

NO. 15-1724

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JANE DOE NO. 1, JANE DOE NO. 2, JANE DOE NO. 3,
SAM LOE, and SARA LOE,

Plaintiffs-Appellants,

v.

BACKPAGE.COM, LLC,
CAMARILLO HOLDINGS, LLC f/k/a Village Voice Media Holding, LLC,
and NEW TIMES MEDIA, LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, corporate Defendants/Appellees state that Backpage.com, LLC, Camarillo Holdings, LLC, and New Times Media, LLC are Delaware limited liability companies and wholly owned subsidiaries of other companies, which are privately held. No publicly held corporation owns any interest in any of the Defendants/Appellees or their parent companies.

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ISSUES PRESENTED

1. Whether Plaintiffs' claims are barred by Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(1) ("Section 230"), because they are based on advertisements created and posted on Defendants' Backpage.com website by third parties, where uniform case law holds that Section 230 immunizes websites from such claims.

2. Whether Plaintiffs can circumvent Defendants' Section 230 immunity by attacking the "construct and operation" of the Backpage.com website as a whole, despite this Circuit's holding to the contrary in *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

3. Whether Plaintiffs' civil claims for damages under 18 U.S.C. § 1595 state a claim, where every court to consider the question has held that Section 230 immunizes websites from civil claims based on federal criminal statutes, and in any event Plaintiffs do not allege that Defendants knowingly participated in a venture to victimize Plaintiffs.

4. Whether Plaintiffs' right-of-publicity claims were properly dismissed, where they are not intellectual property claims exempt from immunity under Section 230(e)(3) because they implicate only Plaintiffs' privacy interests, and where Plaintiffs do not allege that their likenesses were misappropriated by Defendants for their own benefit.

5. Whether Plaintiff Doe 3's copyright claim fails as a matter of law because she has not alleged any damages (and cannot plausibly do so) and also because she cannot show Defendants took any volitional act, directly benefited, or had knowledge sufficient to make out any claim for direct or secondary infringement.

STATEMENT OF THE CASE

This case concerns the proper application of Section 230 of the Communications Decency Act, which bars claims against websites based on content posted by third parties. 47 U.S.C. § 230. Plaintiffs are three young women who allege that pimps trafficked them for sex through ads they posted on a classified advertising website. Instead of bringing claims against the pimps and others who exploited them, Plaintiffs have sued the website, Backpage.com.¹

Applying the extensive case law interpreting Section 230, the district court held Backpage.com immune from suit and dismissed Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6). The court rejected the Plaintiffs' central premise: that they are not suing Backpage.com for the ads concerning them but rather for "business practices" or conduct of the website generally. Courts have repeatedly rejected such "entire website" attacks as inconsistent with the substance and policy of Section 230. Memorandum and Order ("Order," attached in the Addendum hereto), Add. 25-26. In particular, the district court followed this Court's decision in *Lycos*, 478 F.3d at 413, which held that a plaintiff cannot evade Section 230 by "artful pleading" or by challenging the "construct and operation" of a website. *Id.* at 418-19, 422.

¹ Defendants-appellees Backpage.com, LLC; Camarillo Holdings, LLC; and New Times Media, LLC, referred to collectively here as "Backpage.com," were owners and/or operators of the Backpage.com website at the time of the alleged events underlying Plaintiffs' claims.

A. Factual Background

1. Backpage.com

Backpage.com operates an online classified advertising service through which users can post advertisements in a variety of categories, including local places, buy/sell/trade, automotive, rentals, real estate, jobs, dating, adult, and services. Appendix (“App.”) 29-30, ¶ 38; *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013). The site is organized geographically, by state and municipality. App. 32, ¶ 41; *Cooper*, 939 F. Supp. 2d at 813. Users post over three million ads every month, making Backpage.com the second-largest online classified ad service in the country, after Craigslist. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1266 (W.D. Wash. 2012).

All ad content is provided by third-party users who input the content for posting on the website using an automated interface. App. 38, ¶ 53. The website does not dictate or require any content. Backpage.com does, however, take extensive voluntary measures to police user posts. App. 26-28, ¶ 34; App. 39-40, ¶¶ 54-55; App. 41, ¶ 58 (screening). The site employs systems of automated filtering and manual review to identify and preclude ads that violate its rules, including ads for potential illegal activity. Backpage.com refers ads that may indicate child exploitation to the National Center for Missing and Exploited Children (“NCMEC”). See *McKenna*, 881 F. Supp. 2d at 1266-67.

“Backpage.com also regularly works with local, state and federal law enforcement officials by responding to subpoena requests, providing officials with Internet search tools, and removing posts and blocking users at the request of officials.”

Cooper, 939 F. Supp. 2d at 814.

2. Plaintiffs’ Allegations

Plaintiffs allege that pimps and their associates trafficked Plaintiffs for sex via the Internet. App. 46, ¶ 71; App. 50, ¶ 90; App. 52, ¶ 100. According to the Second Amended Complaint (“Complaint”), all ads about Plaintiffs were posted on Backpage.com by the pimps, or by Plaintiffs or the pimps’ associates at the pimps’ direction. App. 46-47, ¶¶ 74, 75; App. 47, ¶¶ 78, 80; App. 48, ¶¶ 82, 83; App. 51, ¶¶ 93, 94; App. 52-53, ¶¶ 100, 101. Plaintiffs allege the ads included photos taken by their “traffickers,” App. 49-50, ¶ 87; App. 51, ¶ 95; App. 53, ¶ 102, except Doe 3 alleges she took one photo of herself, which she registered with the U.S. Copyright Office after this suit was filed. App. 61, ¶ 143.

Plaintiffs do not provide or quote any of the alleged ads about them, except allegations about titles in certain otherwise unidentified ads about Doe 3. App. 52-53, ¶ 101 (alleging they contained words such as “new,” “sweet,” and “playful”). However, the Complaint makes clear (and Plaintiffs do not dispute) that all the ads—text, titles, and photos—were written, created, and posted by the pimps (directly or by one of their associates or Plaintiffs). App. 46, ¶ 75 (pimp

“instructed Jane Doe No. 1 to post advertisements of herself”); App. 50, ¶ 88 (“traffickers advertised Jane Doe No. 1”); App. 51, ¶ 93 (Jane Doe 2’s “pimp or [a] female who worked closely with him” posted ads), ¶ 94 (same); App. 52-53, ¶ 101 (“the traffickers drafted and posted an advertisement” about Jane Doe 3 and “continued to post additional [ads]”). Plaintiffs do not allege that Backpage.com itself created, developed, or required any of the content in Plaintiffs’ ads.

Plaintiffs’ other allegations amount to conclusory, non-factual attacks on the website as a whole. For example, Plaintiffs admit Backpage.com works with and receives support from law enforcement agencies, but then contend these efforts are a ruse. *See* App. 24-29, ¶¶ 30-34, 36. They also acknowledge Backpage.com’s program to monitor ads and refer suspect ads to NCMEC, but conclude these efforts “appear[] to be merely superficial.” App. 27, ¶ 34(iii). Plaintiffs admit the website uses automated filtering to block improper ads, but then denigrate this screening and assert Backpage.com should use different measures. App. 27-28, ¶ 34(iv); App. 36-37, ¶¶ 49-50; App. 40-41, ¶¶ 56, 57; App. 26, ¶ 58 (asserting site’s protections are “deceitful”).

B. Plaintiffs’ Complaint

Plaintiffs filed suit on October 16, 2014. They assert claims under: (1) 18 U.S.C. § 1595, a provision of the Trafficking Victims Protection Reauthorization Act (“TVPRA”) allowing civil damage claims based on criminal violations of 18

U.S.C. § 1591; (2) the Massachusetts Anti-Trafficking Act (“MATA”), G. L. c. 265, § 50(d); (3) Massachusetts’ consumer protection law, G.L. c. 93A, § 9; (4) the Massachusetts and Rhode Island right-of-publicity statutes, Mass. G. L. c. 214, § 3A and R.I. St. § 9-1-28.1; and (5) the Copyright Act, 17 U.S.C. § 101, *et seq.* App. 54-62. The Complaint describes Plaintiffs’ injuries from having been exploited by pimps and then alleges, for all claims, that Backpage.com should be held responsible.²

C. The District Court’s Dismissal Order

On January 16, 2015, Backpage.com moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The district court allowed the motion in a 34-page order.

The district court agreed with Backpage.com “that because the Doe plaintiffs allege they were harmed by the contents of postings that defendants had no part in creating, the claims fall squarely within Congress’s exemption of interactive computer service providers from liability for third-party Internet content.” Add. 9.

² Backpage.com recognizes the Court must accept Plaintiffs’ well-pleaded fact allegations under Rule 12(b)(6). But, to be clear, Backpage.com vehemently denies Plaintiffs’ accusations, which on the whole are not fact allegations but conclusory arguments that should be disregarded. As other courts have found, *see Cooper*, 939 F. Supp. 2d at 813-14; *McKenna*, 881 F. Supp. 2d at 1266-67, Backpage.com makes extensive efforts to block improper ads, cooperate with law enforcement, and combat trafficking and other illegal conduct—actions unparalleled by other online providers in the U.S.

The court rejected, in turn, every one of Plaintiffs’ efforts to avoid or plead around Section 230 immunity.

Recognizing Congress’s purpose in Section 230 to promote Internet free speech and self-policing, the court rejected Plaintiffs’ argument that the law “no longer has the assuasive force that it may once have had.” Add. 11. Indeed, “far from lowering the immunity bar, [Congress] has ratcheted it up” in recent years “by expanding the scope of section 230 immunity.” Add. 11-12 (2010 amendment to 28 U.S.C. § 4102(c)(1) extended Section 230 immunity to inconsistent foreign judgments).³

The court rejected Plaintiffs’ argument that their claim under 18 U.S.C. § 1595 is exempt from Section 230 because Section 230(e)(1) exempts only federal criminal prosecutions. Add. 22. The court dismissed Plaintiffs’ c. 93A claim both under Section 230 immunity and for the additional reason that Plaintiffs’ theory of causation—that were it not for Backpage.com’s representations about its cooperation with law enforcement, the pimps never would have abused Plaintiffs—“is too speculative ... as a matter of law.” *Id.* at 25. The court concluded as to Plaintiffs’ right-of-publicity claims that, even if they amounted to “intellectual

³ Though Plaintiffs waived any contention that Backpage.com lost immunity by acting as an “information content provider,” Plaintiffs’ *amici* raised the issue regardless, and the district court correctly rejected it. Add. 14. The challenged practices of Backpage.com “amount to neither affirmative participation in an illegal venture nor active content creation,” the court ruled. Add. 14.

property” claims exempt under Section 230(e)(3), Plaintiffs did not allege Backpage.com “used their images to extract any direct benefit.” *Id.* at 30. Finally, the court dismissed Doe 3’s copyright claim, because she failed to allege any actual damages or profits to Backpage.com attributable to the allegedly infringing photo. *Id.* at 32.

SUMMARY OF THE ARGUMENT

Congress enacted Section 230 to encourage the unfettered and unregulated development of free speech and commerce on the Internet. Recognizing that it is a practical impossibility for websites and other online providers to screen all of the millions of user-submitted posts or ensure none are harmful, Section 230 instead encourages self-policing, while immunizing websites for claims based on third-party content and preempting any state law claims to the contrary. 47 U.S.C. §§ 230(c)(1), (e)(3). Congress rejected a legal regime that would allow liability against websites for user content, recognizing that such an approach would not just chill but *freeze* online speech. Instead, in passing Section 230, Congress chose to immunize websites from claims based on third-party content and preempt any state or local law that would otherwise allow such claims.

Section 230 provides a simple framework to accomplish its purposes. Pursuant to a three-prong test (discussed in Section II.B, *infra*), if a claim against a website arises from third-party content, the claim is barred. In other words, if an

online provider does not create or require the specific content that allegedly caused a plaintiff's harms, the website is immune from liability and the plaintiff's claims must be dismissed. This has been the consistent interpretation of Section 230 in hundreds of decisions over the last twenty years. Here, Plaintiffs admit that third parties created the online ads that caused the harm alleged, and they do not contend that Backpage.com had anything to do with their development. This resolves the application of Section 230 immunity. Plaintiffs' claims are barred.

Plaintiffs nonetheless attempt to evade Section 230 by insisting they do not seek to "impute" their specific ads to Backpage.com, but instead challenge the website for "encourag[ing] . . . illegal advertisements," "impeding the detection and identification of sex traffickers" by cooperating with law enforcement but only in a "superficial" way (efforts that Plaintiffs label as "lying") and otherwise "evad[ing] public scrutiny." Appellants' Brief ("App. Br.") at 8, 23. This attempt to plead around Section 230 immunity has already been rejected by this Court and many others. "No amount of artful pleading can avoid" Section 230. *Lycos*, 478 F.3d at 418.

Plaintiffs otherwise seek to avoid Section 230 by misapplying the law's exemptions for enforcement of federal criminal laws and intellectual property claims. However, as the district court correctly held, (1) Plaintiffs cannot invoke the Section 230(e)(1) exemption for federal criminal prosecutions by asserting civil

claims based on criminal statutes, (2) Plaintiffs' right-of-publicity claims are not intellectual property claims at all (but even if they were, they do not state a claim); and (3) Doe 3's copyright claim fails as a matter of law because Backpage.com never used or profited from her photo.

Section 230 reflects Congress's considered policy decision that Plaintiffs may "hold liable the person who creates or develops unlawful content, but not the interactive computer service provider that merely enables that content to be posted online." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009). As a matter of law and as the district court correctly held, Plaintiffs may not sue Backpage.com, because the website is immune under Section 230 from liability for third-party content.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's allowance of a motion to dismiss *de novo*. *Garcia-Catalan v. United States*, 734 F.3d 100, 102 (1st Cir. 2013). Under Fed. R. Civ. P. 12(b)(6), "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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Court must accept factual allegations and reasonable inferences in favor of a plaintiff, it must separate such allegations from

“conclusory statements ... to analyze whether the former, if taken as true, set forth a plausible, not merely a conceivable, case for relief.” *Juarez v. Select Portfolio Servicing, Inc.*, 708 F.3d 269, 276 (1st Cir. 2013) (quotations omitted).

In this case, the Court should also consider the intent of Section 230 that claims against online providers based on third-party content should be dismissed at the earliest possible opportunity, to avoid “costly and protracted legal battles.” *Nemet Chevrolet*, 591 F.3d at 259 (“[I]mmunity is an *immunity from suit* rather than a mere defense to liability [and] is effectively lost if a case is erroneously permitted to go to trial.”); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008); *accord Jones v. Dirty World Ent. Rec. LLC*, 755 F.3d 398, 417 (6th Cir. 2014); *see also Lycos*, 478 F.3d at 413 (affirming 12(b)(6) dismissal based on Section 230 immunity).

II. THE DISTRICT COURT CORRECTLY HELD THAT SECTION 230 BARS PLAINTIFFS’ CLAIMS.

A. Section 230 Protects Free Speech by Shielding Websites from Claims Based on Content Posted by Third Parties.

Section 230(c)(1) of the CDA unambiguously bars suits against websites and other online providers based on content provided by third parties: “No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). An “information content provider” under the statute is a person

“responsible, in whole or in part, for the creation or development of information.” *Id.* § 230(f)(3). A website loses immunity only if it “create[s]” or “develop[s]” the allegedly unlawful content itself. In addition to barring federal claims,⁴ Section 230 expressly preempts state laws: “[N]o liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3). Section 230 provides limited exceptions for federal criminal prosecutions and intellectual property laws. *Id.* §§ 230(e)(1), (2).

Congress enacted Section 230 to achieve two goals. First, it “wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.” *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *see also Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000) (Section 230 is meant “to promote freedom of speech”); 47 U.S.C. § 230(b)(2) (Section 230 is intended to “preserve the vibrant and competitive free market that presently exists for the Internet”). Second, it sought to encourage online providers to “self-police” for potentially harmful or offensive material by providing immunity for such efforts. *Batzel*, 333 F.3d at 1028; *see also* 47 U.S.C. § 230(c)(2).

⁴ *See, e.g., Chicago Lawyers’ Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 668-69 (7th Cir. 2008) (Section 230 precluded claim under the federal Fair Housing Act).

