁸

So what about criminal prosecution? That is the big, unanswered question in this area of law. Thus far, a website service provider has never been found to be immune from criminal prosecution as a result of Section 230 immunity. While all of the reported cases interpreting this section have arisen in the context of a civil claim, the statute, itself, does not appear to be limited to civil liability protection. Instead, the law broadly states: “...no liability may be imposed under any state or local law that is inconsistent with this section.”²⁹ South Carolina obscenity and prostitution laws may well be inconsistent with Section 230 immunity if they are imposed against a website operator, and based on the communications posted by third parties. Accordingly, the Craigslist case may be the first to squarely confront the scope of Section 230 immunity, in the context of criminal prosecution.

A ruling in favor of Craigslist would be a game changer for user generated content websites, as it would open the door for extremely broad legal protections to be afforded to these websites. It may be, however, that in order for the state or local law to be considered “inconsistent” with Section 230 that it would have to deal with a substantive criminal offense that is similar to conduct addressed in the Communications Decency Act (“CDA”). The CDA imposes criminal liability on individuals who transmit obscene materials via the Internet.³⁰ Under the more narrow interpretation, only state level obscenity laws would be preempted by Section 230. This would still benefit Craigslist, since at least a portion of McMaster’s threats

²⁷ 17 U.S.C. § 512.

²⁸ *Id.*

²⁹ 47 U.S.C. § 230(e)(3) (emphasis added).

³⁰ The original CDA also included a broad prohibition on any indecent material on the Internet; however those provisions were invalidated by the United States Supreme Court in *Reno, supra* on First Amendment grounds.

were premised upon prosecution for pornographic and/or obscene images. However, the prostitution charges may survive the safe harbor, under this analysis.

The only case, of which this author is aware, where the argument regarding Section 230's applicability to criminal prosecution was raised, was in the highly-publicized obscenity prosecution by Polk County, Florida against Christopher M. Wilson.³¹ There, the Defendant argued in his pretrial Motion to Dismiss that Florida's obscenity law was preempted by Section 230, since the images forming the basis for the obscenity allegations were posted by third parties on his user generated content site, over which he exercised no content control. Fortunately for Wilson, a higher court intervened in the case, issuing a writ of habeas corpus, finding the Defendant's pretrial detention to be illegal, thereby clearing the way for a favorable resolution of the case involving no felony conviction and no jail time.³² As a result, a decision was never issued on the merits of the argument, so the issue has yet to be addressed by the courts.

User generated content sites of all makes and models will be carefully watching the outcome of the Craigslist litigation, given the important Section 230 issues at stake.

Commerce Clause Issues

Craigslist also raises the important question of whether McMaster's threatened state law prosecution triggers potential Commerce Clause concerns. While issues surrounding the dormant Commerce Clause of the United States Constitution are somewhat esoteric for the average adult webmaster, they may prove to be critically important for Craigslist and user generated content sites throughout the nation.

³¹ *State of Florida v. Christopher M. Wilson*; Case No. CF-05-7738 (Fla. 10th Cir. 2006).

³² See, J. Geary, "Wilson Avoids Jail," *The Ledger* (April 22, 2006), found at: <http://www.theledger.com/article/20060422/NEWS/604220360?Title=Owner-of-Controversial-Web-Site-Gets-5-years-Probation->.

In its most basic form, the argument goes like this: The individual states should not be permitted to impose a hodgepodge of inconsistent state laws on national (or international) commercial activities. Such activities can only be regulated at the federal level. This makes good sense, since little issues like the mandatory width of railroad tracks need to be uniform throughout the fifty states so trains can stay on the tracks when crossing state lines. Similarly, restrictions on commercial airlines, importation of foreign goods, and telecommunication systems all need to be regulated at the federal level, for our country to successfully function as a cohesive collection of individual states.

This Commerce Clause argument has been accepted in the context of Internet commerce on numerous occasions, where the states have attempted to impose restrictions on the transmission of sexually explicit materials via the Internet.³³ In every case where that issue has been raised, the state statute was declared unconstitutional in violation of the dormant Commerce Clause. Any attempt to impose state obscenity or prostitution laws on websites implicates similar commerce clause concerns. Each statute, and each case is different, and legitimate distinctions may exist with respect to regulation of targeted classified ads focusing on specific geographic areas. Moreover, the Commerce Clause analysis is nuanced and complex, often making the outcome unpredictable. But Craigslist has raised a legitimate and important issue of constitutional law in response to South Carolina's attempt to impose state law restrictions on Internet communications. Even if the dormant Commerce Clause is found to be inapplicable to

³³ *American Book Sellers Foundation for Free Expression v. Dean*, 202 F.Supp.2d 300 (D. Vt. 2002); *PSI Net, Inc. v. Chapman*, 167 F.Supp. 878 (W.D. Pa. 2001), question certified, 317 F.3d 413 (4th Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Libraries Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997); *Center for Democracy & Technology v. Pappert*, 337 F.Supp.2d 2006 (E.D. PA 2004); *Southeast Booksellers Ass'n v. McMaster*, 371 F.Supp.2d 773 (D.S.C. 2005).

geo-targeted online classified ads, other user generated sites may have more compelling and successful arguments in future cases.

The Court of Public Opinion

McMaster has taken quite a bit of heat for his ham-fisted approach to law enforcement against such a popular and widely used website as Craigslist. But the Internet industry should be thankful for his bumbling, in some respects. Because he went too far in demanding censorship of Craigslist.com, the public discourse has turned away from prostitution, pornography, and decency, to First Amendment censorship and Section 230 protection. Many law enforcement officials, who might have made the same freshman mistake as McMaster, have now been educated regarding the unique protections afforded to user generated content sites, and may be more hesitant to take action if they see something questionable on one of these websites. If the target of the investigation had been a fetish tube site, the public discussion of the issue may have been quite different and more supportive of the Attorney General's tactics. But since the target was Craigslist, which is used by employers, friends, and family throughout the nation, the public was decidedly more sympathetic. If law is to be made in this area, it is better that Craigslist bring the case to court as opposed to some other plaintiff with less public acceptance. While Lady Justice is blind, she has been known to have x-ray vision on occasion, with legal decisions sometimes being influenced by the identities of the parties.

Without a doubt, McMaster stepped in a large pile of excrement with his overzealous bullying tactics. But the rest of us can sit back and enjoy the show as the courts of law and public opinion sort out just how much protection user generated content websites should enjoy when the next bully with a badge decides to impose an agenda of Internet censorship.

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