



7-10-2013

The Implications of Excluding State Crimes from 47 U.S.C. §230's Immunity

Eric Goldman

Santa Clara University School of Law, egoldman@gmail.com

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Law Commons](#)

Automated Citation

Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. §230's Immunity* (2013),
Available at: <http://digitalcommons.law.scu.edu/facpubs/793>

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

The Implications of Excluding State Crimes from 47 U.S.C. §230's Immunity
By Eric Goldman*
July 2013

Introduction

In 1998, a German court convicted CompuServe executive Felix Somm for assisting with the distribution of child pornography via the CompuServe network.¹ In 2010, an Italian court convicted three Google executives (chief lawyer David Drummond, CFO George Reyes and privacy lawyer Peter Fleischer) for criminal privacy violations because a user posted a YouTube video that depicted bullying of an autistic boy.²

These convictions eventually were overturned on appeal,³ but only after years of expensive litigation, during which time the defendants had to cope with the daily fear that they eventually might be jailed. The lesson from these and other criminal prosecutions remains clear: if you want to run a European Internet company dealing with user-generated content (UGC), be prepared to put your personal liberty at stake.

In the United States, we rarely contemplate the possibility that entrepreneurs and managers could face criminal liability for running a UGC website. But if the state Attorneys General (AGs) get their way, such criminal prosecutions could happen.

The State AGs' Proposal

In 1996, Congress enacted 47 U.S.C. 230 (Section 230), which says that websites aren't liable for UGC or other third party content—even if the website ignores takedown notices, and even if the website has exercised editorial control over the UGC. Section 230 is a globally unique policy solution; no other country has laws so protective of UGC website operators.⁴ As a result, Section 230 provides the foundation for our burgeoning domestic UGC industry, and it gives the United States global competitive advantages in creating and operating UGC websites as well as from the social benefits these sites provide.⁵

* Professor of Law and Director, High Tech Law Institute, Santa Clara University School of Law. Website: <http://www.ericgoldman.org>. Email: egoldman@gmail.com. This essay is based on two posts from my Forbes Tertiary Quid blog dated June 26 and 27, 2013.

¹ People v. Felix Somm, File No. 8340 Ds 465 Js 173158/95, Local Court [Amtsgericht] Munich (May 28, 1998), available at <http://www.cyber-rights.org/isps/somm-dec.htm>.

² Manuela D'Alessandro, *Google Executives Convicted for Italy Autism Video*, REUTERS (Feb. 24, 2010), <http://www.reuters.com/article/2010/02/24/us-italy-google-conviction-idUSTRE61N2G520100224>

³ *Ex-CompuServe Boss Acquitted*, BBC, Nov. 17, 1999, <http://news.bbc.co.uk/2/hi/europe/524951.stm>; Eric Pfanner, *Italian Appeals Court Acquits 3 Google Executives in Privacy Case*, N.Y. TIMES, Dec. 21, 2012, <http://www.nytimes.com/2012/12/22/business/global/italian-appeals-court-acquits-3-google-executives-in-privacy-case.html>.

⁴ For example, contrast the United Kingdom's recently enacted Defamation Act. See Posting of Eric Goldman to Forbes Tertiary Quid Blog, *UK's New Defamation Law May Accelerate The Death Of Anonymous User-Generated Content Internationally*, May 9, 2013, <http://www.forbes.com/sites/ericgoldman/2013/05/09/uks-new-defamation-law-may-accelerate-the-death-of-anonymous-user-generated-content-internationally/>.

⁵ See Eric Goldman, *The Unexpected Benefit of Internet Immunity* (forthcoming).

Section 230 does not apply to cases involving intellectual property, federal criminal prosecutions, and violations of the Electronic Communications Privacy Act or analogous state laws.⁶ Otherwise, if the plaintiff's claim doesn't fit into one of these three exceptions, courts have interpreted Section 230 quite expansively. Usually, courts reject direct and indirect attempts to hold websites liable for UGC.⁷

Section 230 preempts all state laws that say, or could be interpreted to hold, that websites are liable for third party content (unless the laws fit one of the statutory exceptions).⁸ The preemptive effect includes any prosecutions under state or local criminal law where the crime is predicated on a website's liability for UGC.

At the Summer 2013 meeting of the National Association of Attorneys' General (NAAG), some state AGs indicated that they plan to ask Congress to exclude state criminal prosecutions from Section 230.⁹ Textually, the change to Section 230 could be quite modest (as few as two additional words),¹⁰ but its effect would be profound. This amendment would allow state attorneys general to prosecute Internet companies, including potentially their executives, for violations of state criminal law for their online publication of third party content.