As this Court has observed, Congress made a “policy choice ... not to deter harmful online speech through the ... route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Lycos, Inc.*, 478 F.3d at 418 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)). Congress sought to eliminate the “obvious chilling effect” that liability of online providers would cause, “given the volume of material communicated through [the Internet], the difficulty of separating lawful from unlawful speech, and the relative lack of incentives to protect lawful speech.” *Id.* at 418-19 (quoting *Zeran*, 129 F.3d at 331). Put more simply, “Section 230 . . . sought to prevent lawsuits from shutting down websites.” *Batzel*, 333 F.3d at 1028. To be sure, Congress recognized that some material on the Internet could be harmful, and in Section 230 it left open a remedy: “[P]laintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online.” *Nemet Chevrolet*, 591 F.3d at 254.

Consistent with Section 230’s terms and Congress’s policy, this Court has observed that “Section 230 immunity should be broadly construed.” *Lycos*, 478 F.3d at 419. Every other circuit to consider the issue has likewise held that Section

230 establishes broad immunity for online providers.⁵ State courts have said the same—one noted that some 300 reported decisions have interpreted Section 230, and “[a]ll but a handful . . . find that the website is entitled to immunity from liability.” *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. Ct. App. 2012).

B. The District Court Correctly Dismissed Plaintiffs’ Claims Under Section 230’s Test.

Section 230 sets forth a three-part test, as this Court has recognized. A website or other online service provider is immune from suit if “(1) [it] is a ‘provider or user of an interactive computer service’; (2) the claim is based on ‘information provided by another information content provider’; and (3) the claim would treat [the website] ‘as the publisher or speaker’ of that information.” *Lycos*, 478 F.3d at 418 (quoting 47 U.S.C. § 230(c)(1)).

⁵ See *Zeran*, 129 F.3d at 330-31; *Ben Ezra*, 206 F.3d at 985 n.3; *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003) (noting a “consensus” that “§ 230(c) provides broad immunity for publishing content provided primarily by third parties”); *Almeida v. Amazon.com, Inc.* 456 F.3d 1316, 1321 (11th Cir. 2006) (“federal circuits have interpreted [Section 230] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user” (internal citations and quotations omitted)); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (same); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (“Courts have construed the immunity provisions in § 230 broadly...”); *Chicago Lawyers’ Comm.*, 519 F.3d at 671 (7th Cir. 2008), *as amended* (May 2, 2008); *Jones*, 755 F.3d at 406-07 (6th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (“join[ing] consensus” that the term “interactive computer service” should be “construed broadly to effectuate the statute’s speech-protective purpose”).

This test is straightforward by design, to provide clarity to online providers and others. *See Jones*, 755 F.3d at 415 (“muddiness” of a test based on whether websites “encouraged” unlawful content would defeat Congress’s purposes). The test comes down to determining whether a plaintiff’s claims arise or stem from third-party content, however the claims are labeled or characterized. *See MySpace*, 528 F.3d at 418; *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009) (“[W]hat matters is not the name of the cause of action [but] whether [it] inherently requires the court to treat the defendant as the ‘publisher or speaker’ of the content provided by another.”). The test turns on “the specific content that was the source of the alleged liability” and who created and developed *that content*. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1198-99 (10th Cir. 2009); *accord Jones*, 755 F.3d at 409 (“immunity under the CDA depends on the pedigree of the content at issue”); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703, 717 n.11 (2002) (allegations that a website operator provides some content are “irrelevant if [it] did not itself create or develop the content for which the [plaintiffs] seek to hold it liable”).

Plaintiffs do not dispute that the first prong of the test is met: Backpage.com, as a website operator, is a “provider ... of an interactive computer service.” *See Lycos*, 478 F.3d at 419. Plaintiffs also do not contest that their claims are based on “information provided by another information content

provider.” Nor could they, given their allegations that they were victimized “as the result” of ads created and posted by the pimps or persons the pimps directed (including Plaintiffs themselves). *See* App. 50, ¶ 89 (Doe 1); App. 52, ¶ 99 (Doe 2); App. 53, ¶ 103 (Doe 3). Further, the Complaint does not allege, nor could it, that Backpage.com had anything to do with creating or developing the ad content.⁶

1. Plaintiffs Seek to Hold Backpage.com Liable as the Publisher of the Pimps’ Ads.

Plaintiffs base their effort to avoid Section 230 on the third element of the test—they maintain “[t]he CDA issue presented by this appeal” is “whether *Plaintiffs’ claims*, as pled, ‘treat’ Backpage ‘as the publisher or speaker of content provided by another.’” App. Br. at 29 (emphasis in original).⁷ The answer is a simple “yes.” The breadth of Section 230’s immunity for “publisher” liability is

⁶ Plaintiffs also do not allege Backpage.com required unlawful content or retained others to create and post content—the two circumstances in which circuit courts have held that providers fell outside Section 230. *See Roommates.com*, 521 F.3d at 1166-68, 1172 n.33, 1174 (roommate-matching website responsible for developing content as to portion of site requiring users to provide discriminatory preferences, but immune as to section allowing users to post comments of their own choosing); *Accusearch, Inc.*, 570 F.3d at 1192, 1199-1200 (website responsible for developing content because it sold private telephone records and hired researchers to obtain them, which required violating or circumventing laws).

⁷ As noted, plaintiffs admit that the ads at issue were created and posted by third-parties, so the only way plaintiffs can assert causation or standing to sue Backpage.com would be because it published the ads. As the district court correctly observed, there can be no “nexus” for plaintiffs’ claims against Backpage.com “[w]ithout the offending ads.” Add. 25.

well-established in the case law and squarely applies to Plaintiffs' claims, regardless of how they label them.

The relevant question under this prong of the Section 230 test is whether a plaintiff's claims "arise or stem" from third-party content, regardless of how those claims may be labeled or phrased. *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 690 (S.D. Miss. 2014) (internal quotation omitted). In fact, courts "repeatedly have rejected attempts to recharacterize claims *fundamentally based on the posting of online information* in order to avoid § 230's prohibition on 'treat[ing] [the defendant] as a "publisher" of information.'" *Goddard v. Google, Inc.*, No. C-08-2738, 2008 WL 5245490, at *4 (N.D. Cal. Dec. 17, 2008).

In *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008), for example, a 14-year-old girl and her mother sued MySpace.com after the girl created a profile on the site (lying about her age) and met a man who sexually assaulted her. The plaintiffs insisted their claims "[did] not attempt to treat" MySpace "as a 'publisher' of information," but instead were "predicated solely on [its] failure to implement basic safety measures to protect minors." *Id.* at 419. The Fifth Circuit affirmed the district court's dismissal, finding that the plaintiffs' arguments were "disingenuous" "artful pleading":

It is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, [the assailant] and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Julie Doe. If MySpace had not

published communications between Julie Doe and [the assailant], including personal contact information, Plaintiffs assert they never would have met and the sexual assault never would have occurred. No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities.

Id. at 419-420 (holding plaintiffs' allegations were "merely another way of claiming that [the website] is liable for publishing the communications and they speak to [its] role as a publisher of online third-party-generated content"). Numerous other Section 230 cases are to the same effect.⁸

Plaintiffs offer dictionary definitions and their view of "historical context" to suggest there is (or should be) some ambiguity about when a website is being

⁸ See, e.g., *Green*, 318 F.3d at 471 (affirming dismissal where "fundamental tort claim is that AOL was negligent in promulgating harmful content"); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1201 (N.D. Cal. 2009) (claims fundamentally rested on Google's "general content policy"); *Beckman v. Match.com*, No. 2:13-CV-97 JCM NJK, 2013 WL 2355512, at *6 (D. Nev. May 29, 2013) ("Plaintiff's claims ... are actually challenging the publication of the profile of a third-party user ..., which is clearly immune"); *Gibson v. Craigslist, Inc.*, No. 08-Civ.-7735 (RMB), 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009) (rejecting claims that Craigslist failed to police website for illegal gun sales, as it was "clear that Plaintiff's claims are directed toward Craigslist as a 'publisher' of third party content and Section 230 specifically proscribes liability in such circumstances" (internal quotation omitted)); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 727 (N.D. Ohio 2007) ("At the end of the day ... Plaintiff is seeking to hold SexSearch liable for its publication of third-party content and harms flowing from [its] dissemination."), *aff'd*, 551 F.3d 412 (6th Cir. 2008); *Saponaro v. Grindr, LLC*, No. CIV. 14-04522 JBS/AM, 2015 WL 1137870, at *3 (D.N.J. Mar. 13, 2015) (website immune where it allegedly failed to enforce age verification, leading to sexual encounter involving a 13-year-old).

“treated as a publisher” for claims based on third-party content. App. Br. at 30-35.⁹ But Plaintiffs’ suggestions are not the law, and the law is clear. “[Section] 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions” about whether to allow or block content. *Zeran*, 129 F.3d at 331. “[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.” *Roommates.com*, 521 F.3d at 1170–71; *see also Green*, 318 F.3d at 471 (3d Cir. 2003) (AOL immune from claims based on “decisions relating to monitoring, screening, and deletion of content from its network”). Thus, Backpage.com’s posting rules and restrictions, its monitoring of user-submitted ads, and its efforts to block and remove improper ads are *quintessential* publisher functions immune under Section 230—indeed, they are self-policing of the sort Congress expressly intended to encourage. Likewise, a website’s policies and practices (and decisions not to change them) are “as much an editorial decision

⁹ Largely ignoring the case law making plain that the “publisher” functions immune under Section 230 include all decisions about allowing or disallowing content or structuring a website (discussed above), Plaintiffs contend that to trigger immunity, a “claim must either impute the allegedly harmful content to the defendant ... or otherwise seek to attach liability to the act or process of publishing the content.” App. Br. at 33. Plaintiffs do not explain what this sort of liability would look like, nor even why their claims do not meet the very test they concoct. In any event, no case has ever adopted Plaintiffs’ proposed construction of the third prong of Section 230 immunity.

[immune within publisher functions under Section 230] as a decision not to delete a particular posting.” *Lycos*, 478 F.3d at 422.

Seeking to show their claims “do not ‘treat’ Backpage ‘as a publisher’ at all,” Plaintiffs list several instances of what they allege constitute a purportedly illicit “course of conduct.” App. Br. at 39. However, all of these activities, when stripped of Plaintiffs’ hyperbole, *are* publisher functions, *i.e.*, “decisions about how to treat postings generally.” *Lycos*, 478 F.3d at 422. For example, Plaintiffs challenge Backpage.com’s automated filters to prevent improper terms in ads (which Plaintiffs call “steering traffickers toward advertising language,” App. Br. at 39), but decisions to screen and block ads are precisely what Congress meant to encourage in Section 230. Plaintiffs assail Backpage.com’s acceptance of “non-traditional payment methods” such as prepaid cards and Bitcoin, but establishing conditions of publication (such as payment) is a publisher function and many online entities accept non-traditional and newly developed forms of payment. As the district court put it, “accepting payments from anonymous sources in Bitcoins, peppercorns, or whatever, might have been made illegal by Congress, but it was not.” Add. 15. Plaintiffs allege Backpage.com “strips” metadata from photographs uploaded by users to the site, App. Br. at 39, and while the allegation is not true,¹⁰ it

¹⁰ Rather, when users upload photos to Backpage.com—whether to sell household items, for dating, or in any other category—the photos are automatically resized so they can appear on the site, and this automated process does not capture metadata.

is a common practice for websites (including Facebook, Instagram, Twitter, and Craigslist) not to retain metadata, as the district court recognized. Add. 15. Plaintiffs vaguely assert Backpage.com “intentionally remov[ed] law enforcement’s ‘sting’ advertisements,” App. Br. at 39 (while failing to allege when that ever happened and disregarding that Backpage.com routinely cooperates with law enforcement operations)—but removing ads that violate the website’s rules (even ones posted by law enforcement) is an editorial function protected by Section 230.

Despite Plaintiffs’ efforts to recharacterize their claims, they fundamentally seek to hold Backpage.com liable for publishing (including failing to block) the third-party ads that Plaintiffs contend resulted in their harm. *See, e.g.*, App. 50, ¶ 89 (alleging Doe 1 was abused “as the result of ... advertisements placed on Backpage.com”); App. 51, ¶ 94 (Doe 2 was harmed “[a]s a result of ... advertisements” about her). Absent the advertisements, Plaintiffs have no connection to Backpage.com and no standing to sue Backpage.com. *See M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1047 (E.D. Mo. 2011) (“absent the content of [the] postings” advertising plaintiff, she “would lack the injury in fact required for Article III standing” in action against Backpage.com).

2. Plaintiffs' Attempt to Characterize Their Claims as Challenging "Business Practices" Cannot Override Section 230 Immunity.

Plaintiffs argue their claims are based on the Backpage.com website and its conduct generally, not on "the act of communicating the advertisements" of Plaintiffs. App. Br. at 37. But this Court and many others have long rejected the stratagem of attacking a website as a whole to avoid Section 230.

First and foremost, this Court's decision in *Lycos* forecloses Plaintiffs' position. 478 F.3d 413. There, a corporate plaintiff claimed websites operated by Lycos published inaccurate, disparaging comments about the company's financial condition and prospects. The plaintiff claimed Lycos fell outside Section 230 because it "involved itself with its subscriber[s'] conduct/activities and/or rendered culpable assistance through the construct and operation of its web site" and "actively induce[d] its subscribers to post unlawful content." 478 F.3d at 420-21. The Court characterized this as "artful pleading" and concluded the claims "fit[] comfortably within the immunity intended by Congress." *Id.* at 418-19. The opinion noted that a website's policies and practices (and decisions not to change them) are "as much an editorial decision [immunized under Section 230] as a decision not to delete a particular posting." *Id.* at 422. Moreover, "message board postings do not cease to be 'information provided by another information content provider' merely because the 'construct and operation' of the web site might have

some influence on the content of the postings.” *Id.* “If the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider’s decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally.” *Id.* at 422.

Many cases have followed *Lycos*, rejecting efforts to evade Section 230 by challenges to the “structure and design” of a website or allegations that a site solicits content. *See Nemet Chevrolet*, 591 F.3d at 256-58; *see also S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (W.D. Mo. Mar. 12, 2012) (rejecting allegations about “the general structure and operation of the Website” because “the CDA focuses on the specific post at issue”). As the district court correctly recognized, *Lycos* and other cases “have repeatedly rejected this ‘entire website’ theory as inconsistent with the substance and policy of section 230,” which focuses solely on who was responsible for the specific harmful material at issue. *Id.* at 25. *See Hill*, 727 S.E.2d at 562 (rejecting arguments that StubHub is designed to enable illegal ticket scalping, and noting that an “‘entire website’ approach is fatally flawed”).

Plaintiffs’ attempt to recast their claims as relating to a supposed “market share growth scheme” of Backpage.com, *see, e.g.*, App. Br. at 7, is but a variation on the rejected “entire website” approach. Indeed, the court in *M.A.*, 809 F. Supp.

2d 1041 (E.D. Mo. 2011), rejected the same argument and enforced Section 230 immunity for claims identical to the ones here. In that case, the plaintiff alleged Backpage.com had created “a highly tuned marketing site” with “the veil of legality,” but “had a desire” that pimps “accomplish[] their nefarious illegal prostitution activities so [they would] pay for more posting,” and thus was “an aider and abettor of minor sex trafficking by virtue of [its] culpable conduct.” *Id.* at 1045, 1053. Relying on *Lycos*, the court in *M.A.* rejected the plaintiff’s challenges to the site’s “construct and operation,” *id.* at 1050 (quoting *Lycos*, 478 F.3d at 420-21), observing that a website is “immune under § 230 unless it created the offending ads.” *Id.* at 1051. Similarly, it was “immaterial” that Backpage.com allegedly “elicit[ed] online content for profit”; what matters is whether the website or third parties create the content at issue. *Id.* at 1050 (quotation omitted). The court also rejected *M.A.*’s assertion that she was not seeking to hold Backpage.com liable as a publisher but “as an aider and abettor.” *Id.* at 1053-54 (rejecting a civil claim under 18 U.S.C. § 2255 based on alleged violation of federal criminal law; *see* Section III *infra*).

