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Kimzey v. Yelp! Inc.

United States Court of Appeals for the Ninth Circuit,
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The Court rejected the plaintiff's arguments against Yelp that Yelp had both been responsible for creating a one-star review of the plaintiff's business on its site and had "transformed" it into an ad by republishing the review on Google and had therefore lost the 'grant of immunity' given to websites under Section 230 of the US Communications Decency Act. The Court thus reaffirmed that plaintiffs cannot 'plead around' Section 230's protection.

In *Kimzey v. Yelp! Inc.*¹, the Ninth Circuit recently reaffirmed the protection afforded to website providers and users under Section 230 of the Communications Decency Act (the 'CDA')². In that case, Yelp was sued by Douglas Kimzey, whose locksmith business had received a bad review and a one-star rating by a Yelp user. Kimzey accused Yelp of being responsible both for creating the review and for "transforming" it into an ad by republishing it on Google. The Court rejected both arguments, holding that Yelp was immune under Section 230.

History of Section 230

In the mid-1990s, a New York brokerage firm sued Prodigy, an internet service provider, over a series of anonymous and allegedly libelous postings on Prodigy's Money Talk 'computer bulletin board.' The New York Supreme Court held that because Prodigy exercised some editorial control over the messages posted on the board, it could be held liable as the publisher of that content - even though it hadn't posted the comments that were at issue in the case³.

It's fair to say that if websites could be held liable for everything their users post, the internet as we know it today could not exist. Congress recognised that, and responded with Section 230 of the CDA. Section 230 sought to undo the New York decision by

guaranteeing that '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.'

Section 230 does not provide a blanket immunity, however. Website owners can be held liable as a publisher or speaker when they are 'responsible, in whole or in part, for the creation or development' of the unlawful information, thereby themselves becoming an 'information content provider'⁴. The question in many CDA cases is at what point a website crosses the line between simply allowing others to post content and playing a role in the creation of that content.

Drawing the line

In 2008, the Ninth Circuit took a big step in drawing that line in a case involving Roommates.com⁵. People who searched for roommates on the site were required to answer questions about gender, sexual orientation, and family size, and they were prompted to select roommates based, in part, on those categories. In addition, users could enter comments in an optional comments field.

The Fair Housing Council of San Fernando Valley sued Roommates.com, arguing that the site violated various anti-discrimination housing laws by giving users the ability to discriminate through the site's questionnaires and comments

In the years since the Roommates.com decision, various businesses who have received negative reviews on sites like Yelp have attempted to hold the sites liable for those reviews.

1. 2016 WL 4729492 (9th Cir. 12 Sept 2016).
2. 47 U.S.C. § 230.
3. Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995).
4. 47 U.S.C. § 230(f)(3).
5. 521 F.3d 1157 (9th Cir. 2008).



field. Roommates.com, however, claimed that it was immune under Section 230. The Ninth Circuit held that Roommates.com was immune for the content users entered in the comments field because it didn't play a role in creating that content. However, Section 230 immunity did not extend to answers provided in response to the required questionnaire. The site "created the questions and choice of answers" and designed the registration process around them. "[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."

Thus, according to the Court, Roommates.com was the 'information content provider' as to those questions and could not claim immunity for having them on its site and requiring users to answer them. In doing so, it became "much more than a passive transmitter of information provided by others." It became, at least "in part," the developer of the information, and thus was responsible, at least "in part," for the content.

Kimzey v. Yelp

In the years since the *Roommates.com* decision, various businesses who have received negative reviews on sites like Yelp have attempted to hold the sites liable for those reviews. In those cases, the businesses have sought to plead around Section 230 immunity by arguing that, like Roommates.com, the sites crossed the line between passively transmitting information to playing a role in creating it.

In September 2011, Kimzey's locksmith business received a negative review on Yelp from 'Sarah K,' who gave the company a one-star rating, writing: "THIS WAS BY FAR THE WORST EXPERIENCE I HAVE EVER ENCOUNTERED WITH A LOCKSMITH. DO NOT GO THROUGH THIS COMPANY." A year later, another user questioned whether the review was

really about Kimzey's business, and Sarah K responded by confirming that it was. Kimzey sued Yelp under a host of different theories, including libel, claiming that Yelp was liable for Sarah K's review. The Ninth Circuit determined that Kimzey's *pro se* complaint, which it described as "far from lucid," alleged two theories of liability. First was that Yelp "found the review on another website and posted it as a comment on its own website." Although Kimzey did not appear to argue that Yelp wrote the words, he still argued that Yelp was behind the content.

The second theory was that Yelp "transformed" Sarah K's review into its own "advertisement" or "promotion" on Google, with the "unique star-rating system as the mantelpiece of its creation." Kimzey seemingly argued that Yelp's creation of its star-rating system made it the "author" for purposes of Sarah K's one-star rating, and that Yelp's "republishing" the statements on Google as "newly developed advertisements" made Yelp the author of that iteration of the content.

The Ninth Circuit rejected Kimzey's attempts to 'plead around' Section 230's immunity. As to his first claim, Kimzey's "threadbare allegations of fabrication of statements are implausible on their face" and were thus insufficient to avoid Section 230. "Were it otherwise, CDA immunity could be avoided simply by reciting a common line that user-generated statements are not what they say they are." Essentially, Kimzey failed to prove that Yelp fabricated Sarah K's review.

The Court likewise rejected Kimzey's second theory, finding that Yelp was not liable for "disseminating the same content in essentially the same format to a search engine, as this action does not change the origin of the third-party content." "Simply put, proliferation and dissemination of content does not equal

creation or development of content."

The Court rejected Kimzey's proposition that a star-rating system could somehow be understood as defamatory and, even if it could be, Yelp's rating system did nothing to "enhance the allegedly defamatory sting of the message" beyond the words of the user." The Court also rejected the contention that Yelp crossed the line by republishing the content on Google because this "does not change the origin of the third-party content."

Nonetheless, the Court recognised that Section 230's use of the words 'creation' and 'development' are "hardly self-evident in the online world, and our cases have struggled with determining their scope." Citing the material contribution test from *Roommates.com* and related decisions, the Court recognised that a website could lose Section 230 immunity "by making a material contribution to the creation or development of content." Yelp's rating system did not cross the line into content development: "Indeed, the star-rating system is best characterized as the kind of 'neutral tool[...]' operating on 'voluntary inputs' that we determined did not amount to content development or creation in *Roommates.com*."

The lesson

The Ninth Circuit's opinion is largely a reminder that plaintiffs cannot 'plead around' Section 230's grant of immunity, and that the development of content-neutral tools that used or collected user-generated input do not make a website the 'creator' or 'developer' of unlawful information supplied by users. Unlike *Roommates.com*, where the online forms were created by the site and the forms themselves solicited unlawful information, Yelp's star-rating and review system was content-neutral and relied entirely on user submissions. By remaining content-neutral, companies increase their chances of being able to take advantage of Section 230 immunity.