What Prompts the State AGs' Proposal?

Why do the state AGs want to amend Section 230? We'll have to wait to see what their letter says, but I have two complementary hypotheses.

First, Section 230 generally restricts the enforcement powers of the state attorneys' general. Thus, where a state AG believes in his/her wisdom that state residents are suffering a problem, Section 230 may preempt the state AG's legal authority to act. What prosecutor wouldn't want more legal flexibility to fix the problems they see?

Second, I suspect the proposed Section 230 amendment is just the latest iteration of the state AGs' multi-year crusade against online prostitution ads. For years, state AGs have been trying to eradicate online ads advertising prostitution—without any meaningful legal success due to Section 230.

The state AGs pursued a multi-year campaign to shut down Craigslist's "Erotic Services" category, which included some ads for non-illegal services but also contained prostitution ads.

⁶ 47 U.S.C. § 230(e).

⁷ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOYOLA L.A. L. REV. 373 (2010).

⁸ The Ninth Circuit has held that Section 230 preempts state intellectual property laws, effectively eliminating that statutory exclusion for state regulation. *Perfect 10, Inc. v. ccBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

⁹ Elizabeth Heichler, *U.S. States' Attorneys General to Take Aim at Internet 'Safe Harbor' Law*, TECHHIVE (June 18, 2013), <http://www.techhive.com/article/2042351/us-states-attorneys-general-to-take-aim-at-internet-safe-harbor-law.html>.

¹⁰ Section 230(e)(1)'s exclusion of "any other Federal criminal statute" could be amended to say "any other Federal or state criminal statute."

Their coercive tactics included threatening to criminally prosecute Craigslist's managers,¹¹ a threat that would take on extra import if Congress honors the AGs' amendment request. It didn't matter that the prostitution ads provided a roadmap for the vice squad to find and prosecute the advertisers; or that we have numerous examples where police actually found and convicted prostitutes and johns using the ads.¹² Instead, the state AGs wanted Craigslist to shut down the category and self-police its listings to screen out prostitution ads. However, because the ads constituted UGC to Craigslist, Section 230 protects Craigslist for publishing those ads.¹³

Nevertheless, Craigslist took several steps to address the state AGs' concerns, including renaming its category to "Adult Services" and requiring a nominal payment as a way of authenticating the advertisers.¹⁴ Despite these accommodations, after relentless pressure from the state AGs and others, Craigslist eventually gave up and angrily shut down its Adults Services category.¹⁵

Craigslist's exit from the market solved the online prostitution ads problem only superficially. As anticipated, the prostitution ads quickly migrated to other online venues, including Backpage.com¹⁶ and Facebook.¹⁷ In response, state AGs trained their guns on Backpage.com.¹⁸ In addition, several state legislatures passed laws designed to overcome Section 230 and hold Backpage accountable for online prostitution ads. These new laws also failed; laws in Washington,¹⁹ Tennessee²⁰ and New Jersey²¹ have been struck down on Section 230 grounds.

So it's easy to understand the state AGs' frustrations. They are obsessed, perhaps irrationally so, with online prostitution ads. Yet, having tried both direct legal action and state legislative amendments, Section 230 still thwarts their multi-year, multi-pronged efforts to shut down

¹¹ Letter from Henry McMaster, South Carolina Attorney General, to Jim Buckmaster, Craigslist CEO (May 9, 2009), <http://www.dmlp.org/sites/citmedialaw.org/files/2009-05-05-South%20Carolina%20AG%20Letter.pdf>.

¹² See, e.g., *State v. Strothers*, 2012-Ohio-5062 (Ohio Ct. App. Nov. 1, 2012); Bob Conners, *Parking Official Nabbed as Cops Prowl Craigslist*, NBC CONNECTICUT (May 3, 2010), <http://www.nbcconnecticut.com/news/local/Cops-Prowling-Craigslist-for-Crime-92676259.html>.

¹³ *Dart v. Craigslist, Inc.*, 09 C 1385 (N.D. Ill. Oct. 20, 2009).

¹⁴ Jim Buckmaster, *Striking the Right Balance*, CRAIGSLIST BLOG (May 13, 2009), <http://blog.craigslist.org/2009/05/13/striking-a-new-balance/>

¹⁵ Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES (Sept. 15, 2010), <http://www.nytimes.com/2010/09/16/business/16craigslist.html>.