Plaintiffs attempt to get around the protections of Section 230 by adding adjectives to their allegations, claiming Backpage.com’s actions are “purposeful” and “calculated,” rather than “neutral.” App. Br. at 38-40. This tack is unavailing. In *Jones v. Dirty World*, for example, the plaintiff sued a gossip website

(TheDirty.com) for disparaging remarks about her posted by a third-party user. *Jones v. Dirty World Entm't Recordings, LLC*, 965 F. Supp. 2d 818 (E.D. Ky. 2013). The district court refused to apply Section 230 because it concluded the site “intentionally encourage[d] illegal or actionable third-party postings,” *id.* at 821, but the Sixth Circuit reversed. 755 F.3d at 414. It noted that “[m]any websites not only allow but also actively invite and encourage users to post particular types of content,” which might be “unwelcome to others.” *Id.* However, the court held such websites cannot be sued on an “encouragement” theory because that would “eclips[e] the immunity from publisher-liability that Congress established.” *Id.* “Congress envisioned an uninhibited, robust, and wide-open internet ... but the muddiness of an encouragement rule would cloud that vision.” *Id.* at 415.

Jones follows the Ninth Circuit’s decision in *Roommates.com*, 521 F.3d 1157, finding a website immune from claims based on a section providing an open-text field for user comments (analogizing this to Craigslist, *id.* at 1172 n.33, which is structured the same as Backpage.com). The court rejected the argument that the site encouraged subscribers to make unlawful discriminatory statements, noting that in many cases “a clever lawyer could argue that *something* the website operator did encouraged the illegality,” but such cases “must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or

encouraged—or at least tacitly assented—to the illegality of third parties.” *Id.* at 1174. As the Ninth Circuit cautioned, “in cases of enhancement by implication or development by inference—such as with respect to the ‘Additional Comments’ here—section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.” *Id.* at 1174-75. Many other cases have similarly rejected “encouragement” arguments. As one said, “there is simply no authority for the proposition that [encouraging unlawful content] makes the website operator responsible, in whole or in part, for the creation of every post on the site.” *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) (quotation omitted).¹¹

3. Plaintiffs’ Additional Attempts to Evade Section 230 Are Similarly Unavailing.

The balance of Plaintiffs’ arguments to avoid Section 230 can be addressed summarily.

¹¹ See also, e.g., *S.C. v. Dirty World*, 2012 WL 3335284, at *4 (“[E]ncouraging defamatory posts is not sufficient to defeat CDA immunity.”); *Goddard*, 640 F. Supp. 2d at 1196 (Google immune despite allegations it “encourages[,] collaborates in the development of [and] effectively, requires [illegal content]” in ad program); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (ripoffreport.com immune despite allegations it encouraged defamatory reviews for financial benefit); *Shiamili v. Real Estate Grp. of New York, Inc.*, 17 N.Y.3d 281, 290, 952 N.E.2d at 1018 (2011) (rejecting claims that ShittyHabitats.com “encouraged users to post negative comments about the New York City real estate industry”).

a. Preemption. Plaintiffs contend that “Congress did not intend to completely ‘occupy the field’ of regulation of internet communications,” and the Court should apply to Section 230 a “‘presumption against preemption’ limiting the displacement of state law.” App. Br. at 44-45. However, Plaintiffs are attempting to invoke principles that apply to *implied* preemption, while Section 230 imposes *express* preemption. *Zeran*, 129 F.3d at 334 (holding that in Section 230, Congress’s “exercise of its commerce power is clear” and “explicitly stated”); *McKenna*, 881 F. Supp. 2d at 1272 (Section 230 preempted state law both expressly and because the law would conflict with Congress’s purposes); *Cooper*, 939 F. Supp. 2d at 823 (same). While Plaintiffs suggest a “narrow reading” should be given to the “outer limits” of an express preemption provision, this case falls within the heart of Section 230. As in *Lycos*, Plaintiffs’ allegations about Backpage.com’s “conduct in operating the . . . web site fit[] comfortably within the immunity intended by Congress.” *Lycos*, 478 F.3d at 419.

b. “Content Creation.” Plaintiffs assert now that the district court “should have permitted discovery to proceed on other aspects of [their] claims,” specifically whether Backpage.com itself in some way created the content of the ads about Plaintiffs. App. Br. at 46. But Plaintiffs expressly *did not* raise this argument in the district court, *see* App. 236 (stating that whether Backpage.com is a “content provider” is “not an aspect of the case upon which [Plaintiffs] are defending this

motion to dismiss”). Plaintiffs may not raise a legal theory now that they expressly abandoned in the district court. *See Pomerleau v. West Springfield Public Schools*, 362 F.3d 143, 146 (1st Cir. 2004) (“If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.”).¹²

c. *Affirmative Defense.* Plaintiffs further contend that Section 230 provides only “an affirmative defense” to liability, “not immunity from suit itself,” and thus the application of Section 230 should have been addressed on “a more complete record.” App. Br. at 47-48. Notwithstanding that Plaintiffs said the opposite in the district court, *see* Dkt. No. 25 at 21, 23 (referring to the CDA’s “immunity provisions”), the uniform case law under *Lycos* and in every other

¹² Plaintiffs also cite a Washington decision, *J.S. v. Village Voice Media Holdings, LLC*, No. 90510-0, 2015 WL 5164599 (Wash. Sept. 3, 2015), affirming a trial court’s refusal to dismiss the plaintiffs’ claims under that state’s Rule 12(b)(6) standard, which rejects *Iqbal* and *Twombly* and instead allows claims to proceed based on a plaintiff’s hypothetical allegations. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wash. 2d 96, 233 P.3d 861, 864 (2010) (rejecting *Twombly*); *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wash. 2d 820, 355 P.3d 1100, 1105 (2015) (“We may even consider hypothetical facts to determine if dismissal is proper.”). In any event, *J.S.* was based on the plaintiffs’ allegations in that case that Backpage.com creates content (the court accepted plaintiffs’ allegations that Backpage.com’s rules to prevent improper content were meant to encourage such content). Again, Plaintiffs here have waived this argument. It bears noting, as well, that *J.S.* has been roundly criticized as inconsistent with the law interpreting Section 230 and as a dangerous precedent for online free speech. *See, e.g.,* Sophia Cope, *Court Ruling Against Backpage.com is a Setback for Online Speech in Washington State* (Sep. 8, 2015), www.eff.org/deeplinks/2015/09/court-ruling-against-backpagecom-setback-online-speech-washington-state.

circuit is that Section 230 *does* provide immunity to online providers, and it is not only appropriate but consistent with Congress’s intent to enforce Section 230 on a 12(b)(6) motion. *See Lycos*, 478 F.3d at 415; *Ricci*, 781 F.3d at 28 (treating CDA preemption as affirmative defense but affirming dismissal under Rule 12(b)(6) because “the statute’s barrier to suit is evident from the face of the complaint”) (quoting *Klayman*, 753 F.3d at 1357 (same)); *see n.5, supra* (collecting cases deeming Section 230 an “immunity” from suit).

d. “Good Faith.” Plaintiffs assert that because Backpage.com in the district court mentioned its monitoring and screening of ads and cooperation with law enforcement, it thereby made an “implicit invocation of Section 230 (c)(2),” and the court should have “permitted discovery to proceed on [the] issue” of whether Backpage.com acted in good faith. App. Br. at 50. Again, Plaintiffs raise this issue for the first time on appeal and give it “perfunctory treatment,” meaning it too is waived. *Abdallah v. Bain Capital LLC*, 752 F.3d 114, 120-21 (1st Cir. 2014). Regardless, Backpage.com moved to dismiss under Section 230 (c)(1), which does not require a showing of good faith. *See Levitt v. Yelp! Inc.*, No. 10-1321-EMC 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011) (noting that “the

text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith").¹³

III. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS UNDER 18 U.S.C. § 1595 AND MASS. G.L. c. 265, § 50.

A. The Section 230(e)(1) Exemption for Federal Criminal Prosecutions Does Not Apply.

Plaintiffs insist their civil claim for damages under 18 U.S.C. § 1595 is exempt from immunity because subsection 230(e)(1) contains an exception for enforcement of federal criminal statutes. Consistent with every court that has addressed this argument, the district court correctly held that subsection 230(e)(1) exempts only *federal criminal prosecutions* and not derivative civil claims.¹⁴

¹³ Subsection (c)(1) gives immunity to online providers for claims arising from *publication* of third-party content, while subsection (c)(2) provides a separate immunity for claims arising from online providers' *removal or blocking* of content. By the express terms of the statute, good faith is only an issue under subsection (c)(2). Indeed, courts have consistently enforced immunity under (c)(1) notwithstanding plaintiffs' allegations that websites acted in bad faith. *See, e.g., Jones*, 755 F.3d at 398.

Seeking to create an argument about "good faith" now, Plaintiffs rely on one judge's concurrence in *J.S.*, in which he offered his own reading of Section 230, asserting that subsection (c)(1) does not create immunity and the only proscription in the statute is subsection (c)(2). App. Br. at 49-50 (citing and quoting from *J.S.*, 2015 WL 5164599, at *6 (Wiggins, J., concurring)). Notably, the concurrence cites no case law supporting this view (there is none) and refers to the extensive body of Section 230 case law only to say that "[t]he dissent is correct that ... many courts [have] appl[ie]d an expansive interpretation of [Section 230]." *J.S.*, 2015 WL 5164599, at *7.

¹⁴ Plaintiffs do not argue that subsection 230(e)(1) saves their claim under Mass. G.L. c. 265 § 50, nor could they, as subsection 230(e)(3) preempts all state-law

Entitled “No effect on *criminal law*,” subsection 230(e)(1) states:

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

47 U.S.C. § 230(e)(1) (emphasis added). At least six federal courts in addition to the court below have held that “the CDA exception for federal criminal statutes applies to *government prosecutions*, not to civil private rights of action under [statutes] with criminal aspects.” *Obado v. Magedson*, 2014 WL 3778261, *8 (D.N.J. July 31, 2014) (emphasis added), *aff’d*, 612 F. App’x 90 (3rd Cir. 2015); *M.A.*, 809 F. Supp. 2d at 1053 (dismissing civil claims against Backpage.com based on 18 U.S.C. §§ 1595 and 2255); *Hinton*, 72 F. Supp. 3d at 691; *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009) (reference in civil complaint to federal criminal statute does not elevate nuisance action to criminal prosecution); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (exception applies only to criminal prosecutions); *Goddard*, 2008 WL 5245490, at *5 n.5 (Google immune for civil claim seeking to hold it liable for money laundering under 18 U.S.C. § 1957).¹⁵ By titling the exemption

civil or criminal claims. *See, e.g., Cooper*, 939 F. Supp. 2d 805, 825 (holding Section 230 preempted Tennessee criminal statute).

¹⁵ Plaintiffs cite no cases holding otherwise, only *dicta* from *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931, at *9 (C.D. Ill. Aug. 3, 2012), *aff’d*, 512 F. App’x 635 (7th Cir. 2013), *see* App. Br. at 51, where the court held the plaintiff

“No effect on criminal law” and applying it only to “enforcement” of “Federal criminal statutes,” Congress clearly articulated a narrow exception for federal prosecutions, one that cannot apply to the “Civil remedy” created by 18 U.S.C. § 1595. *See M.A.*, 809 F. Supp. 2d at 1055 (emphasizing differences between “criminal law” and “civil law”). “Of course, Plaintiffs are not prosecutors, they are civil litigants seeking to recover money damages under § 1595 for a violation of a criminal statute.” *David v. Signal Int’l, LLC*, No. CIV.A. 08-1220, 2012 WL 10759668, at *20 (E.D. La. Jan. 4, 2012) (noting that 18 USC § 1595 “is a damages statute, not a statutory penalty provision that imposes a monetary sanction once the plaintiff establishes that the defendant has engaged in certain conduct”).

Section 230 itself supports the district court’s conclusion that “criminal and civil actions differ in kind” and “Section 230 exempts only criminal prosecutions.” Add. 22. In subsection 230(b)(5), Congress declared its policy to permit “vigorous enforcement of Federal criminal laws to *deter and punish* trafficking in obscenity, stalking, and harassment by means of a computer.” 47 U.S.C. § 230 (b)(5).

Punishment is the province of criminal law,¹⁶ and as for deterrence, this Court held

failed to state a claim under RICO. Plaintiffs’ allusions to cases mentioning that civil claims are included in other statutes (RICO and antitrust) to aid in their enforcement has nothing to do with the express terms of subsection 230(e)(1) and Congress’s intent as reflected in *that* law.

¹⁶ *See Black’s Law Dictionary* (10th ed. 2014) (defining “criminal law” as “[t]he body of law defining offenses against the community at large . . . and establishing punishments for convicted offenders”).

in *Lycos* that Congress made a “policy choice ... *not* to deter harmful online speech through the ... route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Lycos*, 478 F.3d at 418 (emphasis added).

In addition, Plaintiffs’ interpretation would make part of Section 230 superfluous. Subsection (e)(4) provides that nothing in Section 230 “shall be construed to limit the application of the Electronic Communications Privacy Act of 1986” (“ECPA”). ECPA is a criminal statute that, like the TVPRA, provides for civil claims. 18 U.S.C. §§ 2511, 2520. If Plaintiffs’ interpretation of § 230(e)(1) was correct, subsection 230(e)(4) would be surplusage, because both criminal and civil ECPA claims would already be exempted under (e)(1). *See United States v. Commonwealth Energy Sys. & Subsidiary Companies*, 235 F.3d 11, 15 (1st Cir. 2000) (statutes must be construed “so that each part is given effect and no part is rendered inoperative or superfluous”).¹⁷

Finally, Congress recently reinforced the distinction between criminal and civil liability in the TVPRA and reiterated that Section 230 immunizes online providers from the latter. In Public Law 114-22, Congress amended 18 U.S.C.

¹⁷ Indeed, subsection 230(e)(4) exempts any “*application*” of ECPA, whether civil or criminal, while the statute uses the narrower term “*enforcement*” in subsection (e)(1). *Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each.”).

§ 1591 to provide that a person who “advertises” a victim for sex trafficking may be criminally liable.¹⁸ In so doing, Congress expressly stated that it was *not* changing Section 230 immunity for derivative civil claims based on 18 U.S.C.

§ 1595—*i.e.*, claims such as Plaintiffs assert here. The House Report for the bill that became law stated:

H.R. 285 clarifies that people who advertise sex trafficking can face criminal liability. ... Under current law, Section 1595 of Title 18 extends the possibility of civil liability to defendants who violate Section 1591. However, under Section 230 of the Communications Decency Act, online publishers of third-party advertisements are generally immune from civil liability for such advertisements. H.R. 285 does nothing to disrupt or modify the civil immunity already provided by Section 230.

H.R. REP. NO. 114-8, at 3 (2015). If Congress believed that *civil* claims under Section 1595 were exempt from Section 230, it certainly would not have said the opposite.

B. Plaintiffs’ Claims Under 18 U.S.C. § 1595 and the MATA Are Not Plausible In Any Event.

Even if Plaintiffs could assert claims under 18 U.S.C. § 1595 and the MATA notwithstanding Section 230, their allegations do not come close to plausibly alleging such claims.

¹⁸ The amendment added “advertises” to the other predicate acts that may constitute sex trafficking (*e.g.*, “recruits, entices, harbors, transports, provides, obtains, advertises, maintains”) with sufficient proof of *mens rea* and the other elements of the statute. *See* 18 U.S.C. § 1591.

To bring a civil claim under either 18 U.S.C. § 1595 or G.L. c. 265, § 51(d), a plaintiff must allege and ultimately prove all the elements of the predicate crimes. *See Doe v. Liberatore*, 478 F. Supp. 2d 742, 755 (M.D. Pa. 2007) (18 U.S.C. § 2255 requires showing defendant committed underlying crime). Thus, for their Section 1595 civil claim, Plaintiffs must show Backpage.com (1) “knowingly benefit[ed] financially” (2) “from participation in a venture” that (3) “engaged in an act” of sex trafficking while (4) knowing or recklessly disregarding that the trafficker would use force, fraud, or coercion or that the victim was underage. 18 U.S.C. § 1591(a)(2).

Plaintiffs allege no facts to support any of these elements. Their allegations about Backpage.com’s business model are insufficient because criminal law requires knowing participation to accomplish “a *certain* crime.” *Liberatore*, 478 F. Supp. 2d at 756 (quoting *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991) (emphasis in original)). Plaintiffs do not identify a specific sex trafficking incident, much less allege Backpage.com participated in a venture to accomplish it.

At base, Plaintiffs misunderstand the anti-trafficking laws’ requirements for *mens rea* and knowing “participation in a venture,” 18 U.S.C. § 1591(a)(2), or acting as a “joint venturer in trafficking of [a] person,” G.L. c. 265, § 51. The courts have held that participating in a venture under 18 U.S.C. § 1591 means aiding and abetting, requiring proof the defendant “was associated with a criminal

venture, participated in it as something he wished to bring about and sought [by] his actions to make it succeed.” *United States v. Afyare*, 2013 WL 2643408, at *12 (M.D. Tenn. June 12, 2013) (quoting *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978)).¹⁹ In other words, the defendant must share “in the criminal intent of the principal” and “commit[] an overt act designed to aid in the success of the venture.” *Id.* (quoting *Longoria*, 569 F.2d at 425).²⁰ Thus, the U.S. Department of Justice and courts have agreed that websites cannot be criminally liable for publishing third-party content, unless the site knew of, participated in, and sought to bring about a specific crime. The DOJ’s National Coordinator for Child Exploitation Prevention and Interdiction testified to Congress that an “Internet provider[] like craigslist” is not “criminally liable for [third-party] postings unless”

¹⁹ See also *La. Mun. Police Emps. Ret. Sys. v. Hershey Co.*, No. 7996-ML, 2013 WL 6120439, at *7, 9 (Del. Ch. Nov. 8, 2013) (allegations about Hershey’s knowledge of illegal trafficking in African cocoa farming provided no plausible basis to claim Hershey participated in a venture to exploit child labor); *Stein v. World-Wide Plumbing Supply Inc.*, No. 13 Civ. 6795 (BMC), 2014 WL 6783739, at *5 (E.D.N.Y. Dec. 2, 2014) (dismissing Section 1595 claim where complaint provided no factual allegations defendants knew of peonage scheme); *United States v. Polanco*, 634 F.3d 39, 44 (1st Cir. 2011) (noting “Judge Learned Hand’s ‘classic’ definition that an aider and abettor is one who associate[s] himself with the venture, ... participate[s] in it as in something that he wishes to bring about,’ and ‘seek[s] by his action to make it succeed” (internal quotation marks omitted)).

²⁰ G.L. c. 265, § 51(d), also refers to aiding and abetting requirements—it permits liability against a business entity only if it “knowingly aids or is a joint venturer in trafficking.” See *Commonwealth v. Zanetti*, 454 Mass. 449, 467 (2009) (“[J]oint venture criminal liability has two essential elements: that the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent.”).

it “was a participant . . . conspiring with those who were misusing the site,” because “the standard for prosecution would be knowing or willful [conduct].” *Domestic Minor Sex Trafficking: Hearing before Senate Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 215-16 (2010). She also explained: “We have [the proper tools] to prosecute the guilty, that is, the people who are using the Internet” and cautioned against a different rule because no one “would propose closing the Internet.” *Id.* at 216. Courts, too, have rejected claims based on allegations that websites assist, promote, or aid and abet users’ criminal conduct.²¹

Nothing in the Complaint remotely suggests Backpage.com participated in any venture with Plaintiffs’ pimps to traffic them, shared any criminal intent, knew the ads when posted were for sex trafficking or the persons depicted were underage or coerced, or took any overt act to accomplish the pimps’ unlawful aims. Plaintiffs have therefore provided no plausible allegations to support *any* element of the anti-trafficking laws on which they base their civil claims.

²¹ *See, e.g., Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (website did “not satisfy the ordinary understanding of culpable assistance to a wrongdoer, which requires a desire to promote the wrongful venture’s success”); *Dart*, 665 F. Supp. 2d 961, 967-69 (N.D. Ill. 2009) (Craigslis not culpable for “aiding and abetting” users as it did not “cause” them to do anything except “in the sense that no one could post [unlawful content] if craigslis did not offer a forum”); *M.A.*, 809 F. Supp. 2d at 1054 (rejecting claims against Backpage.com under 18 U.S.C. §§ 1595 and 2255 because plaintiff’s general allegations about website “do not describe the specific intent required” for criminal liability).

IV. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CHAPTER 93A CLAIMS.

The district court correctly dismissed Plaintiffs' c. 93A claims because they are barred by Section 230 and fail to allege any plausible grounds for relief.

Courts have widely held Section 230 immunity encompasses claims under state consumer protection statutes. *See, e.g., Hinton*, 72 F. Supp. 3d 685 (Mississippi Consumer Protection Act); *Obado*, 2014 WL 3778261, at *1 (New Jersey Consumer Fraud Act); *Goddard*, 2008 WL 5245490, at *1 (California Unfair Competition Law); *Sexsearch.com*, 502 F. Supp. 2d at 723, 728 (Ohio Consumer Sales Practices Act); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 2015 WL 6437786, at *10 (M.D. Fla. Oct. 21, 2015) (Florida Deceptive and Unfair Trade Practices Act). Where Section 230 applies, “providers are immune from ‘any’ claim arising out of content originating from a third party, regardless of the theory of the underlying cause of action.” *Obado*, 2014 WL 3778261, at *4.

Plaintiffs' theory is that their c. 93A claims are somehow divorced from the ads on Backpage.com. They contend their c. 93A claims “center on Backpage’s deceptive representations, conduct that is wholly separate from Backpage’s publication” of ads, App. Br. at 44, or, as they put it in the district court, the claims should survive “even if the ad[s] had never been posted,” Dkt. No. 25, at 16. Contradicting Plaintiffs’ assertions, the district court accurately observed that “[w]ithout the offending ads, no nexus would exist between Backpage and the

harms suffered by the Doe plaintiffs.” Add. 25. As noted, Plaintiffs’ Complaint alleges they suffered harm “as a result” of the ads posted about them, App. 50, ¶ 89; App. 51, ¶ 94, not because they heard or relied on any representations made by Backpage.com. Plaintiffs do not have standing to sue Backpage.com as private attorneys general or self-appointed censors of the Internet. Indeed, allowing such a claim would be an egregious form of the “heckler’s veto,” which the First Amendment and Section 230 forbid. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997); *Jones*, 755 F.3d at 407.²²

Even if Section 230 was not a complete bar to Plaintiffs’ c. 93A claims (and it is), the claims fail because they are far too speculative to be plausible, as the district court held. Add. 25. Under c. 93A, Plaintiffs must show that they were “injured by” the “use or employment” of “unfair or deceptive acts or practices in the conduct

²² Plaintiffs rely on two district court decisions that are readily distinguishable, *see* App. Br. at 43-44, as both allowed c. 93A claims based on online content created or developed by websites rather than third parties. In *Small Justice, LLC v. Xcentric Ventures LLC*, No. 13-cv-11701, 2014 WL 1214828 (D. Mass. Mar. 24, 2014), the court held that a lawyer’s claims against a website (Ripoffreport.com) for refusing to take down negative reviews about him were barred by Section 230, noting that plaintiffs “cannot attempt an end run around the CDA through the use of c. 93A.” *Id.* at *8. The court declined to dismiss a separate claim in which the lawyer challenged a program offered and promoted by the website ostensibly to “restore” businesses’ reputations for a fee. Similarly, in *Moving & Storage, Inc. v. Panayotov*, No. 12-12262-GAO, 2014 WL 949830 (D. Mass. Mar. 12, 2014), the court refused to dismiss claims against a moving company based on representations it made on its website that customer reviews were objective, when the plaintiff (a competing moving company) alleged that, contrary to those representations, the website omitted all favorable reviews about competitors.

of any trade or commerce.” G.L. c. 93A, §§ 2, 9. “[A] plaintiff must demonstrate that she suffered a separate, identifiable harm *arising from the violation itself that bears a causal connection to the unfair or deceptive act.*” *Ferreira v. Sterling Jewelers, Inc.*, No. 13-13165-DPW, 2015 WL 5437086, at *3 (D. Mass. Sept. 15, 2015) (emphasis added); *see Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 503, 984 N.E.2d 737, 745 (2013) (requiring a “distinct injury or harm that arises from the claimed unfair or deceptive act itself”). Put differently, “a causal connection between a deceptive act and a loss to the consumer is an essential predicate for recovery.” *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 791, 840 N.E.2d 526, 528 (2006); *see also RSA Media, Inc. v. AK Media Group, Inc.*, 260 F.3d 10, 16 (1st Cir. 2001) (“causation remains a necessary element of a successful 93A claim”); *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 81 (1st Cir. 2013) (upholding dismissal of c. 93A claim where “the allegation of causation [was] unembellished by any supporting facts”).

Plaintiffs’ theory for their c. 93A claims is based on a number of speculative allegations, one piled atop another. They contend that (a) because Backpage.com has worked with and made representations to law enforcement and groups such as NCMEC to combat sex trafficking—actions that Plaintiffs allege are a ruse; (b) this “successfully deflected public scrutiny”; (c) thereby “lowering the supply-side transaction costs involved in sex trafficking online,” which (d) allowed the “online

sex market” to grow; and (e) this “expanded market ensnared the Plaintiffs”; (f) whereas, otherwise, the website might have been shut down altogether; and (g) Plaintiffs would have never been victimized by the pimps who recruited and abused them. *See* App. Br. at 55-57.²³ This “hypothesized chain of events falls far short of chapter 93A’s causation requirement.” *Ray v. Ropes & Gray LLP*, 961 F. Supp. 2d 344, 361 (D. Mass. 2013); *see also Hershenow*, 445 Mass. at 802, 804, 840 N.E.2d at 536, 537 (when impact on plaintiff of alleged unfair or deceptive act is “speculative and uncertain,” the required “causal connection” is absent); *Smith v. Jenkins*, 732 F.3d 51, 71-72 (1st Cir. 2013) (vacating c. 93A judgment where plaintiff’s claim was based on speculation without evidence). As the district court correctly held, Plaintiffs’ supposed chain of causation does not “fall ... within the penumbra of reasonabl[e] foreseeability,” “as a matter of law.” App. 25.²⁴

²³ Plaintiffs’ Complaint asserts similar attenuated causation, *i.e.*, that Backpage.com has “avoided, minimized and delayed the intense publicly [sic] media, legislative, and law enforcement scrutiny that reasonably could have been expected to interfere with, if not terminate, its efforts to grow market share,” and, as a result, Plaintiffs were “sold for sex, trafficked [and] raped ...” App. 58, ¶ 126.

²⁴ Not only do Plaintiffs fail to support their c. 93A claim with a plausible theory of causation, they do not even identify the alleged misrepresentations on which the claims purportedly are based. Plaintiffs merely assert that there were “numerous” undescribed “interactions” between Backpage.com and unidentified “state and federal law enforcement agencies beginning in or about 2010,” in which Backpage.com allegedly provided “assurances” that it would use “various means” to detect trafficking. App. 25, ¶ 32. These hazy allegations fail to satisfy Fed. R. Civ. P. 8, much less comply with Rule 9(b)’s requirement of pleading with particularity. *Santos v. SANYO Mfg. Corp.*, No. CIV.A. 12-11452-RGS, 2013 WL

Plaintiffs urge the Court to rely on “[c]ommon economic sense’ to test the plausibility of causation pleadings ... where market forces are the media of injury.” App. Br. at 56. Whatever that might mean, the cases they cite concern competitor standing, *i.e.*, claims by a business that it was injured by unfair trade practices of a competitor. *See Katin v. Nat’l Real Estate Info. Servs., Inc.*, No. 07-10882-DPW, 2009 WL 929554, at *5-7, *10 (D. Mass. Mar. 31, 2009) (lawyers who sued real estate settlement service providers for unauthorized practice of law sufficiently alleged lost business under competitor standing doctrine); *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2015 WL 314131, at *4 (D. Mass. Jan. 26, 2015) (unfair competition claim by taxi companies against Uber). Such claims have nothing to do with this case, for the simple reason that Plaintiffs do not allege they were competitors of Backpage.com.²⁵

Nor have Plaintiffs alleged that *they* were misled or injured as consumers in a transaction with the website, which is a necessary predicate for c. 93A claims that are not between competitors. The statute “‘is intended to protect against unfair and deceptive practices in trade, not unfair practices in general.’” *Swenson v.*

1868268, at *6 (D. Mass. May 3, 2013) (“Where a Chapter 93A action sounds in fraud, a plaintiff must plead such fraud with particularity.”).

²⁵ Plaintiffs also advert to *Mullins v. Pine Manor College*, 389 Mass. 47 (1983), which is not a case concerning c. 93A, but held that a college was liable for failing to prevent the rape of a student where the risks of such attacks were foreseeable and the college owed a “distinctive relationship” to protect students. 389 Mass. at 56. Obviously, a website has no such relationship with third-party users.

Yellow Transp., Inc., 317 F. Supp. 2d 51, 56-57 (D. Mass. 2004) (dismissing c. 93A claim arising from auto accident, where plaintiffs contended the defendant trucking company’s policies encouraged speeding (quoting *L.B. Corp. v. Schweitzer-Mauduit Int’l, Inc.*, 121 F. Supp. 2d 147, 152 (D. Mass. 2000))).²⁶

V. PLAINTIFFS’ STATE-LAW RIGHT-OF-PUBLICITY CLAIMS ARE BARRED BY SECTION 230, AND ALSO FAIL TO STATE A CLAIM.

Plaintiffs also sought damages for the “unauthorized use of pictures of a person” under Massachusetts law, G.L. c. 214, § 3A, and, in the case of Doe 1, the Rhode Island privacy statute, R.I. St. § 9-1-28. These claims also fall within Section 230 immunity and are not viable in any event.

A right-of-publicity claim is not an “intellectual property claim” as the phrase is used in Section 230(e)(2). “Intellectual property” is a “category of intangible rights protecting commercially valuable products of the human intellect.” *Black’s Law Dictionary* (10th ed. 2014). As the court below properly observed, “a person’s image is not a ‘product of the human intellect.’” Add. 29 n.13. Rather, the right of publicity “flows from the right to privacy,” *Alvarez*

²⁶ In *L.B. Corp.*, the court explained that “[a]part from claims of unfair competition, a plaintiff must allege some sort of transaction between the parties for liability to attach This is the ‘common thread’ of 93A cases. Plaintiff’s position, if accepted, would run the danger of converting any tort claim against a business into a Chapter 93A claim, because all torts encompass ‘acts or practices’ that could arguably be considered ‘unfair.’ [T]his position tests the limits of common sense.” *Id.* (internal citations and quotation marks omitted).

Guedes v. Marcano Martinez, 131 F. Supp. 2d 272, 278 (D.P.R. 2001); *see also Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78 (Ga. 1905) (noting that right of publicity is one of the four privacy torts, protecting “the right of the individual to be let alone”). Courts have routinely relied on CDA immunity to dismiss other invasion-of-privacy claims. *See, e.g., Dowbenko v. Google Inc.*, 991 F. Supp. 2d 1219, 1220 (S.D. Fla. 2013); *Gavra v. Google Inc.*, No. 5:12-CV-06547-PSG, 2013 WL 3788241 (N.D. Cal. July 17, 2013).²⁷

Even putting aside Section 230 immunity, Plaintiffs cannot assert a claim under G.L. c. 214, § 3A, because they do not allege (and cannot allege) that Backpage.com appropriated their likenesses and used them for *its own* commercial benefit. The Massachusetts right of publicity statute protects “the interest in not having the commercial value of one’s name, portrait or picture appropriated to the benefit of another.” *Tropeano v. Atl. Monthly Co.*, 379 Mass. 745, 749, 400 N.E.2d 847, 850 (1980). As the Supreme Judicial Court has held: “It is only when the publicity is given for the purpose of appropriating *to the defendant’s*

²⁷ Even if the right of publicity was deemed an “intellectual property” claim, the CDA’s intellectual property exception, properly construed, applies only to federal-law intellectual property claims. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007) (noting the wide variety of state-law claims that could come under the rubric of “intellectual property,” thereby sowing confusion as to the scope of the exemption). *But see Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008) (relying on dicta from *Lycos*, 478 F.3d 413, in which the Court affirmed dismissal of a state-law trademark dilution claim on other grounds).

benefit the commercial or other values associated with the name or likeness’ that this cause of action can exist.” *Id.* (quoting *Nelson v. Maine Times*, 373 A.2d 1221 (Me. 1977)) (emphasis added). ““The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.”” *Id.* (quoting *Nelson*, 373 A.2d at 1224); *see also Restatement (Second) of Torts*, § 652C, comment d.