¹⁶ Daniel Fisher, *Backpage Takes Heat, But Prostitution Ads Are Everywhere*, FORBES.COM (Jan. 26, 2012), <http://www.forbes.com/sites/danielfisher/2012/01/26/backpages-takes-heat-for-prostitution-ads-that-are-everywhere/>.

¹⁷ Sudhir Venkatesh, *How Tech Tools Transformed New York's Sex Trade*, WIRED.COM (Jan. 31, 2011), http://www.wired.com/magazine/2011/01/ff_sextrade/all/1.

¹⁸ See, e.g., Press Release, New Hampshire Department of Justice Office of the Attorney General, *Attorneys General to Backpage.com: Prove You Are Fighting Human Trafficking*, Aug. 31, 2011, <http://doj.nh.gov/media-center/press-releases/2011/20110831-backpage-human-trafficking.htm>.

¹⁹ *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); see also Eric Goldman, *Overzealous Legislative Effort Against Online Child Prostitution Ads at Backpage Fails, Providing a Big Win for User-Generated Content*, FORBES TERTIUM QUID (July 30, 2012), <http://www.forbes.com/sites/ericgoldman/2012/07/30/child-prostitution-ads-backpage-legislative-fail/>.

²⁰ *Backpage.com, LLC v. Cooper*, 2013 WL 1558785 (M.D. Tenn. Jan. 3, 2013).

²¹ *Backpage.com, LLC v. Hoffman*, 2:13-cv-03952-DMC-JAD (D. N.J. June 28, 2013) (issuing a TRO), available at <https://www.eff.org/node/74792>.

publication venues for online prostitution ads. You can almost imagine the state AGs pleading to Congress: we've tried everything we can do, now it's your turn.

Section 230's Key Role in Internet Entrepreneurship

Section 230 has played an essential role in the Internet's success. Think of the Internet services we enjoy most frequently every day: Google, Facebook, Twitter, Pinterest, Wikipedia, eBay, YouTube, Yelp and Craigslist. All of these services publish UGC and other third party content. They all provide valuable content publication services to users, often at no cost to the user. As a result, all of these services rely heavily on Section 230, as will the next generation of Internet UGC services. Without Section 230, these services may not exist at all, or they would exist in a radically different form that would be more expensive and less helpful to users. Even a tiny legal change to Section 230 could upset the delicate balance that facilitated the extraordinary Internet boom over the past 15+ years.²²

The state AGs' proposed amendment to Section 230 may add only two words to the statute, but it isn't a tiny change. Instead, it would dramatically chill the entrepreneurial environment for UGC websites, threatening the Internet services we love as well as services that haven't been dreamt of yet.

This essay previously mentioned the specter that state AGs could prosecute the individual managers or entrepreneurs of UGC websites. After all, because Section 230 would no longer protect websites from liability for UGC, states would be free to prosecute to the maximum scope of criminal liability, including holding managers criminally liable for users' content and actions. This risk alone—that running a UGC website could lead to jailtime—would have devastating effects on Internet entrepreneurship. After all, entrepreneurs already risk their careers, their reputations and their fortunes to launch new enterprises; asking them to risk their liberty as well is too much.

The Differences Between State and Federal Criminal Laws and Prosecutions

Section 230's immunity already explicitly excludes *federal* criminal prosecutions against UGC website entrepreneurs.²³ We've seen the U.S. Department of Justice initiate such criminal proceedings only occasionally, such as the enforcements against search engines for accepting gambling ads,²⁴ and against Google for accepting ads for illegal pharmaceuticals.²⁵ (Indeed, in the latter case, the Rhode Island U.S. Attorney publicly questioned Google CEO Larry Page's criminal culpability).²⁶ Given that Section 230 already allows federal criminal prosecutions, why would it be such a big change to permit state prosecutions as well? Let me offer a few reasons:

²² Eric Goldman, *Unregulating Online Harassment*, 87 DENV. U. L. REV. ONLINE 59 (2010).

²³ 47 U.S.C. § 230(e)(1).

²⁴ Jason Ryan, *Microsoft, Google, Yahoo to Pay \$31.5M Over Illegal Gambling Ads*, ABC NEWS (Dec. 19, 2007), http://abcnews.go.com/Technology/FedCrimes/story?id=4029545&page=1#.Uc3CR_InSSp.

²⁵ Press Release, U.S. Dep't of Justice, *Google Forfeits \$500 Million Generated by Online Ads & Prescription Drug Sales by Canadian Online Pharmacies* (Aug. 24, 2011), <http://www.justice.gov/opa/pr/2011/August/11-dag-1078.html>.