Here, Plaintiffs’ right of publicity count is based solely on the premise that ads posted on Backpage.com by the pimps (or at their direction) “displayed photographs” of the Plaintiffs. App. 60, ¶ 133. The Complaint contains no plausible allegations that Backpage.com used plaintiffs’ images for *its own* benefit. *Tropeano*, 379 Mass. at 749, 400 N.E.2d at 850. A publisher is not liable for commercial misappropriation merely because a third-party advertisement appeared in its publication. *Cabaniss v. Hipsley*, 114 Ga. App. 367, 381-82 (1966) (dismissing right of publicity claim against magazine publisher because appropriation of plaintiff’s photograph inured to the benefit of advertiser, not the magazine itself); *see also Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) (no violation of right of publicity by Amazon’s display of book bearing plaintiff’s photograph on cover); *Gauck v. Karamian*, 805 F. Supp. 2d 495, 502-03 (W.D. Tenn. 2011) (rejecting right of publicity claim where website published

third-party posts containing plaintiff's photograph but did not use photo to advertise the website).

Plaintiffs cannot save their claim by arguing that Backpage.com's use of photographs was "an integral part of [Backpage's] business model" to "encourage, support, and materially contribute to the use *by pimps and traffickers* ... of photographic images to enhance the effectiveness" of the pimps' ads. App. 59, ¶ 130 (emphasis added). The allegation that photographs generally are an "integral part" of Backpage.com's "business model" is not the same as to say that the Plaintiffs' individual photos were used by Backpage.com "for purposes of publicity" or to appropriate the commercial or other values associated with plaintiffs to Backpage's benefit.²⁸ They were not. Plaintiffs have cited no case holding that a website, newspaper, or other media entity can be held liable for commercial misappropriation merely for "support[ing]" or "encourag[ing]" third parties to "place[]" advertisements containing pictures.

Doe 1's claim based on R.I. St. § 9-1-28 fails for the same reasons. Like the Massachusetts statute, section 28 applies only when a defendant appropriates a person's name or likeness "for commercial purposes," meaning for the defendant's own "advertising purposes." *Mendonsa v. Time Inc.*, 678 F. Supp. 967, 970 (D.R.I. 1988); *see also Herink v. Harper & Row Publishers, Inc.*, 607 F. Supp. 657, 659

²⁸ There is no allegation that Backpage.com charges more for ads with photos than for ads without; it does not.

(S.D.N.Y. 1985) (under New York statute, on which § 9-1-28 was based, “[t]he advertising purposes prong ... is not violated where the use of a plaintiff’s name is not designed primarily to solicit purchasers for *defendant’s* products” (emphasis added)). Again, Backpage.com did not use Doe 1’s photo to advertise Backpage.com (or for any purpose).

VI. THE DISTRICT COURT PROPERLY DISMISSED DOE 3’S COPYRIGHT INFRINGEMENT CLAIM.

Finally, Doe 3 asserts that Backpage.com should be held liable for copyright infringement because her traffickers included a photograph she took of herself in an advertisement that they uploaded to Backpage.com. App. 61, ¶ 142 (“Jane Doe No. 3 provided certain photographs that she took of herself ... which the traffickers then included in the Backpage.com advertisements”). Any such claim lies against Doe 3’s traffickers, not against Backpage.com.

The district court properly dismissed Doe 3’s copyright claim for failure to plead any redressable damages. Add. 32-33. Doe 3 did not register the copyright in her photograph until December 18, 2014, after the alleged infringement occurred. Add. 31; App. 61, ¶ 142 & 64, Ex. A. As a result, she is not entitled to the remedies of statutory damages or attorneys’ fees. 17 U.S.C. § 412. Rather, she is limited to “the actual damages suffered by ... her as a result of the infringement,

and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” 17 U.S.C. § 504.

As to actual damages suffered, Doe 3 makes no allegation that she suffered a financial loss, in the form of licensing revenue or otherwise, as a result of the infringement. Accordingly, she cannot recover. *See Dash v. Mayweather*, 731 F.3d 303, 313 (4th Cir. 2013) (“a copyright holder asserting [actual] damages ‘must prove the existence of a causal connection between the alleged infringement and some loss of anticipated revenue’”) (quoting *Thoroughbred Software Int’l, Inc. v. Dice Corp.*, 488 F.3d 352, 358 (6th Cir. 2007)).

As to Defendants’ profits attributable to the infringement, Doe 3 makes only the general allegation that “[t]he Backpage Defendants derive a financial benefit directly attributable to the public display of such photographs by virtue of the payment of fees ... to Backpage.com.” App. 60-61, ¶ 139; Add. 32. The allegation that the inclusion of photographs on the website generally enhances the financial value of the site does not come close to demonstrating that the inclusion of one specific photo on the website—Doe’s “selfie”—can be causally linked to any actual profits received in the operation of Backpage.com’s business. Such profits are too speculative to allow for a recovery, *see Goldenberg v. Doe*, 731 F. Supp. 1155, 1159-60 (E.D.N.Y. 1990) (denying recovery for pirated videotape because actual damages were “speculative” and “tenuous”), and Plaintiffs cannot

overcome the 12(b)(6) threshold based on mere speculation, *Twombly*, 550 U.S. at 555.²⁹ See, e.g., *Davis v. The Gap, Inc.*, 246 F.3d 152, 159 (2d Cir. 2001) (affirming summary judgment because plaintiff was required to allege a “causal connection between the infringement and the defendant’s profits,” and “the overall revenues of The Gap Inc. had no reasonable relationship” to allegedly infringing use of plaintiff’s eyeglass design in ad); see also *Dash*, 731 F.3d at 333 (affirming summary judgment dismissing all claims for actual damages and profits for failure of proof). Put simply, the threadbare and conclusory damages allegations of the Complaint are not enough to “nudge [Doe 3’s] claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

In their appellate brief, Plaintiffs protest that the district court overlooked the general prayer for injunctive relief tucked into the conclusion of their Complaint. App. 62. However, a plaintiff is not automatically entitled to injunctive relief on the finding of a copyright violation. *Nimmer on Copyright* (Dec. 2014) § 14.06[B][1][a] (“injunctive relief ordinarily is not granted absent any threat of continuing or additional infringements” (citing *Broadcast Music, Inc. v. Arlos*, 682

²⁹ The doctrine of “*de minimis non curat lex*” also cautions against allowing such minor and speculative claims to proceed. *Hessel v. O’Hearn*, 977 F.2d 299, 303 (7th Cir. 1992) (a case must be dismissed under the *de minimis* doctrine, in order to prevent devoting “substantial resources” to “determining whether there was any loss at all”). The doctrine has been applied in the copyright context. See, e.g., *Knickerbocker Toy Co., Inc. v. Azrak-Hamway Int’l, Inc.*, 668 F.2d 699, 703 (2d Cir. 1982).

F. Supp. 1, 3 (D. Mass. 1986)); *Nimmer*, § 14.06[B][1][b][i] (“injunction is not the automatic consequence of infringement” (quoting *New Era Publications Int’l, ApS v. Henry Holt & Co.*, 884 F.2d 659, 661 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990))). Rather, the plaintiff must have alleged that continued infringement is likely to occur. *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 976 (9th Cir.1981), *rev’d on other grounds*, 464 U.S. 417 (1984). Doe 3 has not alleged that her photo continues to be displayed on the Backpage.com site, and there is no reasonable basis for apprehension that it will appear there in the future. “A single past instance of exposure to illegal conduct is insufficient to establish standing for injunctive relief if there are no ‘continuing, present adverse effects.’” *Newdow v. Eagen*, 309 F. Supp. 2d 29 (D.D.C. 2004) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

In addition to inadequately alleging redressable damages, the Complaint fails plausibly to plead liability under any of the three available copyright infringement theories: direct infringement, contributory infringement, or vicarious infringement.³⁰ Doe 3 has not stated a claim for direct copyright infringement because she admits that third parties—not Backpage.com—uploaded her photograph to Backpage.com. App. 61, ¶ 142. “[A] person [must] engage in

³⁰ This Court is “not limited by the district court’s reasoning, and ... ‘may affirm an order of dismissal on any basis made apparent by the record.’” *Lycos*, 478 F.3d at 418 (quoting *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir. 2006)).

volitional conduct—specifically, the act constituting infringement—to become a direct infringer.” *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) (citing *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal.1995)) (website hosting online real estate listings for brokers not liable for direct infringement by users who uploaded infringing photos); *Holy Transfig. Monastery, Inc. v. Gregory*, 689 F.3d 29, 39 (1st Cir. 2012) (“copying of constituent elements of the work that are original” is element of direct infringement claim). Where a plaintiff fails to show that an online provider itself “uploaded or downloaded the files, or directly caused such uploading or downloading to occur,” it is not liable for direct infringement. *Sega Enterprises, Ltd. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (no direct infringement where proprietor of online bulletin board system knew infringing activity was occurring and solicited others to upload infringing content).³¹

³¹ See also *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 622 (4th Cir. 2001) (ISP facilitating access to newsgroups not liable for direct infringement by users who uploaded infringing images); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008) (cable television company not liable for direct infringement by allowing customers to make copies of programs using its digital video recorder); *Sarvis v. Polyvore, Inc.*, No. 12-12233-NMG, 2013 WL 4056208, at *8 (D. Mass. Aug. 9, 2013) (recommending dismissal of direct infringement claim on ground that plaintiff failed plausibly to allege volitional copying, where artworks were posted to defendant’s website); *Williams v. Scribd, Inc.*, No. 09cv1836-LAB, 2010 WL 10090006 (S.D. Cal. June 23, 2010) (granting motion to dismiss direct infringement claim premised on user’s uploading of book excerpts to website); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006) (holding on motion to dismiss: “It is clear that Google’s

Relying on *Holy Transfig. Monastery, Inc.*, 689 F.3d at 39, Doe 3 contended below that Backpage.com can be held liable for direct infringement because it performed “supervisory acts” which ensured that her photograph was “available on a server and posted to a website.” Dkt No. 25, at 28. But in that case, the poster of the copyrighted material was an agent of the defendant, and the court’s ruling was based on agency principles. *Id.* at 56. Plaintiffs do not allege that “the traffickers” who “included” Doe 3’s photographs “in the Backpage.com advertisements” did so as agents of Backpage.com. App. 61, ¶ 142. Nor do they make any other allegations to satisfy the required element of volitional “copying” of Doe 3’s photograph.

As for vicarious liability, Doe 3 makes the conclusory allegation that Backpage.com has the “right and ability to supervise the infringing activity” and “a direct financial interest” in it. *See, e.g.*, App. 60-61, ¶¶ 139, 140; App. 62, ¶ 146. Yet, to survive a motion to dismiss, she must allege facts to support both assertions, and the Complaint is bereft of them. *Perfect 10, Inc. v. Visa Intern. Service Ass’n*, 494 F.3d 788, 803 (9th Cir. 2007) (affirming dismissal of vicarious liability claim against credit card companies for processing payments for infringing images on websites); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1093-1094 (automatic archiving of USENET postings and excerpting of websites in its results to users’ search queries do not include the necessary volitional element to constitute direct copyright infringement”).

(C.D. Cal. 2001) (ability to remove or block access to materials posted on website or voluntary monitoring of website for infringement does not mean website has right and ability to supervise infringing conduct); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (“direct financial benefit” requires defendant’s revenue be tied “directly to the infringing activity involving [its] websites”).

The claim for contributory infringement fares no better, because Doe 3 again offers no more than a conclusory statement that Backpage.com knew the photo was infringing or that it materially contributed to the infringement. App. 60-61, ¶ 139; 62, ¶ 145; see *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068 (9th Cir. 2013) (affirming dismissal where plaintiff alleged wireless carriers did nothing to stop users from re-sharing content; “conclusory allegations that the Carriers had the required knowledge of infringement are plainly insufficient”). The law requires “knowledge of specific and identifiable infringements,” *i.e.*, “actual knowledge that the material is infringing.” *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19, 20 (2d Cir. 2011); see also *UMG Recordings v. Shelter Capital Partners*, 718 F.3d 1006, 1022 (9th Cir. 2013) (“Merely hosting a category of copyrightable content...with the general knowledge that one’s services could be used to share infringing material, is insufficient to meet the actual knowledge requirement[.]”). The Complaint does not allege that anyone notified

Backpage.com, or that the web site had any other source of knowledge, that the posting constituted copyright infringement. *See* App. 54, ¶ 105 (alleging Doe 3's parents requested removal of ad for other reasons).

CONCLUSION

For the foregoing reasons, the District Court's Order and Judgment of May 15, 2015, should be affirmed.

Respectfully submitted,

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS, LLC, f/k/a Village Voice Media Holdings, LLC, and NEW TIMES MEDIA, LLC

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Dated: November 2, 2015

Certificate of Service

I hereby certify that on November 2, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties and counsel of record to the parties and prospective *amici* are registered as ECF Filers and that they will be served by the CM/ECF system:

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NO. 15-1724

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JANE DOE NO. 1, JANE DOE NO. 2, JANE DOE NO. 3,
SAM LOE, and SARA LOE,

Plaintiffs-Appellants,

v.

BACKPAGE.COM, LLC,
CAMARILLO HOLDINGS, LLC f/k/a Village Voice Media Holding, LLC,
and NEW TIMES MEDIA, LLC,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

**ADDENDUM TO APPELLEES' BRIEF
REQUIRED BY FIRST CIRCUIT LOCAL RULE 28.0**

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 14-13870-RGS

JANE DOE NO. 1, a minor child,
by her parent and next friend MARY ROE;
JANE DOE NO. 2;
and JANE DOE NO. 3, a minor child,
by her parents and next friends SAM LOE AND SARA LOE

v.

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS, LLC
(f/k/a VILLAGE VOICE MEDIA HOLDINGS, LLC),
and NEW TIMES MEDIA, LLC

MEMORANDUM AND ORDER
ON DEFENDANTS' MOTION TO DISMISS

May 15, 2015

STEARNS, D.J.

In this litigation, two important public policies collide head on – the suppression of child sex trafficking and the promotion of a free and open Internet. Plaintiffs Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 (the Doe plaintiffs) seek redress in the form of money damages from defendants Backpage.com, LLC; Camarillo Holdings, LLC (f/k/a Village Voice Media Holdings, LLC); and New Times Media, LLC. The Doe plaintiffs allege that they were molested and repeatedly raped after being advertised as sexual wares on defendants' website, backpage.com (Backpage). Defendants

contend that most of the Doe plaintiffs' claims are preempted by the Communications Decency Act (CDA), 47 U.S.C. § 230, and that the remaining intellectual property claims (unauthorized use of a person's image and copyright infringement) fail to state claims upon which relief may be granted.

BACKGROUND¹

Backpage is an online classifieds forum that groups goods and services advertised for sale by geographic location and subject matter. At issue in this case is the forum's adult entertainment section and its subcategory offering the services of "escorts." The Doe plaintiffs allege that in the seamy world of adult entertainment, this section of Backpage is a notorious haven for promoters of the illicit sex trade, and even more troubling, the trafficking of children for sex. The Doe plaintiffs contend that Backpage's business model depends in large part on the revenues it earns from its involvement in the trafficking of children. To this end, Backpage is alleged to have structured its adult entertainment section to lightly camouflage its illegal content to divert the attention of law enforcement. In support, the Second Amended Complaint (SAC) marshals the following facts:

¹ On a motion to dismiss, the court accepts as true the well-pleaded facts of a complaint.

- Backpage charges a fee for posting advertisements in the adult entertainment section (and not in most other licit areas of the website). The fee for the “adult” ads ranges from \$12.00 to \$17.00 per posting. Backpage charges an additional fee for each reposting of an adult ad, and for featuring the ad (with a selection of text and photos) prominently on the right side of the website.
- Backpage does not require posters in the adult entertainment section to verify their identity. The website also does not require that the poster use a registered credit card linked with a name and address, and accepts anonymous payments in the form of prepaid credit cards, or pseudo-currencies, such as Bitcoin.
- Backpage does not require a poster to verify the age of an “escort” whose services are offered on the website. Although the website will not accept an ad when the poster enters an age of less than 18, it will permit the poster to immediately re-enter an assumed age.
- Backpage does not require any verification of the telephone numbers posted in its adult entertainment section. It also permits users to enter telephone numbers using any combination of character strokes rather than in the more traceable (by law enforcement) nominal numbers required in other sections of the website (such as “twoO13fourFive678niNe” rather than “201-345-6789”). Backpage does not require posters in the adult entertainment section to use their actual email addresses, but provides an email forwarding service that protects a poster’s anonymity.
- Backpage strips out metadata associated with photographs (such as date, time, geolocation and other identifying information) before publishing the photographs on its website. This prevents law enforcement from effectively searching for repostings of the same photograph.
- While Backpage bars the use of certain words and phrases through its “automatic filtering” system, such as “barely legal,” “high school,” “innocent,” “sex,” “blow job,” “hand job,” “schoolgirl,” “teen”, and “teenage,” it readily permits the use of suggestive

circumlocutions like “girl,” “young,” “underage,” and “fresh.” It also does not filter out easily recognizable abbreviations of forbidden words, such as “brly legal” or “high schl.”

The Doe plaintiffs further allege that defendants have waged a phony war against sex traffickers to divert attention from their illegal activities. While Backpage claims that its adult entertainment advertisements are screened by trained moderators, it has refused to install readily available technology that would far more accurately detect the trafficking of children. According to the Second Amended Complaint, Backpage’s highly touted claim to make regular referrals to the National Center of Missing & Exploited Children has led to few instances of identification or rescue. Although Backpage will on request remove an offending ad in the geographic location in which it is posted, it does nothing to report or remove the identical ad posted in other geographical areas, or other ads involving the same child. The overall effect, the Doe plaintiffs contend, is to create a Potemkin-like “façade of concern” that obscures the shady source of its filthy lucre. SAC ¶ 34.

Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 aver that they have been each personally harmed by defendants’ unsavory business practices. Jane Doe No. 1 was first trafficked by pimps on Backpage after running away from home in February of 2012, when she was 15 years old. She was again

sold on Backpage in March of 2013, after she ran away a second time. Between June of 2013 and September 10, 2013, her “services” were advertised on Backpage each and every day. As a result of the ads, she engaged in 10 to 12 sex transactions daily with adult men in Massachusetts and Rhode Island. Her pimp moved her from town to town every two days to avoid detection. Jane Doe No. 1 appeared on some 300 ads on Backpage and was raped over 1,000 times.

Backpage listed each ad featuring Jane Doe No. 1 as an offer of “escort” services, a common euphemism for prostitution. The Jane Doe No. 1 ads included known signifiers for child prostitution such as “young,” “girl,” “fresh,” “tiny,” “roses,” and “party.” Jane Doe No. 1’s pimp provided a prepaid mobile phone and a prepaid credit card to conceal Jane Doe No. 1’s identity when Jane Doe No. 1 placed ads on Backpage. When Jane Doe No. 1 attempted to enter her true age (which was under 18) during the purchase of an ad, Backpage would instruct her to enter her age as 18 or older. Photographs of Jane Doe No. 1 (with her facial features obscured, but at least on one occasion displaying a unique tattoo) accompanied all of her ads.

Jane Doe No. 2 was trafficked on Backpage by her pimp during various periods between 2010 and 2012 at different locations in Massachusetts. She first appeared on Backpage when she was 15 years old, after she had

absconded from a residential program. Ads featuring Jane Doe No. 2 were posted either by her pimp or an older woman who worked with him (his “bottom”). The ads would appear on Backpage on average six times a day. Jane Doe No. 2 was given a prepaid mobile phone to answer calls from would-be customers generated by the Backpage ads. As a result of the ads, she was coerced into 5-15 sex transactions every day. Like the ads of Jane Doe No. 1, those of Jane Doe No. 2 featured her photograph. The ads were placed using a prepaid credit card. Altogether, Jane Doe No. 2 was raped over 900 times while in the thrall of her pimp.

Jane Doe No. 3 was trafficked on Backpage in December of 2013 by her pimp and one or more of his associates. The Backpage solicitations for the underage Jane Doe No. 3 described her as “new,” “sweet,” and “playful.” As with the other Jane Does, the ads were paid for with a prepaid credit card. Jane Doe No. 3 was also given a mobile phone to take calls and texts from customers. She was taken to a hotel in Foxborough, Massachusetts, where she was raped by men who responded to the ads. Photos of Jane Doe No. 3,

including one that she had taken of herself, appeared with the ads on Backpage.²

The Doe plaintiffs brought this lawsuit in October of 2014. In their Second Amended Complaint, they allege that defendants' business practices violate the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C. § 1595 (Count I); the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50 (Count II); and constitute unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 9 (Count III). The Doe plaintiffs also bring claims for unauthorized use of pictures of a person, Mass. Gen. Laws. ch. 214, § 3A and R.I. Gen. Laws § 9-1-28 (Count IV), and copyright infringement (specific to the photograph taken by Jane Doe No. 3 of herself) (Count V). In January of 2015, defendants moved to dismiss the Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The parties and several amici curiae³ filed helpful briefs. The court heard oral argument on April 15, 2015.

² At some point, Jane Doe No. 3's parents became aware of the ads featuring their daughter on Backpage and demanded that they be taken down. A week later, the illicit ads still appeared on the website.

³ The City and County of San Francisco, the City of Atlanta, the City and County of Denver, the City of Houston, the City of Philadelphia, and the City of Portland (Oregon) (collectively the local government amici) and the

DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, the factual allegations of a complaint must “possess enough heft” to set forth “a plausible entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 559 (2007); *see also Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008). As the Supreme Court has emphasized, this standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted).

Defendants rely primarily on the immunity provided by Congress in enacting 47 U.S.C. § 230, 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,” *id.* § 230(c)(1), and the concomitant preemption of “cause[s] of action . . . brought

Commonwealth of Massachusetts submitted two amicus briefs in support of plaintiffs. The Electronic Frontier Foundation, the Center for Democracy & Technology, and Professor Eric Goldman (of Santa Clara University School of Law) (collectively EFF) submitted an amicus brief in support of defendants.

. . . under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).⁴ There is no dispute that defendants are, as the operators of Backpage, providers of an interactive computer service. Defendants contend that because the Doe plaintiffs allege they were harmed by the contents of postings that defendants had no part in creating, the claims fall squarely within Congress’s exemption of interactive computer service providers from liability for third-party Internet content.

Congress enacted section 230 in 1996, while the Internet was still in its infancy. Congress explained the purposes of the law in five pertinent findings:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

⁴ The Doe plaintiffs argue that the court should first assess the plausibility and sufficiency of the factual allegations relevant to each claim before reaching the immunity issue. However, the entitlement to immunity under section 230 is not only an affirmative defense, but also the right to be immune from being sued. *See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *accord Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (Section 230 “can [] support a motion to dismiss if the statute’s barrier to suit is evident from the face of the complaint.”); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (same). As the Supreme Court counsels, a claim of entitlement to immunity should be “resolv[ed] . . . at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a). Consistent with these findings, section 230 reflects the “policy of the United States”

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Id. § 230(b).

The Doe plaintiffs argue that because the Internet has matured since the enactment of section 230, the principal policy consideration that animated Congress (promoting the growth of the Internet by insulating it from regulatory restrictions and lawsuits) no longer has the assuasive force that it may once have had. They cite the characterization of section 230's immunity guarantee as an affirmative defense in cases like *Klayman* and *Ricci* as evidence that the courts have been whittling back the scope of section 230 immunity as the Internet has shed its training wheels. *See Klayman*, 753 F.3d at 1357; *Ricci*, 781 F.3d at 28. The argument, however, does not bear scrutiny. Both the *Klayman* and *Ricci* courts, whatever the label they used to describe section 230's effect, found the interactive computer service providers at issue to be immune from any imputation of liability for third-party speech. *Klayman*, 753 F.3d at 1357-1359; *Ricci*, 781 F.3d at 27-28. Moreover, Congress, far from lowering the immunity bar, ratcheted it up in

2010 by expanding the scope of section 230 immunity to preempt the enforcement of inconsistent foreign judgments. *See* 28 U.S.C. § 4102(c)(1).⁵

The local government amici attempt to repackage Backpage as an “information content provider,” an entity that section 230 defines as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). Their ultimate point is that information content providers are excluded from the immunity granted by section 230. The amici contend that Backpage generates content by: (1) posting illegal materials in sponsored ads; (2) stripping metadata from posted photos; (3) coaching the crafting of ads by allowing misspellings of suggestive terms; and (4) designing the escorts section of the website in such a way as to signal to readers that sex with children is sold here. The amici argument relies heavily on *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008). In that case, the Ninth

⁵ Section 4102(c)(1) reads as follows: “Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230) unless the domestic court determines that the judgment would be consistent with section 230 if the information that is the subject of such judgment had been provided in the United States.”

Circuit determined Roommates.com, a roommate matching service, to be an “information content provider” shorn of section 230 immunity because it elicited information about personal characteristics of users that is forbidden by the Fair Housing Act. *Id.* at 1169-1170. The Court reasoned that

Roommate’s connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children. Roommate selected the criteria used to hide listings, and Councils allege that the act of hiding certain listings is itself unlawful under the Fair Housing Act, which prohibits brokers from steering clients in accordance with discriminatory preferences.

Id.

To get to its result, the Court in *Roommates* attempted to draw a line between active control of the content of a web posting and the provision of a neutral interactive service that simply replicates offending third-party matter.⁶

If an individual uses an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any alleged unlawfulness in the individual’s conduct; providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception. . . . Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria might help some users exclude email from

⁶ *Roommates* is one of the few sentinels denying section 230 immunity left standing among some 300 cases (as of 2012) that have decided the issue. See *Hill v. StubHub, Inc.*, 219 N.C. App. 227, 239 (2012).

other users of a particular race or sex. However, that website would be immune, so long as it does not **require** the use of discriminatory criteria. A website operator who edits user-created content – such as by correcting spelling, removing obscenity or trimming for length – retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.

Id. at 1169 (bold emphasis added). This latter passage lays out the distinction that afforded immunity to craigslist.com, an online classifieds forum that also published discriminatory housing ads. “Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, craigslist does not offer a lower price to people who include discriminatory statements in their postings.” *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-672 (7th Cir. 2008).

Singly or in the aggregate, the allegedly sordid practices of Backpage identified by amici amount to neither affirmative participation in an illegal venture nor active web content creation. Nothing in the escorts section of Backpage requires users to offer or search for commercial sex with children. The existence of an escorts section in a classified ad service, whatever its social merits, is not illegal. The creation of sponsored ads with excerpts taken from the original posts reflects the illegality (or legality) of the original posts and nothing more. Similarly, the automatic generation of navigational

path names that identify the ads as falling within the “escorts” category is not content creation. *See Seldon v. Magedson*, 2014 WL 1456316, at *5-6 (D. Ariz. April 15, 2014). The stripping of metadata from photographs is a standard practice among Internet service providers. Hosting anonymous users and accepting payments from anonymous sources in Bitcoins, peppercorns, or whatever, might have been made illegal by Congress, but it was not. Backpage’s passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider.

Although the Doe plaintiffs recognize that defendants did not author the content of the offending ads, *see* Opp’n at 16 (“Plaintiffs’ trafficking claims do not seek to ‘impute’ to [d]efendants any advertisements created by others”), they challenge the breadth of the immunity sought by defendants. Count I alleges a violation of a section of the TVPRA, a federal statute that criminalizes sex trafficking. As the Doe plaintiffs note, section 230 expressly states that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or *any other Federal criminal statute.*” 47 U.S.C. § 230(e)(1) (emphasis added). Plaintiffs contend that defendants’ business practices, “even if the

advertisements had never been posted,” Opp’n at 16, are sufficient to make out a violation of the TVPRA. Furthermore, according to the Doe plaintiffs, section 230 only immunizes “action voluntarily taken in *good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A) (emphasis added). The Doe plaintiffs argue that their claims are of a different sort – they allege that defendants have intentionally and in bad faith hidden behind ineffectual counter-trafficking measures to deflect the scrutiny of law enforcement and social services agencies. Count II alleges a violation of the MATA, the Massachusetts analog to the TVPRA. The Doe plaintiffs argue that, because claims under the TVPRA are exempt from the scope of section 230’s immunity, the claim under MATA does not depend on “*inconsistent state law*” preempted by section 230. Count III, which presses a claim of unfair and deceptive businesses practices under Massachusetts law, is alleged to arise not from the posted ads and their contents, but from the architecture of Backpage itself, which the Doe plaintiffs contend is constructed to conceal illegal activity from law enforcement. Finally, the Doe plaintiffs rely on Congress’s stricture that section 230 “shall not be construed to limit or expand any law pertaining to

intellectual property,” *id.* § 230(e)(2), as preserving the intellectual property claims (unauthorized publicity and copyright infringement).⁷ I will examine the viability of each count in turn.

Civil Remedy under the TVPRA

18 U.S.C. § 1595 provides victims of trafficking the right to bring a private civil action for restitution against “whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter.” The parties dispute whether a civil action authorized by a criminal statute can be construed as “enforcement of . . . a Federal criminal statute” exempt from the immunity provided by section 230(e)(1).⁸

⁷ Defendants do not rely on section 230 immunity with respect to the copyright infringement claim, but contend, to be discussed *infra*, that it should be dismissed on other grounds.

⁸ The Doe plaintiffs, citing *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), also contend that their TVPRA claim falls outside of the protections of section 230 immunity because section 1595 imposes a duty of care on defendants wholly independent of their role as publishers of speech. In *Barnes*, the Ninth Circuit barred a negligent undertaking claim under Oregon law that sought to hold Yahoo liable for an alleged failure to remove indecent profiles of a plaintiff that had been posted by her ex-boyfriend because the claim attempted to impose publisher liability on Yahoo for content created by a third party. *Id.* at 1102-1105 (“The word ‘undertaking,’ after all, is meaningless without the following verb. That is, one does not

The Doe plaintiffs maintain that the statutory language, “enforce[ing] . . . a Federal criminal statute,” implies more than a dependence on criminal prosecution alone. *See* Black’s Law Dictionary (10th ed. 2014) (to “enforce” is “[t]o give force or effect to” or “[l]oosely, to compel a person to pay damages for not complying with . . .”). Further, plaintiffs contend that civil actions are frequently authorized as part and parcel of the enforcement regime behind criminal statutes. *See Luka v. Procter & Gamble Co.*, 785 F. Supp. 2d 712, 719 (N.D. Ill. 2011) (“[C]ivil enforcement mechanisms [] permit private parties to sue *to enforce* statutory

merely undertake; one undertakes *to do* something. And what is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo’s website. But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.”).

The Court did, however, allow a claim of promissory estoppel to stand on the allegation that a Director of Communications at Yahoo had contacted plaintiff and promised to remove the offending ads, but failed to do so in a timely manner. *Id.* at 1107-1109. “Contract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication.” *Id.* at 1107. There is no claim by the Doe plaintiffs that any such assurance was given to them by Backpage. As *Barnes* illustrates, the existence of a statutory remedy without more does not give rise *mirabile dictu* to a tort duty. If it did, there would no need to create such a remedy in the first place.

prohibitions.” (emphasis added)). Plaintiffs also rely on *dicta* in *Nieman v. Versuslaw, Inc.*, 2012 WL 3201931, at *9 (C.D. Ill. Aug. 3, 2012), surmising that section 230 “arguably . . . may not be used to bar a civil RICO claim because that would impair the enforcement of a Federal criminal statute.”

Defendants, for their part, point out that courts have consistently rejected this argument in a section 230 immunity context. In *Doe v. Bates*, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006), the court held that Yahoo could not be held civilly liable for allegedly knowingly hosting child pornography on a user site styled as the Candyman e-group. The Magistrate Judge examined “th[is] issue of first impression” in scholarly detail that is worth quoting at length. *Id.*, at *3.