²⁶ *New Heat for Google CEO*, WALL ST. J., Aug. 27, 2011, <http://online.wsj.com/article/SB10001424053111904787404576532692988751366.html>.

State Criminal Laws Are Numerous and Broadly Worded. In general, we live in an overcriminalized society. We have too many crimes on the books, those crimes are drafted too broadly, and typically prosecutors have too much discretion to decide which prosecutions to pursue.²⁷

The overcriminalization problem exists at both the state and federal level, but the problem is worse at the state level for at least three reasons. First, I believe that, on average, state criminal laws are drafted more poorly than federal laws. State legislators often have less staffing help than members of Congress, and state legislators come from more diversified backgrounds that didn't include training in legal drafting. This is not to say that federal laws are models of clarity, but in my experience state laws are baffling and inscrutable more frequently than federal statutes.

Second, numerically, there are a lot of state laws. There's only one federal government, but there are fifty states, each defining their own idiosyncratic crimes. So excluding state criminal laws from Section 230's immunity would exponentially expand the number of crimes potentially applicable to UGC websites.

Third, I believe there are more state crimes that are goofy compared to federal crimes.²⁸ Over the decades and centuries, states have accreted quirky or local-specific laws that never got repealed even as times and norms changed. For example, a majority of states still criminalize defamation²⁹—a potentially significant crime in the UGC website context. Many laws still on the books are vestiges of a different era, but until they are repealed, an eager state AG with broad prosecutorial discretion could use them to make significant mischief.

States Create New Stupid Anti-Internet Laws All the Time. In addition to the multitudinous and outdated state criminal laws currently on the books, states can—and do—enact new Internet crimes all the time. Congress passes comparatively few Internet laws because every proposal must navigate the gauntlet of conflicting special interests and lobbyists. In contrast, special interests can't monitor state legislatures as closely, so really awful anti-Internet laws can pass state legislatures without much debate.

For example, in 2007, Utah passed a law banning keyword advertising.³⁰ The law passed with minimal opposition because the keyword advertising industry wasn't closely tracking legislative developments in a small state like Utah. Given there are 50 state legislatures, it's overwhelming for big Internet incumbents to track and respond to every state legislative development that might affect the UGC website industry. For smaller start-ups or non-profit enterprises, it's simply impossible.

²⁷ See, e.g., Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 24, 2011), <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html>.

²⁸ See generally DumbLaws.com, <http://www.dumblaws.com/laws/united-states> (last visited July 4, 2013).

²⁹ Bill Kenworthy & Beth Chesterman, *Criminal-Libel Statutes, State by State*, FIRST AMENDMENT CENTER (Aug. 10, 2006), <http://www.firstamendmentcenter.org/criminal-libel-statutes-state-by-state>.

³⁰ Trademark Protection Act, 2007 Utah Laws Ch. 365 (S.B. 236) (enacted March 19, 2007) (subsequently repealed); see also Eric Goldman, *Utah Bans Keyword Advertising [Updated]*, Technology & Marketing Law Blog (Apr. 3, 2007), http://blog.ericgoldman.org/archives/2007/04/utah_bans_keywo.htm.

Also, state legislatures can—and do—routinely pass anti-Internet laws that are unconstitutional. Congress does this too (especially in their futile 1990s quest to ban online pornography),³¹ but state legislatures pass unconstitutional laws more frequently because Congress passes comparatively fewer laws and the lobbying process neuters many of the ones that pass. For example, numerous states enacted new crimes against websites letting children access online pornography, even after those laws were routinely struck down as unconstitutional.³² Unconstitutional crimes are incredibly time-consuming and expensive to contest in court, and until they are struck down, they can chill a lot of entrepreneurial behavior.

I already mentioned how states enacted crimes restricting online prostitution ads after existing prosecutions failed in court. Were state crimes excluded from Section 230, I expect many more state legislatures would wheel into action in a devastating effort to “clean up” the Internet to their specifications.

States Aren't the Right Regulators of the Internet. There are two main arguments in favor of letting states manage their own affairs locally (“federalism”). First, states can be “laboratories of experimentation,”³³ such that states can try out new legislative policies and the successful ones can be emulated by other states. Second, states are better situated to respond to local conditions than geographically remote federal government entities.