The plain text of the statute establishes that the 230(e)(1) exception does not encompass private civil claims. As argued by Defendant, the common definition of the term “criminal,” as well as its use in the context of Section 230(e)(1), specifically excludes and is distinguished from civil claims. The term “criminal” is defined as “[c]onnected with the administration of penal justice.” Black’s Law Dictionary 302; *see also* American Heritage Dictionary of the English Language 430 (4th ed. 2000) (defining “criminal” as “[r]elating to the administration of penal law”). The term “civil” is defined as follows: “[o]f or relating to private rights and remedies that are sought by action or suit, *as distinct from criminal proceedings.*” Black’s Law Dictionary 262 (emphasis added). In addition, Congress’ use of the word “enforcement” in Section 230(e)(1) again confirms that the exception refers to governmental action, not civil actions by a private litigant.

Congress did not bifurcate any statutes as asserted by Plaintiffs. Rather, as noted by Defendant, it preserved the ability of law enforcement officials to enforce the federal criminal laws to their fullest extent while at the same time eliminating the ability of private plaintiffs to pursue service-provider defendants. Given the complexity of Title 18 and the availability of civil remedies in statutes throughout the criminal code, Congress achieved its intended result using simple language making it clear that Section 230's limits on civil liability would not affect governmental enforcement of federal criminal laws.

As noted by Defendant, Plaintiffs' invocation of Section 230(e)(1) rests on their generalized policy arguments rather than the text of the statute. Plaintiffs' core argument appears to be that Section 230(e)(1) must exempt civil claims under the child pornography statutes because child pornography is "not to be tolerated" and "[i]f the prospect of civil liability provides a disincentive for engaging in child pornography over and above that provided by the prospect of fines and jail time, then that is a good thing."

Child pornography obviously is intolerable, but civil immunity for interactive service providers does not constitute "tolerance" of child pornography any more than civil immunity from the numerous other forms of harmful content that third parties may create constitutes approval of that content. Section 230 does not limit anyone's ability to bring criminal or civil actions against the actual wrongdoers, the individuals who actually create and consume the child pornography. Here, both the neighbor [who created the child pornography] and the moderator of the Candyman web site have been prosecuted and are serving sentences in federal prison. Further, the section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws.

Regarding civil liability, however, Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider's actions violated the criminal laws. As

Defendant explained in its briefing, the reason is evident. If civil liability were possible, the incentive to bring a civil claim for the settlement value could be immense, even if a plaintiff's claim was without merit. Even if it ultimately prevailed, the service provider would face intense public scrutiny and substantial expense. Given the millions of communications that a service provider such as Defendant enables, the service provider could find itself a defendant in numerous such cases. Congress determined that it wanted to eliminate the resulting disincentives to the development of vibrant and diverse services involving third-party communication, while maintaining the ability of criminal prosecutions by the government for violations of federal criminal law. In sum, Congress did intend to treat civil and criminal claims differently and carefully crafted Section 230(e)(1) to achieve exactly that result. Plaintiffs' claim, although novel, is untenable and without merit.

Id., at *21-22.

The District Judge adopted the Magistrate Judge's opinion, also noting that

[t]he legislative history [] buttresses the Congressional policy against civil liability for internet service providers. One key proponent of an amendment containing the language of § 230 at issue explained that “the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.” 141 Cong. Rec. H8469. Several legislators identified “obscenity” in particular as material that could be more freely regulated as a result of the immunity provided by the statute. Another proponent noted that “[t]here is no way that any of [the internet service providers], like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. . . . We are talking about . . . thousands of pages of information every day, and to have that imposition imposed on them is wrong.” *Id.* at H8471. The House approved the amendment by a vote of 410 to 4. *Id.* at H8478.

Id., at *4. The court concluded that on the basis of this legislative history, “Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws.” *Id.*, at *5.

In *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), the court adopted the reasoning of *Bates* and rejected the *identical* argument from plaintiff, a victim of child sex trafficking, that section 230 carved out an exemption for the civil claim that she had brought against Backpage under 18 U.S.C. § 1595. *Id.* at 1055-1056. Similarly, in *Obado v. Magedson*, 2014 WL 3778261 (D.N.J. July 31, 2014), the court rejected plaintiff’s effort to claim private redress for defendants’ alleged criminal conspiracy to violate his rights. *Id.*, at *8. “Even if Plaintiff had alleged any facts to sustain this claim, the CDA exception for federal criminal statutes applies to government prosecutions, not to civil private rights of action under stat[utes] with criminal aspects.” *Id.*

Although the Doe plaintiffs challenge this line of cases as “flawed,” the court is persuaded that criminal and civil actions differ in kind and that section 230 exempts only criminal prosecutions. Section 1595 itself recognizes that although a private right of action may be complementary to

government interests in combating trafficking, a civil action primarily vindicates private interests and must take a back seat to a criminal prosecution. *See* 18 U.S.C. § 1595(b)(1) (“Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.”). The court also finds persuasive amici EFF’s argument that only criminal prosecutions are exempted from section 230’s immunity because they are subject to the filter of prosecutorial discretion and a heightened standard of proof, making them less likely to have a chilling effect on the freedom of online speech.⁹

The Doe plaintiffs’ next argument, that section 230 only immunizes “good faith” efforts to restrict access to offensive materials, has also failed to find support in the decided cases. Section 203(c)(1) states 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(c)(2) further provides that

⁹ Defendants also contend that plaintiffs fail to make out a case under 18 U.S.C. § 1595 because they do not allege that defendants shared the traffickers’ criminal intent. Plaintiffs counter that section 1595 imposes liability not only for aiding and abetting, but more broadly for “*participation* in a venture which that person knew or should have known has engaged in an act in violation of this chapter.” *Id.* § 1595(a) (emphasis added). The court need not decide this issue because it holds that this claim is preempted by section 230 immunity.

[n]o provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Where section 230(c)(1) exempts an interactive service provider from liability for publishing third-party content, section 230(c)(2) also immunizes these providers from liability for actions taken in good faith to restrict offensive content.

[Section] 230(c)(1) contains no explicit exception for impermissible editorial motive, whereas § 230(c)(2) does contain a “good faith” requirement for the immunity provided therein. That § 230(c)(2) expressly provides for a good faith element omitted from § 230(c)(1) indicates that Congress intended not to import a subjective intent/good faith limitation into § 230(c)(1). “[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208 [] (1993). Accordingly, the text of the two subsections of § 230(c) indicates that (c)(1)’s immunity applies regardless of whether the publisher acts in good faith.

Levitt v. Yelp! Inc., 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).¹⁰

Unfair and Deceptive Business Practices

The Doe plaintiffs contend that the claim for unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Gen. Laws ch. 93, § 9, survives section 230 immunity because it does not depend on the content of the advertisements themselves, but rather on the “deceptive” design of Backpage. Without the offending ads, however, no nexus would exist between Backpage and the harms suffered by the Doe plaintiffs. Their theory – that absent the permissive website design and imperfect filtering, their pimps would not have trafficked them or, if they had attempted to do so, law enforcement would have scrutinized Backpage more closely and would possibly have intervened to prevent their injuries – is too speculative to fall as a matter of law within the penumbra of reasonably foreseeability.

Moreover, courts have repeatedly rejected this “entire website” theory as inconsistent with the substance and policy of section 230. In *Universal*

¹⁰ Because the CDA immunizes Backpage from private litigants seeking redress under civil law, the parallel state law claim under the MATA is necessarily inconsistent with, and therefore preempted by, the CDA.

Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007), the First Circuit refused to hold Lycos (a search engine) liable for the “construct and operation” of its website. *Id.* at 422. “Lycos’s decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting. Section 230 immunity does not depend on the form that decision takes.” *Id.*; *see also StubHub, Inc.*, 219 N.C. App. at 245 (rejecting the “entire website” approach in determining whether the Internet ticket marketplace may be held responsible for scalpers’ unfair or deceptive trade practices); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (finding a “structure and design” approach inapplicable where, unlike in *Roommates*, the design of website did not “require[] users to input illegal content as a necessary condition of use.”).¹¹

Also problematic is the suggestion that either knowledge or tacit encouragement of illegal content (but not the content itself) can be the basis

¹¹ Court have also rejected consumer protection claims under section 230(c)(1) that seek to hold interactive service providers liable for third-party content. *See, e.g., Lycos*, 478 F.3d at 421-422 (Florida securities and cyberstalking laws); *Hinton v. Amazon.com*, 2014 WL 6982628, at *1 (S.D. Miss. Dec. 9, 2014) (Mississippi Consumer Protection Act); *Obado*, 2014 WL 3778261, at *1 (New Jersey Consumer Fraud Act); *Goddard v. Google*, 2008 WL 5245490, at *1 (N.D. Cal. Dec. 17, 2008) (California Unfair Competition Law).

for interactive web services liability. “It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech.” *Lycos*, 478 F.3d at 420; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (“The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law.”). Moreover,

there is simply no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site. . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage.

Ascentive, LLC v. Opinion Corp., 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011)

(internal quotation marks omitted, ellipsis in original). Indeed,

an encouragement test would inflate the meaning of “development” to the point of eclipsing the immunity from publisher-liability that Congress established. Many websites not only allow but also actively invite and encourage users to post particular types of content. Some of this content will be unwelcome to others – *e.g.*, unfavorable reviews of consumer products and services, allegations of price gouging, complaints of fraud on consumers, reports of bed bugs, collections of cease-and-desist notices relating to online speech. And much of this content is commented upon by the website operators who make the forum available. Indeed, much of it is “adopted” by website operators, gathered into reports, and republished online. Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers’ suits aimed at the publisher. Moreover, under the district court’s

rule, courts would then have to decide what constitutes “encouragement” in order to determine immunity under the CDA – a concept that is certainly more difficult to define and apply than the Ninth Circuit’s material contribution test. *See Zeran*, 129 F.3d at 333. Congress envisioned an uninhibited, robust, and wide-open internet, *see* § 230(a)(1)-(5), but the muddiness of an encouragement rule would cloud that vision. Accordingly, other courts have declined to hold that websites were not entitled to the immunity furnished by the CDA because they selected and edited content for display, thereby encouraging the posting of similar content.

Jones v. Dirty World Entm’t Recordings LLC, 755 F.3d 398, 414-415 (6th Cir. 2014).¹²

Right of Publicity

Mass. Gen. Laws ch. 214, § 3A, provides that

[a]ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use.

R.I. Gen. Laws § 9-1-28 provides in almost identical language that

[a]ny person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent

¹² Defendants also argue that the Chapter 93A claim, in so far as it is based on alleged misrepresentations to law enforcement and social services agencies, lacks an essential foundational element because law enforcement and social services agencies have no connection in a commercial context to defendants as “consumers” of goods and services.

may bring an action in the superior court against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use.

Accepting, *dubitante*, the Doe plaintiffs' assertion that the right to publicity constitutes an intellectual property claim exempt from immunity under section 230,¹³ the court agrees with defendants that plaintiffs have not pled

¹³ Although certain publicity rights are akin to “intellectual property” rights, a person’s image is not a “product of the human intellect.” Black’s Law Dictionary (10th ed. 2014). “[T]he right of publicity flows from the right to privacy,” *Alvarez Guedes v. Marcano Martinez*, 131 F. Supp. 2d 272, 278 (D.P.R. 2001) (citing numerous cases), which is an intangible right of a different nature. Despite the Doe plaintiffs’ attorney’s contention at oral argument that a photograph may be copyrightable, it does not follow that the underlying image is *ipso facto* protectable under intellectual property law. *See Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1264 (10th Cir. 2008) (“Recognizing that Oscar Wilde’s inimitable visage does not belong, or ‘owe its origins’ to any photographer, the Supreme Court noted that photographs may well sometimes lack originality and are thus not *per se* copyrightable. . . . [P]hotographs are copyrightable, if only to the extent of their *original* depiction of the subject. Wilde’s image is not copyrightable; but to the extent a photograph reflects the photographer’s decisions regarding pose, positioning, background, lighting, shading, and the like, those elements can be said to ‘owe their origins’ to the photographer, making the photograph copyrightable, at least to that extent.”), *citing Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884). Courts also disagree as to whether state law intellectual property claims are exempted under section 230. *Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (“In the absence of a definition from Congress, we construe the term “intellectual property” to mean ‘federal intellectual property.’”) *with Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008)

plausible claims for unauthorized use of their images. Plaintiffs do not allege that defendants used their images to extract any direct benefit (such as featuring plaintiffs on advertisements *for* Backpage). Rather, the allegation is that defendants benefitted incidentally from the fee charged for posting advertisements with the Doe plaintiffs' pictures in the escorts section of the website. The argument, however, has been explicitly rejected by the Massachusetts Supreme Judicial Court.¹⁴

[T]he crucial distinction under G.L. c. 214, s 3A, must be between situations in which the defendant makes an incidental use of the plaintiff's name, portrait or picture and those in which the defendant uses the plaintiff's name, portrait or picture deliberately to exploit its value for advertising or trade purposes.

Tropeano v. Atl. Monthly Co., 379 Mass. 745, 749 (1980). “The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.”

(“[Section] 230(e)(2) applies simply to ‘any law pertaining to intellectual property,’ not just federal law.”).

¹⁴ “[A]s a federal court considering state law claims, we must apply the state’s law on substantive issues and ‘we are bound by the teachings of the state’s highest court.’” *Phoung Luc v. Wyndham Mgmt. Corp.*, 496 F.3d 85, 88 (1st Cir. 2007), *citing N. Am. Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 37-38 (1st Cir. 2001).

Id., quoting *Nelson v. Maine Times*, 373 A.2d 1221, 1224 (Me. 1977) (in turn quoting Restatement (Second) of Torts § 652C, cmt. d (1977)); see also *Intercity Maint. Co. v. Local 254 Serv. Employees Int’l Union*, 62 F. Supp. 2d 483, 506 (D.R.I. 1999), *aff’d in part, vacated in part on other grounds, remanded sub nom. Intercity Maint. Co. v. Local 254, Serv. Employees Int’l Union AFL-CIO*, 241 F.3d 82 (1st Cir. 2001) (“The Rhode Island legislature borrowed the Privacy Act’s scheme of four privacy torts, including the tort of false light, from the doctrine of privacy torts promulgated by the Restatement (Second) of Torts. See *Liu v. Striuli*, 36 F. Supp. 2d 452, 479 (D.R.I. 1999); Restatement (Second) of Torts §§ 652B-E (establishing the four privacy torts). Accordingly, Rhode Island courts have often turned to the Restatement as an authority on the matter of privacy torts.”).

Copyright Infringement

Jane Doe No. 3 obtained a registration for her photograph on December 18, 2014, after this lawsuit was filed. Although registration is not a jurisdictional prerequisite of bringing a suit for copyright infringement, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010), it is a “condition precedent for obtaining certain remedies, such as statutory damages and attorneys’ fees.” *Johnson v. Gordon*, 409 F.3d 12, 20 (1st Cir. 2005); see also 17 U.S.C § 412 (“[N]o award of statutory damages or of attorney’s fees . . .

shall be made for – (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration.”).

The only recovery remaining open to Jane Doe No. 3 is compensatory damages under 17 U.S.C. § 504. Section 504 permits recovery of “the actual damages suffered by [] her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” With respect to the latter, Jane Doe No. 3 alleges that “[t]he Backpage Defendants derive a financial benefit directly attributable to the public display of such photographs by virtue of the payment of fees by the pimps and traffickers to Backpage.com.” SAC ¶ 139. However, she may only recover profits from defendants that are causally linked to specific acts of infringement. *See On Davis v. The Gap, Inc.*, 246 F.3d 152, 159-161 (2d Cir. 2001). Here no plausible link exists between defendants’ generalized profits and any common-law copyright vesting in Jane Doe No. 3’s photo for the simple reason that the fee for posting an ad is the same whether or not it includes a photograph. Jane Doe No. 3 does not allege that she suffered any loss of revenues or licensing fees for her photo as a result of the infringement (nor does she allege that the protectable elements of the photo, *see n.12 supra*, have any market value).

Because she does not plead any redressable damages, Jane Doe No. 3's copyright infringement claim must also be dismissed.

To avoid any misunderstanding, let me make it clear that the court is not unsympathetic to the tragic plight described by Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3. Nor does it regard the sexual trafficking of children as anything other than an abhorrent evil. Finally, the court is not naïve – I am fully aware that sex traffickers and other purveyors of illegal wares ranging from drugs to pornography exploit the vulnerabilities of the Internet as a marketing tool. Whether one agrees with its stated policy or not (a policy driven not simply by economic concerns, but also by technological and constitutional considerations), Congress has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned. Putting aside the moral judgment that one might pass on Backpage's business practices, this court has no choice but to adhere to the law that Congress has seen fit to enact.

ORDER

For the foregoing reasons, defendants' motion to dismiss the Second Amended Complaint is ALLOWED. The Clerk is directed to enter judgment accordingly and close this case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOE ET AL

Plaintiff

V.

BACKPAGE.COM

Defendant

CIVIL ACTION

NO. 14CV13870-RGS

JUDGMENT

STEARNS, D.J.

In accordance with the Court's Memorandum and Order dated 5/15/15
 granting defendant's motion to dismiss, it is hereby ORDERED that judgment be
entered for defendant.

By the Court,

5/15/15

Date

/s/ Elaine Flaherty

Deputy Clerk



United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

Effective: October 21, 1998

[Currentness](#)

(a) Findings

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of [section 223](#) or [231](#) of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

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

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

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

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added [Pub.L. 104-104, Title V, § 509](#), Feb. 8, 1996, 110 Stat. 137; [Pub.L. 105-277](#), Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739.)

[Notes of Decisions \(96\)](#)

Footnotes

[1](#) So in original. Probably should be “subparagraph (A)”.

47 U.S.C.A. § 230, 47 USCA § 230

Current through P.L. 114-51 approved 9-24-2015

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)

This section has been updated. Click [here](#) for the updated version.

18 U.S.C.A. § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

Effective: December 23, 2008 to May 28, 2015

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is--

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

§ 1591. Sex trafficking of children or by force, fraud, or coercion, 18 USCA § 1591

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

CREDIT(S)

(Added Pub.L. 106-386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1487; amended Pub.L. 108-21, Title I, § 103(a)(3), Apr. 30, 2003, 117 Stat. 653; Pub.L. 108-193, § 5(a), Dec. 19, 2003, 117 Stat. 2879; Pub.L. 109-248, Title II, § 208, July 27, 2006, 120 Stat. 615; Pub.L. 110-457, Title II, § 222(b)(5), Dec. 23, 2008, 122 Stat. 5069.)

18 U.S.C.A. § 1591, 18 USCA § 1591

Current through P.L. 114-51 approved 9-24-2015

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United States Code Annotated
Title 18. Crimes and Criminal Procedure ([Refs & Annos](#))
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Chapter 77. Peonage, Slavery, and Trafficking in Persons ([Refs & Annos](#))

This section has been updated. Click [here](#) for the updated version.

18 U.S.C.A. § 1595

§ 1595. Civil remedy

Effective: December 23, 2008 to May 28, 2015

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a “criminal action” includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than 10 years after the cause of action arose.

CREDIT(S)

(Added [Pub.L. 108-193](#), § 4(a)(4)(A), Dec. 19, 2003, 117 Stat. 2878; amended [Pub.L. 110-457](#), Title II, § 221(2), Dec. 23, 2008, 122 Stat. 5067.)

18 U.S.C.A. § 1595, 18 USCA § 1595

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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted **Limited on Preemption Grounds by** Doe ex rel. Roe v. Backpage.com, LLC, D.Mass., May 15, 2015

Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 265. Crimes Against the Person (Refs & Annos)

M.G.L.A. 265 § 50

§ 50. Trafficking of persons for sexual servitude; trafficking of persons under 18 years for sexual servitude; trafficking by business entities; penalties; tort actions brought by victims

Effective: February 19, 2012

[Currentness](#)

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.

Credits

Added by [St.2011, c. 178, § 23, eff. Feb. 19, 2012.](#)

[Notes of Decisions \(1\)](#)

§ 50. Trafficking of persons for sexual servitude; trafficking of..., MA ST 265 § 50
M.G.L.A. 265 § 50, MA ST 265 § 50
Current through Chapter 95 of the 2015 1st Annual Session

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Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 2

§ 2. Unfair practices; legislative intent; rules and regulations

Currentness

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act ([15 U.S.C. 45\(a\)\(1\)](#)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of [15 U.S.C. 45\(a\)\(1\)](#) (The Federal Trade Commission Act), as from time to time amended.

Credits

Added by St.1967, c. 813, § 1. Amended by St.1978, c. 459, § 2.

M.G.L.A. 93A § 2, MA ST 93A § 2

Current through Chapter 95 of the 2015 1st Annual Session

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 9

§ 9. Civil actions and remedies; class action; demand for relief; damages; costs; exhausting administrative remedies

Effective: August 9, 2004

Currentness

(1) Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court as provided in [section three of chapter one hundred and eighty-five C](#) whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section. Notwithstanding any other provision to the contrary, if the court finds any method, act or practice unlawful with

regard to any security or any contract of sale of a commodity for future delivery as defined in section two, and if the court finds for the petitioner, recovery shall be in the amount of actual damages.

(3A) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as herein provided. The demand requirements and provision for tender of offer of settlement provided in paragraph (3) shall also be applicable under this paragraph, except that no rights to equitable relief shall be created under this paragraph, nor shall a person asserting a claim hereunder be able to assert any claim on behalf of other similarly injured and situated persons as provided in paragraph (2).

(4) If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action; provided, however, the court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section.

<[There is no paragraph (5).]>

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

(7) The court may upon motion by the respondent before the time for answering and after a hearing suspend proceedings brought under this section to permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate regulatory board or officer providing adjudicatory hearings to complainants if the respondent's evidence indicates that:

(a) there is a substantial likelihood that final action by the court favorable to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme that regulates or covers the actions or transactions complained of by the petitioner established and administered under law by any state or federal regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) that said regulatory board or officer has a substantial interest in reviewing said transactions or actions prior to judicial action under this chapter and that the said regulatory board or officer has the power to provide substantially the relief sought by the petitioner and the class, if any, which the petitioner represents, under this section.

Upon suspending proceedings under this section the court may enter any interlocutory or temporary orders it deems necessary and proper pending final action by the regulatory board or officer and trial, if any, in the court, including issuance of injunctions, certification of a class, and orders concerning the presentation of the matter to the regulatory board or officer. The court shall issue appropriate interlocutory orders, decrees and injunctions to preserve the status quo between the parties pending final action by the regulatory board or officer and trial and shall stay all proceedings in any court or before any regulatory board or officer in which petitioner and respondent are necessarily involved. The court may issue further orders, injunctions or other relief while the matter is before the regulatory board or officer and shall terminate the suspension and bring the matter forward for trial if it finds (a) that proceedings before the regulatory board or officer are unreasonably delayed or otherwise unreasonably prejudicial

to the interests of a party before the court, or (b) that the regulatory board or officer has not taken final action within six months of the beginning of the order suspending proceedings under this chapter.

(8) Except as provided in section ten, recovering or failing to recover an award of damages or other relief in any administrative or judicial proceeding, except proceedings authorized by this section, by any person entitled to bring an action under this section, shall not constitute a bar to, or limitation upon relief authorized by this section.

Credits

Added by St.1969, c. 690. Amended by St.1970, c. 736, §§ 1, 2; St.1971, c. 241; St.1973, c. 939; St.1978, c. 478, §§ 45, 46; St.1979, c. 72, § 1; St.1979, c. 406, §§ 1, 2; St.1986, c. 557, § 90; [St.1987, c. 664, § 3](#); [St.1989, c. 580, § 1](#); [St.2004, c. 252, § 1, eff. Aug. 9, 2004](#).

M.G.L.A. 93A § 9, MA ST 93A § 9
Current through Chapter 95 of the 2015 1st Annual Session

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United States Code Annotated
Title 17. Copyrights (Refs & Annos)
Chapter 5. Copyright Infringement and Remedies (Refs & Annos)

17 U.S.C.A. § 501

§ 501. Infringement of copyright

Effective: November 2, 2002

[Currentness](#)

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by [sections 106](#) through [122](#) or of the author as provided in [section 106A\(a\)](#), or who imports copies or phonorecords into the United States in violation of [section 602](#), is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than [section 506](#)), any reference to copyright shall be deemed to include the rights conferred by [section 106A\(a\)](#). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of [section 411](#), to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under [subsection \(c\) of section 111](#), a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to [section 111\(c\)\(3\)](#), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under [section 119\(a\)\(5\)](#), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

(f)(1) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under [section 122](#), a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station.

§ 501. Infringement of copyright, 17 USCA § 501

(2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under [section 122\(a\)\(2\)](#), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2584; Pub.L. 100-568, § 10(a), Oct. 31, 1988, 102 Stat. 2860; Pub.L. 100-667, Title II, § 202(3), Nov. 16, 1988, 102 Stat. 3957; Pub.L. 101-553, § 2(a)(1), Nov. 15, 1990, 104 Stat. 2749; Pub.L. 101-650, Title VI, § 606(a), Dec. 1, 1990, 104 Stat. 5131; Pub.L. 106-44, § 1(g)(5), Aug. 5, 1999, 113 Stat. 222; Pub.L. 106-113, Div. B, § 1000(a)(9) [Title I, §§ 1002(b), 1011(b)(3)], Nov. 29, 1999, 113 Stat. 1536, 1501A-527, 1501A-544; Pub.L. 107-273, Div. C, Title III, § 13210(4)(B), Nov. 2, 2002, 116 Stat. 1909.)

17 U.S.C.A. § 501, 17 USCA § 501
Current through P.L. 114-51 approved 9-24-2015

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United States Code Annotated
Title 17. Copyrights (Refs & Annos)
Chapter 5. Copyright Infringement and Remedies (Refs & Annos)

17 U.S.C.A. § 502

§ 502. Remedies for infringement: Injunctions

Currentness

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of [section 1498 of title 28](#), grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

CREDIT(S)

([Pub.L. 94-553, Title I, § 101](#), Oct. 19, 1976, 90 Stat. 2584.)

17 U.S.C.A. § 502, 17 USCA § 502
Current through P.L. 114-51 approved 9-24-2015

United States Code Annotated
Title 17. Copyrights (Refs & Annos)
Chapter 5. Copyright Infringement and Remedies (Refs & Annos)

17 U.S.C.A. § 504

§ 504. Remedies for infringement: Damages and profits

Effective: December 9, 2010

[Currentness](#)

(a) In General.--Except as otherwise provided by this title, an infringer of copyright is liable for either--

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.--The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages.--

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under [section 107](#), if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in [section 118\(f\)](#)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3) (A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

(d) **Additional damages in certain cases.**--In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2585; Pub.L. 100-568, § 10(b), Oct. 31, 1988, 102 Stat. 2860; Pub.L. 105-80, § 12(a)(13), Nov. 13, 1997, 111 Stat. 1535; Pub.L. 105-298, Title II, § 204, Oct. 27, 1998, 112 Stat. 2833; Pub.L. 106-160, § 2, Dec. 9, 1999, 113 Stat. 1774; Pub.L. 108-482, Title II, § 203, Dec. 23, 2004, 118 Stat. 3916; Pub.L. 111-295, § 6(f)(2), Dec. 9, 2010, 124 Stat. 3181.)

17 U.S.C.A. § 504, 17 USCA § 504
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United States Code Annotated
Title 17. Copyrights (Refs & Annos)
Chapter 5. Copyright Infringement and Remedies (Refs & Annos)

17 U.S.C.A. § 505

§ 505. Remedies for infringement: Costs and attorney's fees

Currentness

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2586.)

17 U.S.C.A. § 505, 17 USCA § 505

Current through P.L. 114-51 approved 9-24-2015

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Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 214. Equity Jurisdiction (Refs & Annos)

M.G.L.A. 214 § 3A

§ 3A. Unauthorized use of name, portrait or picture of a person; injunctive relief; damages; exceptions

Currentness

Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him. Nothing in this section shall be so construed as to prevent any person practicing the profession of photography from exhibiting in or about his or its establishment specimens of the work of such person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting thereto has been given by the person portrayed; and nothing in this section shall be so construed as to prevent any person from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by such manufacturer or dealer which such person has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with any literary, musical or artistic production of such author, composer or artist which such person has sold or disposed of with such name, portrait or picture used in connection therewith.

Credits

Added by St.1973, c. 1114, § 62.

M.G.L.A. 214 § 3A, MA ST 214 § 3A

Current through Chapter 95 of the 2015 1st Annual Session

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West's General Laws of Rhode Island Annotated
Title 9. Courts and Civil Procedure--Procedure Generally
Chapter 1. Causes of Action

Gen.Laws 1956, § 9-1-28

§ 9-1-28. Action for unauthorized use of name, portrait, or picture

Currentness

(a) Any person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent may bring an action in the superior court against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used the person's name, portrait, or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him or her.

(b) Nothing in this section shall be so construed as to:

(1) Apply to the use of names, portraits, or pictures in political speech or on matters of public concern;

(2) Prevent any person practicing the profession of photography from exhibiting in or about his or her or its establishment specimens of the work of the person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting to it has been given by the person portrayed; or

(3) Prevent any person from using the name, portrait, or picture of any manufacturer or dealer in connection with the goods, wares, and merchandise manufactured, produced, or dealt in by the manufacturer or dealer which the person has sold or disposed of with the name, portrait, or picture used in connection therewith, or from using the name, portrait, or picture of any author, composer, or artist in connection with any literary, musical, or artistic production of the author, composer, or artist which the person has sold or disposed of with the name, portrait, or picture used in connection therewith.

Credits

P.L. 1972, ch. 281, § 1; P.L. 2012, ch. 366, § 1, eff. June 21, 2012; P.L. 2012, ch. 384, § 1, eff. June 21, 2012.

Gen. Laws, 1956, § 9-1-28, RI ST § 9-1-28

The statutes and Constitution are current through chapter 285 of the January 2015 session.

West's General Laws of Rhode Island Annotated
Title 9. Courts and Civil Procedure--Procedure Generally
Chapter 1. Causes of Action

Gen.Laws 1956, § 9-1-28.1

§ 9-1-28.1. Right to privacy--Action for deprivation of right

Currentness

(a) **Right to privacy created.** It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:

(1) The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;

(i) In order to recover for violation of this right, it must be established that:

(A) It was an invasion of something that is entitled to be private or would be expected to be private;

(B) The invasion was or is offensive or objectionable to a reasonable man; although,

(ii) The person who discloses the information need not benefit from the disclosure.

(2) The right to be secure from an appropriation of one's name or likeness;

(i) In order to recover for violation of this right, it must be established that:

(A) The act was done without permission of the claimant;

(B) The act is of a benefit to someone other than the claimant;

(ii) It need not be established that there was any publication.

(3) The right to be secure from unreasonable publicity given to one's private life;

(i) In order to recover for violation of this right, it must be established that:

(A) There has been some publication of a private fact;

(B) The fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities;

(ii) The fact which has been disclosed need not be of any benefit to the discloser of the fact.

(4) The right to be secure from publicity that reasonably places another in a false light before the public;

(i) In order to recover for violation of this right, it must be established that:

(A) There has been some publication of a false or fictitious fact which implies an association which does not exist;

(B) The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances;

(ii) The fact which was disclosed need not be of any benefit to the discloser.

(b) **Right of action.** Every person who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to a deprivation and/or violation of his or her right to privacy shall be liable to the party injured in an action at law, suit in equity, or any other appropriate proceedings for redress in either the superior court or district court of this state. The court having jurisdiction of an action brought pursuant to this section may award reasonable attorneys' fees and court costs to the prevailing party.

(c) **Right of access.** Nothing in this section shall be construed to limit or abridge any existing right of access at law or in equity of any party to the records kept by any agency of state or municipal government.

Credits

P.L. 1980, ch. 403, § 1.

Gen. Laws, 1956, § 9-1-28.1, RI ST § 9-1-28.1

The statutes and Constitution are current through chapter 285 of the January 2015 session.