Neither justification works with the Internet. First, when it comes to Internet regulation, states can't restrict their legislative experiments only to actors within the state. Most UGC websites have no easy way to avoid interacting with residents in any specific state, so even small websites typically have users in every state. Thus, state legislative experiments related to the Internet—especially experiments invoking criminal coercive powers—instantly reach all Internet actors, negating the possibility of other states conducting different experiments or choosing to reject another state's solution.

For this reason, I believe every state law purporting to regulate the Internet violates the Dormant Commerce Clause, the constitutional principle that only Congress can regulate interstate activity. Because every state's Internet law changes the behavior of Internet actors even if they aren't dealing with in-state residents, those laws impermissibly have extra-territorial reach. The Dormant Commerce Clause also protects businesses from inconsistent state laws—another real concern when states attempt to regulate the Internet. For example, before Congress enacted the CAN-SPAM Act in 2003,³⁴ some states required spammers to use “ADV:” as the first characters of the email's subject line,³⁵ but at least one state created a technological impossibility by requiring the subject line's first characters to be “ADV-”.

³¹ See, e.g., *American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 184-86 (3d Cir. 2008) (recapping the history of the Communications Decency Act and Child Online Protection Act); Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977 (2002).

³² *Online Censorship in the States*, ACLU (Feb. 13, 2002), <http://www.aclu.org/technology-and-liberty/online-censorship-states>.

³³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, ¶ 92 (1932) (Brandeis, J., dissenting).

³⁴ 15 U.S.C. §§ 7701-7713.

³⁵ E.g., Mich. Comp. Laws Ann. § 445.2503(a) (West); Utah Code Ann. § 13-36-103(b) (West), *repealed by* Laws 2004, c. 278, § 1, eff. May 3, 2004; see also Nat'l Conference of State Legislatures, *State Laws Relating to*

Second, states don't need to address state-specific Internet conditions because there are not geographic-based "regional" Internet problems. Because so much Internet activity cuts across state borders, no Internet activities are so unique to any one state that the state is in a uniquely superior position to redress those conditions.

As a result, in allocating responsibility for governing the Internet between Congress and state legislatures, I don't think the states have any useful role to play. Instead, I think Congress is the only appropriate legislative body to regulate the Internet.

State and Local Prosecutors are Provincial. State and local prosecutors are tasked with solving the problems of their constituents. They don't have to consider how their actions might have adverse consequences on residents outside their state. Many state AGs and some local prosecutors have taken strong (overreaching?) legal campaigns against Internet companies, especially when the targeted Internet company isn't based in their state. In contrast, federal prosecutors can take national perspectives when making prosecutorial decisions, so they can more easily balance the benefits and costs that may be felt in different parts of the country.

The European prosecutions discussed above are good illustrations of what happens when local prosecutors have criminal enforcement powers against the Internet. Their provincial efforts to address a local concern can have devastating effects on the national or global Internet economy; but provincial prosecutors don't have any incentive to incorporate those widespread adverse consequences into their calculus.

State AGs and Local Prosecutors Are Typically Elected. State AGs and local prosecutors are constantly positioning themselves for re-election or for higher political ambitions. This requires getting their names into the headlines so that voters know what they are doing. Few things grab headlines as reliably as asserting criminal charges against Internet companies—especially well-known Internet companies, and *especially* if the charges have a salacious taint. (This may help explain the state AGs' irrational fixation on Craigslist/Backpage and online prostitution ads). In contrast, federal prosecutors are appointed and don't need to impress voters. Federal prosecutors do like making splashes in the press, but they are less likely to bring a case solely for its headline value.

Conclusion

For these reasons, I see a big difference between Section 230's current exclusion for federal criminal prosecutions and extending the exception to include state criminal prosecutions. The amendment would unleash hordes of parochial headline-seeking prosecutors using countless broadly worded and possibly antiquated laws to go after Internet companies outside their states. It's easy to see how this massive expansion of prosecutorial activity could undercut the legal reliability and certainty that Section 230 currently provides to UGC entrepreneurs, leaving all of us much poorer.

Unsolicited Commercial or Bulk E-mail (SPAM) (Feb. 10, 2010), available at <http://www.ncsl.org/issues-research/telecom/state-spam-laws.aspx#Virginia> (collecting state anti-spam statutes).

These adverse consequences are especially troublesome if the state AGs are principally angry about online prostitution ads. If that's the real target, the proposed change is ludicrously over-expansive. I would still oppose a narrower exclusion to Section 230 that targeted only online prostitution ads for some of the reasons I've explained elsewhere,³⁶ but I think the state AGs would get more credibility if their proposed amendment more precisely fit the harms they want to redress.

³⁶ Goldman, *supra* note 22.